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. 2018-130

SEPTEMBER TERM, 2018

In re Frank Fellows*	}	APPEALED FROM:
	}	
	}	Superior Court, Essex Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 50-11-13 Excv
		Trial Judge: Thomas A. Zonay

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

Petitioner appeals the superior court's denial of his petition for post-conviction relief (PCR). We affirm.

Following a three-day trial in which petitioner failed to appear for the second and third days, petitioner was convicted of sexually assaulting and engaging in lewd and lascivious conduct with his then fourteen-year-old daughter based on an incident that occurred in April 2009. The superior court imposed concurrent sentences of five years to life for the sexual assault and five to fifteen years for the lewd and lascivious conduct. This Court affirmed the convictions, rejecting petitioner's arguments that the trial court erred by allowing the State to impeach his character witnesses with evidence that petitioner had impregnated the mother of the complainant when she (the mother) was fourteen years old and by admitting testimony of the complainant's friend relating to conversations she had with complainant the day after the incident. See State v. Fellows, 2013 VT 45, 194 Vt. 77.

Following this Court's affirmance of his convictions, petitioner filed the instant PCR petition, alleging ineffective assistance of his trial counsel. An evidentiary hearing on the petition was held over four days between June 15 and August 15 of 2017. Petitioner was represented by counsel, and both petitioner and the State presented expert testimony regarding the alleged shortcomings of petitioner's trial counsel. In a lengthy and detailed decision, the superior court denied the petition, concluding that none of the eight claims of ineffective counsel supported by expert testimony met either prong of the established test for demonstrating ineffective assistance of counsel, either individually or collectively. The court further concluded that none of petitioner's pro se claims of ineffective assistance of counsel fell within the class of "rare situations" when counsel's ineffectiveness may be presumed without expert testimony. In re Grega, 2003 VT 77, ¶ 16, 175 Vt. 631 (mem.). In addition, the court denied petitioner's post-trial request to amend his PCR petition to allege prosecutorial misconduct based on what he claimed to be new testimony by the complainant at trial.

A petitioner alleging ineffective assistance of counsel must show: (1) "counsel's performance fell below an objective standard of reasonableness as informed by prevailing

professional norms"; and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Bristol, 159 Vt. 334, 337 (1992) (quotation omitted). The petitioner has the heavy burden of showing that counsel's performance fell below an objective standard of reasonableness because trial counsel has "a great deal of discretion in decisions regarding trial strategy." In re Kirby, 2012 VT 72, ¶ 11, 192 Vt. 640 (mem.) (quotation omitted) (recognizing "a strong presumption of reasonableness in an attorney's performance"). " 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' " In re Pernicka, 147 Vt. 180, 183 (1986) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). Regarding the second prong, a reasonable probability is one "sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694. Expert testimony is required to demonstrate ineffective assistance of counsel unless the "lack of care is so apparent that only common knowledge and experience are needed to comprehend it." Grega, 2003 VT 77, ¶ 16 (quotation omitted).

For the same reasons stated by the superior court, we discern no basis to disturb the court's denial of post-conviction relief as to the eight claims of ineffectiveness raised by petitioner's expert. In his pro se appellate brief, petitioner challenges many of the superior court's findings and alleges dozens of errors in the PCR proceedings, but most of his claims were not raised below, and petitioner provides little legal or factual support for any of the alleged errors.

In considering petitioner's challenges to the superior court's findings, we keep in mind that the "credibility of witnesses, weight of the evidence and its persuasive effect are matters for the exclusive determination of the trier of fact." State v. Tribble, 2005 VT 132, ¶ 12, 179 Vt. 235 (quotation omitted). Findings "must stand if supported by credible evidence, even though there may be inconsistencies or substantial evidence to the contrary." Id. (quotation omitted).

Petitioner challenges the superior court's finding that he directed a defense strategy that combined presenting evidence of his good character along with the contention that any improper conduct on his part during the night in question occurred while he was sleeping and thus lacked the requisite intent. The court's finding was supported by the testimony of petitioner's trial counsel, whom the court found to be credible. The superior court agreed with the State's expert that, given the recorded police interview in which petitioner affirmed the complainant's credibility and equivocated as to whether the charged acts occurred, petitioner's trial counsel had limited options for a defense strategy, and that trial counsel's position became even more untenable when petitioner failed to show up for his trial after the first day.

Petitioner's challenge to the admission of the police interview is unavailing, given that he did not challenge admission of the interview on direct appeal or in the PCR proceeding. See In re Bridger, 2017 VT 79, ¶ 8 n.2 (stating that PCR petitioner waived argument made for first time on appeal); In re Stewart, 140 Vt. 351, 361 (1981) ("Post-conviction relief is not a substitute for appeal."). The same goes for petitioner's claim that his counsel was ineffective for not challenging the admission of the interview, which is also raised for the first time here on appeal and thus was not raised or supported by expert testimony in the PCR proceeding. Moreover, any such claim is undermined by the superior court's findings that petitioner drove himself to the police station and acknowledged that he was there willingly to talk to police about the incident in question. Nor did petitioner raise in the PCR proceeding his claim that the State failed to provide a transcript of the police interview in which petitioner made inculpatory statements about the night in question; in any event, he makes no claim that the defense did not have timely access to a video recording of the interview, and he fails to demonstrate any prejudice.

Petitioner argues that the superior court failed to acknowledge the many ways his trial counsel could have contested the testimony of the nurse practitioner who testified on behalf of the State concerning a small vaginal abrasion she observed on the complainant shortly after the events at issue. We find no basis to disturb the superior court's conclusion that petitioner's trial counsel acted reasonably in deciding not to litigate the existence of the abrasion beyond cross-examining the nurse practitioner, given the defense's strategy not to contest the occurrence of the charged act but rather to contest any criminal intent on petitioner's part. For the same reason, as the State's expert testified, and the superior court concluded, it was reasonable for petitioner's trial counsel to forego hiring a forensic medical expert to counter the testimony of the nurse practitioner. As for petitioner's challenge to the credibility of the State's PCR expert, that was for the superior court to evaluate. Petitioner also claims that the nurse practitioner failed to cooperate with petitioner's PCR expert by refusing to provide a video of the complainant's pelvic examination. As indicated by the superior court in denying petitioner's request for the court to issue an extraterritorial subpoena on Dartmouth Hitchcock Medical Center, it was not the nurse practitioner's privilege to waive release of that medical record. In any event, as the superior court pointed out, petitioner's counsel got the nurse practitioner to concede on cross-examination that the abrasion was not diagnosable without knowing the underlying history and that it was speculative for her to conclude that a fingernail caused the small vaginal abrasion.

Regarding petitioner's claim that his trial counsel failed to file a motion in limine to exclude evidence of petitioner's sexual relationship with the complainant's mother when she was fourteen years old, the superior court rejected this argument not only because this Court had concluded on direct appeal that the trial court had not erred by allowing the State to cross-examine his character witnesses with evidence that petitioner had impregnated the complainant's mother at age fourteen, but more fundamentally because the evidence was highly probative to rebut the testimony of those witnesses as to petitioner's good character and lack of interest in underage girls. We agree. We also agree with the court that it was reasonable for petitioner's trial counsel to acknowledge that relationship during his opening statement to blunt the State's anticipated use of the relationship to rebut petitioner's good-character testimony. Petitioner also contends that his trial counsel made prejudicial statements during his opening statement and closing argument that essentially conceded petitioner's guilt. To the extent petitioner has not waived these claims by failing to raise them in the PCR hearing, his citations to the record do not support them.

Regarding petitioner's claim that his trial counsel should have called additional character witnesses, petitioner failed to present any testimony at the PCR hearing as to any relevant testimony that could have been presented, and the superior court noted the absence in the record of any evidence of any additional witnesses that could have been called. Petitioner's claims regarding delays in the trial were also not raised below or supported by expert testimony.

Petitioner also challenges the continuation of the trial on the second day after he did not show up. Petitioner's expert contended that petitioner's trial counsel was ineffective because he failed to object to going ahead with the trial in petitioner's absence. The expert argued that while noncapital trials may proceed when a defendant voluntarily absents himself or herself after the trial has commenced, see V.R.Cr.P. 43(b)(1), because Vermont does not have a death penalty and petitioner was subject in this case to a potential life sentence—the most severe penalty allowed in Vermont—the trial should not have proceeded. The superior court pointed out that petitioner's trial counsel did in fact object to the trial continuing without petitioner, but the trial court overruled the objection. The superior court concluded that trial counsel's objection at trial, though not grounded on the same rationale as that of petitioner's expert at the PCR hearing, provided a basis to assert a challenge on direct appeal, of which petitioner did not take advantage. The court further concluded that, in any event, life imprisonment is not a capital offense, and therefore the reasoning

of petitioner's expert was flawed. On appeal, petitioner does not challenge the superior court's analysis on this latter point, but rather he emphasizes that the trial court waited only an hour before proceeding on the second day of trial and that there could have been many reasons why he did not arrive at trial within that hour. This argument rings hollow, given that petitioner did in fact voluntarily absent himself from the second and third days of his trial.

Petitioner also claims error in the trial court's response to the jurors' request, after they retired, for the complainant's statement, part of the police interview transcript, and a list of the elements of the charged offense. After the court responded to their request in varying ways, the jurors indicated that their questions were satisfied, and there was neither an objection at trial nor an argument at the PCR proceeding concerning this matter.

Petitioner makes other arguments on appeal that were not raised in the PCR proceeding, which are without factual and legal support, and which do not fall within that class of rare situations in which expert testimony is not required to support them. As noted, to the extent that petitioner's arguments are related to those claims raised by his expert at the PCR proceeding, they are unavailing for the reasons stated by the superior court.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice