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. 2020-298

APRIL TERM, 2021

In re Edward Johnson*	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 351-7-19 Wncv
		Trial Judge: Robert R. Bent

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

Petitioner appeals the civil division's decision granting summary judgment to the State with respect to his petition for post-conviction relief (PCR) alleging ineffective assistance by his appellate counsel. We affirm.

Petitioner was convicted by jury on two counts of lewd-and-lascivious conduct based on two separate incidents occurring two weeks apart in the spring of 2008. In the first incident, petitioner allegedly began masturbating through his clothes after sitting down at a table in front of a woman at a church soup kitchen in Montpelier, Vermont. In the second incident, petitioner allegedly began masturbating through his clothes after sitting down at a table across from a woman at a library in Montpelier, Vermont. In motions filed both before and during his trial, petitioner unsuccessfully sought to sever the charges. Following his convictions, petitioner appealed to this Court, arguing in part that the trial court erred by denying his motion to sever the charges. We affirmed the trial court's discretionary decision, concluding that the jury could easily distinguish the two charged offenses and that the trial court explicitly instructed the jury to consider the elements of each count individually. See State v. Johnson, No. 2010-480, 2011 WL 6003879, *2 (Vt. Nov. 9, 2011) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo10-480.pdf [https://perma.cc/AV5Y-LSTV].

Petitioner filed a PCR petition in July 2019, claiming ineffective assistance of counsel. In his amended petition filed in November 2019, petitioner alleged in relevant part that his appellate attorney fell below the standard of care exercised by appellate defense attorneys in Vermont by failing to cite comments the prosecutor made in his opening statement and closing argument that would have supported the inference that the two charges were easily confused with one another. The petition further alleged that this omission prejudiced petitioner. In support of his petition, petitioner submitted an affidavit by an attorney with expertise in appellate criminal defense work. The expert opined that appellate counsel's failure to draw out evidence in the record to support petitioner's argument on appeal fell below the prevailing standards of competence. Specifically, the expert pointed to appellate counsel's failure to cite comments the prosecutor made during his closing argument that showed that the prosecutor himself had trouble distinguishing the two incidents underlying the charges against petitioner. The expert also opined that there is a

reasonable probability that the errors resulted in an unfair and erroneous affirmation of the conviction on appeal.

In response to the parties' cross-motions for summary judgment, the civil division granted the State's motion, concluding that petitioner's appellate attorney fully and fairly argued the severance issue to this Court, which understood the issue and fully and fairly addressed it. Hence, the civil division concluded that petitioner could neither overcome the presumption of his appellate counsel's competence nor show that a stronger argument by his appellate counsel would have resulted in a different outcome on appeal.

On appeal, petitioner argues that the civil division erred in concluding that his appellate counsel provided effective assistance of counsel and that he was not prejudiced by his appellate counsel's assistance. According to petitioner, by neglecting to mention the most compelling support for his argument that the trial court erred in denying his motion to sever—namely, comments the prosecutor made during his opening statement and closing argument reflecting a failure to distinguish the two incidents—his appellate attorney provided ineffective assistance of counsel that likely affected the outcome of his appeal.

"This Court reviews a grant of summary judgment de novo, employing the same standard as the trial court." In re Barrows, 2007 VT 9, ¶ 5, 181 Vt. 283. "To obtain summary judgment, the moving party must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." Id.

"On a petition for post-conviction relief, the petitioner has the substantial burden of proving by a preponderance of the evidence, that fundamental errors rendered [the] conviction defective." In re Grega, 2003 VT 77, ¶ 6, 175 Vt. 631 (mem.) (quotation omitted). "The appropriate standard for reviewing claims involving ineffective assistance of counsel is whether a lawyer exercised that degree of care, skill, diligence and knowledge commonly possessed and exercised by reasonable, careful and prudent lawyers in the practice of law in this jurisdiction." Id. ¶ 7. "To demonstrate ineffective assistance of counsel, a petitioner must show by a preponderance of the evidence that: (1) [the] counsel's performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have resulted in a different outcome." Id. These standards apply equally to claims of ineffective assistance of both trial and appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285 (2000).

As we explained in response to petitioner's direct appeal of his convictions, the applicable legal standards regarding joinder and severance "are well settled." Johnson, No. 2010-480, *1. Two or more offenses may be joined for trial if they "are of the same or similar character" or "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." V.R.Cr.P. 8(a)(1)-(2). "Where the offenses are joined solely because they are of the same or similar character, a defendant is entitled to severance as a matter of right." State v. Willis, 2006 VT 128, ¶ 26, 181 Vt. 170 (citing V.R.Cr.P. 14(b)(1)(A)). "When the offenses are joined because they form part of a single scheme or plan . . . there is no absolute right to severance." Id. "The defendant must instead show before trial that severance is appropriate or, at trial, necessary for 'a fair determination' of his 'guilt or innocence of each offense.' " Id. (quoting V.R.Cr.P. 14(b)(1)(B)). In the latter case, it is the defendant's burden to provide the court with "substantial evidence of prejudice" to support a severance. Id. ¶ 33 (quotation omitted). "The decision is committed to the sound discretion of the trial court." State v. LaBounty, 168 Vt. 129, 134 (1998). Petitioner has never claimed that he was entitled to severance as a matter of right;

hence, he was required to show substantial evidence of prejudice to support his motion to sever at trial. See Johnson, No. 2010-480, *2.

Even assuming that petitioner presented sufficient evidence, in the form of expert testimony, to survive summary judgment on the question of whether counsel's performance fell below prevailing professional norms, we conclude that petitioner cannot show prejudice. Viewing the summary judgment record in the light most favorable to petitioner, we cannot conclude that he has shown a reasonable probability that, but for appellate counsel's errors, this Court would have ruled otherwise. In explaining our conclusion concerning the prejudice question, we consider in more detail the alleged deficiencies in appellate counsel's arguments—the failure to argue specifically that the prosecutor fumbled the names of the complaining witnesses in his opening statement and was unable to distinguish the two incidents in closing argument.

With respect to the opening statement, the record reflects that, after telling the jury what the first complaining witness would say about the soup kitchen incident, the prosecutor stated: "And [L.L.]—I mean, [K.T.] will also testify . . . ." It is hard to imagine how appellate counsel's highlighting this momentary slip of the tongue, which was documented in the transcript that was part of the appellate record, could have impacted this Court's analysis of the merits of the appeal. (In fact, although petitioner argues this point in this appeal, his expert did not specifically identify appellate counsel's failure to highlight this misstatement as an omission that failed to conform to the prevailing standards of appellate defense representation.)

The statements in the prosecutor's closing argument that petitioner's expert did specifically identify are, in context, similarly unimpressive. First, petitioner's expert points to a statement by the prosecutor in closing argument that the expert contends shows that the prosecutor himself was confused. After discussing the testimony of complaining witness L.L., the prosecutor said, "And K.T. Oh, and again, yeah, [L.L]. went on to say . . . ." After further discussion of L.L.'s testimony, the prosecutor said, "That was [L.L.], if I said [K.T.]." The prosecutor then transitioned to discussing K.T.'s testimony. It is apparent from the record that the prosecutor started to shift from discussing L.L.'s testimony to discussing K.T.'s testimony but then shifted back to L.L. to make an additional point about L.L.'s testimony. Second, petitioner's expert points to the prosecutor's reminder to the jury that it is up to the jury to decide the facts, as evidence that the prosecutor himself could not remember which witness offered which evidence. And finally, petitioner's expert points to a statement in the prosecutor's closing argument in which he attributed a history of depression to the wrong complaining witness. This last statement was the only instance petitioner identifies where the prosecutor made an incorrect statement.

All of these comments were in the transcript included in the record on appeal before the Supreme Court when it decided petitioner's appeal, and we cannot see how appellate defense counsel's highlighting those particular statements in petitioner's brief or oral argument would have altered this Court's analysis of the severance issue. The question on appeal before the Court, as we described it, was whether "in view of the number of offenses charged and the complexity of the evidence, the jury can distinguish the evidence and apply the law intelligently to each offense." Id. at *2. We concluded that, "although there are similar traits, . . . the jury could easily distinguish the facts in both cases." Id. at *2. Appellate defense counsel's highlighting the above statements would not have caused us to decide otherwise, and petitioner's expert's conclusory assertion that

there is a reasonable probability that these errors resulted in an unfair and erroneous affirmation of the conviction on appeal are insufficient to defeat the State's summary judgment motion.*

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

* Petitioner also points out instances during his closing argument where the prosecutor noted the similarity of petitioner's conduct in the two incidents. The State, however, sought joinder based on its contention that petitioner's conduct in the two incidents showed a common scheme or plan, which the trial court acknowledged. Petitioner has never suggested that the charges should have been severed because they do not show a common scheme or plan.