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. 2018-379

MAY TERM, 2019

In re Gregory H. Penn*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 434-12-15 Bncv
		Trial Judge: David A. Barra

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.

In 2010, petitioner was convicted on four counts of sexual assault of multiple victims under the age of ten. On appeal from the convictions, he argued that the evidence was insufficient to establish that he was the person who committed the alleged offenses. This Court affirmed.

Petitioner filed an initial PCR petition in December 2015. His amended petition filed in May 2017 claimed that his trial attorney had provided him with ineffective assistance of counsel by not moving to sever the charges and by not objecting to the prosecutor's improper closing argument. Regarding the latter claim, petitioner argued that his trial attorney should have objected to the prosecutor's improper "Golden Rule argument" inviting the jurors to put themselves in the position of the victim. He claimed that the prosecutor's comments were in direct violation of our holding in State v. Scales, 2017 VT 6, 204 Vt. 137.

The superior court rejected both of petitioner's claims of ineffective assistance of counsel. With respect to the closing-argument claim, the sole issue raised on appeal, the court ruled that: (1) the prosecutor's remarks, which did not overtly ask the jurors to put themselves in the place of the victim, were more similar to those not found to be improper in State v. Bellanger, 2018 VT 13, than those found to be improper in Scales; (2) petitioner's trial attorney did not act ineffectively by electing not to bring attention to the remarks by objecting to them; and (3) in any event, the evidence of guilt was great, and petitioner failed to carry his burden of showing a reasonable likelihood that an objection to the remarks would have changed the result at trial.

On appeal, petitioner argues that the prosecutor's comments during closing argument, taken together, effectively asked the jurors to put themselves in the place of the victim, and thus violated Scales. We conclude that petitioner has failed to satisfy his burden of demonstrating that his trial counsel provided ineffective assistance that prejudiced him.

"Post-conviction relief is a limited remedy" in which petitioners have "the substantial burden of proving by a preponderance of the evidence that fundamental errors rendered [the underlying] conviction defective." In re Grega, 2003 VT 77, ¶ 6, 175 Vt. 631 (mem.) (quotation omitted). Petitioners claiming ineffective assistance of counsel must demonstrate that (1) "defense counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms"; and (2) there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In re Combs, 2011 VT 75, ¶ 9, 190 Vt. 559 (quotations omitted). In reviewing the superior court's application of this two-part test, "we apply a clearly erroneous standard to the PCR court's findings of fact and we will uphold the PCR court's judgment if the conclusions follow from those findings." In re Russo, 2010 VT 16, ¶ 17, 187 Vt. 367 (quotations omitted). In evaluating the first prong of this test, we afford trial counsel considerable discretion regarding trial strategy and we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Combs, 2011 VT 75, ¶ 10 (quotation omitted).

Petitioner argues that the prosecutor at his trial violated our holding in Scales by making the following comments during closing argument:

> I want to talk a little bit about the court process. We have girls who testified here in an open courtroom. Most people remember the very first time they had to give a book report in grade school; the first time someone had to stand up in front of a class and read about a book or whatever the report was, it was a very difficult experience for everyone.
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> And most people remember that time in fourth or fifth grade when they stood up and talked about Vermont farms or whales or whatever the topic was, and they remember, often, for the rest of their lives, because it was such a difficult experience this public speaking. And a classroom, of course, is a contained environment. You have a teacher who's supportive, wants the kid to do a good job speaking; you have a—an audience of peers, classmates, friends, and you're talking about a completely neutral subject. And yet most people remember it forever that first time, because it's so upsetting.
>
> Here in contrast, we have girls talking in a courtroom among adults, strangers, court officials, lawyers; keep that in mind. Then, let's talk about the topic of which they're talking about. Outside of a criminal context, no adult would ever bear the thought of sitting over on a witness stand and talking about their first sexual experience in their life.
>
> No one would do it. The thought is mortifying. And then imagine that that adult has to not only talk about their first sexual experience in their whole life, they have to do it in front of the person with whom they had that experience; blow-by-blow, step-by-step with that person right there.
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> And then to make it worse, when all this discussion is over, they have to look that person in the eye and point at him and say, yes,

> that's the person I had my very first sexual experience with. No adult would ever do that voluntarily; it's beyond mortifying.
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> Yet in our system, this is what we ask children to do. Teenage girls, three of them. So keep in mind when you consider their testimony how extremely difficult and challenging and emotional this must be for them.

In Scales, the defendant, who was convicted of three felony counts of lewd and lascivious conduct with a child, argued on direct appeal that the trial court erred by admitting consciousness-of-guilt evidence and that the prosecutor improperly made Golden-Rule comments during closing argument by asking the jurors to put themselves in the place of the victim. After concluding that the trial court erroneously admitted the consciousness-of-guilt evidence and that the error was prejudicial, we addressed the prosecutor's challenged comments made during closing argument. Scales, 2017 VT 6, ¶ 23. Noting that the prosecutor had "referred to the defense as mere 'smoke and mirrors,' " we cited previous case law in which this Court had disapproved of a prosecutor's closing remarks that impugned the defense. Id. ¶ 24. We then addressed the following remarks by the prosecutor asking the jurors to put themselves in the place of the victim:

> As adults, no one would want to ever come into court . . . and say, okay, I'm going to talk now about my first sexual experience. . . . Imagine how difficult it would be for an adult, and then put yourself in the eyes of twelve-year-old child, and how difficult and challenging it would have been for her to come here, as well.

Id. ¶ 26 (quotation omitted) (emphasis added). Noting that the "Golden Rule argument" is disallowed "because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence," we concluded that the prosecutor's "repeated improper remarks" demonstrated an intent to arouse the jury's prejudices and "exceeded the bounds of fair and temperate discussion circumscribed by the evidence and inferences properly drawn therefrom." Id. ¶¶ 28, 30.

In Bellanger, a later case in which we affirmed on direct appeal the defendant's convictions for aggravated sexual assault of a child and lewd and lascivious conduct with a child, we addressed the defendant's argument that the following remarks by the prosecutor during closing argument constituted reversible error:

> And think about—most people can remember being in fifth grade, or fourth grade, having to do your very first oral report, how incredibly stressful that is. Most people remember it. And here we have a fifth-grade girl who has to give an oral report to this group of strangers on a topic incredibly private.
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> How difficult it was for her to talk about what was in the bedroom. That was real emotion. She's not an actress; she's a little girl. And her demeanor on the stand, above all else, demonstrated the truthfulness of her report.

2018 VT 13, ¶ 44. We rejected the defendant's argument that the remarks were inappropriate, stating that the prosecutor's statement inviting the jury to think about how difficult it was for the child to testify addressed the victim's credibility. Id.; see State v. Bubar, 146 Vt. 398, 403-04

(1985) (holding that prosecutor's statement asking jurors whether they had given any thought to how difficult it was for child victim to testify "was a permissible argument as to credibility" that did not violate rule against asking jurors to put themselves in victim's place). We explained that the "fundamental distinction" between Scales and that case was that in Scales "the prosecutor expressly invited jurors to imagine themselves in the place of the victim," while in that case the prosecutor did "not overtly invite jurors to place themselves in the victim's position." Bellanger, 2018 VT 13, ¶¶ 43-44.

In the instant case, the prosecutor did not explicitly ask the jurors to put themselves in the place of the alleged victims; on the other hand, the prosecutor's comments were not as plainly tied to a credibility argument as they were in Bellanger. Here, the prosecutor summed up the challenged remarks by asking the jury to consider how extremely difficult and challenging it was for the teenaged girls to testify, which could be considered an appeal to consider the girls' credibility. As the superior court stated in finding no ineffective assistance of counsel, it was a reasonable trial strategy for defendant's attorney not to draw attention to comments that may or may not have been improper. See Beaudoin v. Feldman, 2018 VT 83, ¶ 52 (stating that "golden-rule comments . . . are not per se grounds for a new trial," but "are reviewed under an abuse of discretion standard" with respect to denial of motion for new trial). One could reasonably argue that defendant had more to lose than gain if his trial attorney had objected to the prosecutor's comments pointing out how difficult testifying was for the alleged victims.

In any event, even if we were to assume that the prosecutor's comments were improper and that the failure to object to those comments amounted to ineffective assistance of counsel, defendant fails to make any showing that there is a reasonable probability of a different outcome at his trial had his attorney objected to the comments. Indeed, on appeal, defendant does not make any challenge to the court's findings or conclusions on this issue.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice