IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 9, 2023

JOSE GONZALEZ BONILLA v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sumner County
No. 2020-CR-748 Dee David Gay, Judge

No. M2022-01157-CCA-R3-PC

Petitioner, Jose Gonzalez Bonilla, appeals as of right from the Sumner County Criminal Court's denial of his petition for post-conviction relief, wherein he challenged his convictions for rape of a child and aggravated sexual battery. On appeal, Petitioner asserts that he received ineffective assistance of trial counsel because counsel (1) did not inform Petitioner during plea negotiations that he would be subject to lifetime community supervision and registration on the sex offender registry if he was convicted at trial; (2) failed to object to the admission of the victim's forensic interview recording during a pretrial severance hearing; and (3) failed to object to the racial composition of the jury venire. Petitioner also argues that the cumulative effect of these errors requires relief. Following our review, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and MATTHEW J. WILSON, JJ., joined.

Jose Gonzalez Bonilla, Tiptonville, Tennessee, pro se (on appeal); and Anthony Daher, Gallatin, Tennessee (at post-conviction hearing), for the appellant, Jose Gonzales Bonilla.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Ray Whitley, District Attorney General; and Tara Wyllie, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual and Procedural Background

A. Proof at Trial

Petitioner was convicted by a Sumner County jury of rape of a child and aggravated sexual battery and sentenced to an effective thirty-five years in confinement. *See State v. Jose Gonzalez Bonilla*, No. M2017-01193-CCA-R3-CD, 2020 WL 3791677 (Tenn. Crim. App. July 7, 2020), *no perm. app. filed.* On direct appeal, this court summarized the evidence presented at trial as follows:

> [Petitioner]'s ten-year-old stepdaughter disclosed to her mother that [Petitioner] had sexually abused her by digitally penetrating her on one occasion and by touching her vaginal area on another occasion. [Petitioner] fled the state but was subsequently apprehended and charged with rape of a child occurring in October 2015 and with aggravated sexual battery occurring in November 2015. [Petitioner] moved to sever the offenses.
>
> At trial, the victim testified that [Petitioner] was her stepfather and the father of her younger brother. The victim recalled that when she was ten years old, she lived with her mother, her brother, and [Petitioner] at the home of her mother's friend for approximately two months. Her family slept in the living room, but she slept in the homeowner's office.
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> A video of the victim's forensic interview was played for the jury. The victim stated in the video that her mother's friend had a sectional couch in the living room and that her mother was asleep on one end of the couch while the victim was watching television at the other end. She told the interviewer that [Petitioner] was seated at her mother's feet and began to tug on the victim's leg. [Petitioner] then put his right hand up the right leg of the victim's loose-fitting pajama pants. She stated that he put his hand into her private area and asked her "if it felt good." She told him to stop and eventually kicked him. At trial, the victim testified that [Petitioner]'s middle finger penetrated her vagina during this episode. She stated on cross-examination that her mother did not wake up.
>
> The aggravated sexual battery took place at a mobile home into which the family moved in November of 2015. In the video, the victim stated that the family was painting the mobile home and that she was standing on the

edge of the bathtub to try to reach the ceiling to paint it. [Petitioner] came in and began to rub her sides and then unbuttoned her skinny jeans, under which she had on shorts. He rubbed the top part of her "area." The victim pushed [Petitioner] away, and he left. Her mother and brother were painting in the living room.

At trial, the victim stated that [Petitioner] had rubbed her vagina with his hand on her skin during this episode. She explained that she was wearing shorts under her jeans because she wanted to have shorts for physical education but it was too cold to wear shorts outside. She stated on cross examination that she was standing on the rim of the bathtub, which was approximately three inches wide, and that she did not have trouble balancing.

The victim did not initially tell her mother about the abuse. She stated that she had told her mother "something" prior to the disclosure in the hospital but that her mother did not believe her. The victim had left information out of the prior disclosure. She was reluctant to disclose because [Petitioner] had also threatened to hurt her and anyone she told.

In January 2016, the victim's mother was in the hospital because of an intestinal rupture. The whole family was in the hospital room when the victim decided to tell her mother about the abuse. The victim testified that she had worried that if she disclosed the abuse, her mother would attack [Petitioner] and suffer consequences. She chose to tell her mother at the hospital because she did not believe her mother could hurt [Petitioner] there. [Petitioner] fled the room when the victim revealed the abuse. The victim's mother immediately arranged to be discharged and went to find [Petitioner] but was unsuccessful. The victim's mother then took the victim to another hospital and subsequently to the child advocacy center where the interview was conducted.

The victim stated that she had been close to [Petitioner] and thought of him as a father figure. She testified that she now "shut everybody out" and that the abuse had affected her relationship with her mother and brother. The victim testified that her mother was the primary parent to discipline the children but acknowledged that [Petitioner] also occasionally disciplined her.

Ms. Jennifer Longmire testified that she had conducted the victim's forensic interview at Ashley's Place, and she detailed her qualifications and those of the advocacy center.

The victim's mother testified that she and [Petitioner] married when the victim was approximately thirteen months old and that he was the victim's only father figure. The victim's mother had a son with [Petitioner] who was approximately a year younger than the victim. [Petitioner] "walked out" on the family in August 2015. In September, the victim's mother and the children moved in with Ms. Elizabeth Vechey and Ms. Vechey's roommate. In October, [Petitioner] "started coming around again," and he would spend the night and spend weekends with the family. The victim's mother recalled one night in October 2015 when she was on the couch with the victim and [Petitioner] watching movies and fell asleep. The victim's mother confirmed that the family subsequently moved to a mobile home in November, where they painted the walls.

On January 10, 2016, the victim's mother had been in the hospital for four days, and her children and [Petitioner] were visiting her. The victim made a disclosure, which caused the victim's mother to get out of bed, remove her intravenous equipment, and "in anger go after" [Petitioner]. [Petitioner] reacted "like a deer that was caught in headlights," began to yell, and stormed out. The victim's mother insisted that she be discharged against medical advice and began to drive to a children's hospital, but she stopped at a different hospital after speaking with her niece on the telephone. She reported the victim's allegations to police and took the victim to Ashley's Place, the Sumner County Child Advocacy Center. She later took the victim for a medical examination at Our Kids in Nashville.

The victim's mother became aware that [Petitioner] had left the state, but she maintained contact with him in an attempt to obtain a confession. The victim's mother placed a recorded telephone call to [Petitioner] with the assistance of the Gallatin Police Department, and this recording was played for the jury. During this telephone call, [Petitioner] denied digitally penetrating the victim but acknowledged, "Maybe she feel like I was. I did touch her . . . . I don't know what the f*** I was thinking . . ." [Petitioner] stated he had apologized to the victim, but he also blamed the victim by claiming, "At that moment, she let me do whatever I was doing." [Petitioner] denied having touched the victim inappropriately in the bathroom, "at least not intentionally." He asserted that he "didn't for real put [his] hands in there" but put a finger on the back and front of the victim's pants to pull them up. [Petitioner] made other incriminating statements, including that he did not know what "c[a]me across" him, that he did not see how he could face

the victim's mother "after what [he had] done," and that he did not have the courage to "go back to the house and say ok and act like nothing happened." When asked if what he had done to the victim was motivated by something the victim's mother had done to him, [Petitioner] replied, "For a moment . . . I was thinking of revenge for all the stuff you done for me, on me." The victim's mother asked him if he had taken something she did "out on [her] child," and he confirmed, "I guess that is what I was thinking."

The victim's mother testified that the victim was "bubbly" and friendly prior to the assaults but that she had attempted suicide three times since and that she was cutting herself. The victim was also taking "her anger and the rage out on her brother" because he resembled [Petitioner].

The victim's mother acknowledged that the victim only disclosed one sexual assault in the hospital. She testified that [Petitioner] did not live at Ms. Vechey's house and that if the victim said he did, the victim might have been confused because of the frequency of [Petitioner]'s visits. She acknowledged that [Petitioner] occasionally disciplined the victim and that the victim would get upset. She agreed that she had never witnessed any inappropriate contact between the victim and [Petitioner].

Ms. Elizabeth Vechey confirmed that she housed the victim's mother and the two children for two to three months. [Petitioner] did not live there but visited one to two nights per week and on the weekends. She confirmed that the victim's mother and brother slept in the living room, noting there was a sectional couch which would accommodate two adults, in addition to an air mattress. The victim occasionally slept in the office. Ms. Vechey did not witness anything inappropriate, and the family moved out after Thanksgiving.

In January 2016, Investigator James Myers was employed as an investigator with the Gallatin Police Department, and he was assigned to investigate the case. He made an appointment for the victim at Ashley's Place and observed the interview. Investigator Myers spoke briefly with [Petitioner], and [Petitioner] said he had done nothing and did not intend to return to the state. Investigator Myers was able to record a telephone call between the victim's mother and [Petitioner] on January 28, 2016. On March 15, 2016, [Petitioner] had been apprehended and returned to the [s]tate, and Investigator Myers interviewed him. In the interview, [Petitioner] acknowledged that he "messed up." Asked to elaborate, he stated, "I, I mean,

I touch her in a couple. I was in there on the couch, my wife was over here she was on the other side . . . . I touch her on the thigh or whatever." He asserted he did not have intercourse with the victim and that he had apologized to her because he was "not supposed to be doing that." He stated that in the bathroom, he had only been pulling up the victim's pants, which were falling down. Investigator Myers agreed that English was not [Petitioner]'s first language, and he could not recall whether he had offered [Petitioner] the services of an interpreter.

[Petitioner] objected at trial to the proposed testimony of Ms. Jill Howlett, who was a forensic social worker at Our Kids, an outpatient clinic which conducts medical examinations of children when there is suspicion of sexual abuse. [Petitioner] asserted that Ms. Howlett's testimony about the victim's statements constituted inadmissible hearsay, and the State argued that the statements were medical history taken for the purposes of medical diagnosis. The court ruled that Ms. Howlett could testify about the victim's statements but not about the victim's mother's statements. The court also excluded a statement the victim made to Ms. Howlett that [Petitioner] had once choked her when she threatened to tell about the abuse. Ms. Howlett testified that as a forensic social worker, she would first obtain information from a child's parent or guardian, and then, if the child was over five years old, she would meet with the child in order to obtain the child's medical history. She stated that the medical history she would obtain from a child was for the purpose of medical diagnosis and treatment. She noted that she spoke to the child in part to evaluate the child's mental and physical development. Ms. Howlett would immediately share the medical history she had obtained from the child with the nurse practitioner, who would then conduct a medical examination of the child. Ms. Howlett spoke with the victim to obtain her medical history on January 25, 2016, asking the victim about prior injuries, whether she had started her period, and whether she was experiencing pain during urination or defecation. She also asked the victim if she knew what the private areas of her body were and if anyone had ever touched them. The victim stated that her stepfather had touched her private area, "[t]he one I go pee from," with his hand on the inside. She only disclosed one incident to Ms. Howlett. The victim said that [Petitioner] threatened to "smack her" if she told anyone and that she revealed the abuse to her mother while her mother was in the hospital because she did not believe [Petitioner] would hurt her there. She stated that she had not suffered any other sexual abuse. Ms. Howlett stated that it was not unusual for a child

to delay the disclosure of abuse and that only a small fraction of the children seen at the center were examined within seventy-two hours of an assault.

Ms. Hollye Gallion, clinical director and pediatric nurse practitioner at Our Kids, testified regarding the report of the victim's physical examination. The examination showed no sign of injury or infection. Ms. Gallion testified that she would not have expected to see any physical evidence of assault based on the victim's allegations. She stated that only about seven percent of children presented with injuries when there were allegations of sexual abuse and that injuries were more likely if a child reported an assault within hours, if a child described penetration, or if a child was over twelve or thirteen years old. She stated that for children under twelve or thirteen, only two or three percent would present with medical findings, and the percentage would be lower if the alleged sexual contact had happened weeks prior to the examination. Ms. Gallion acknowledged that she was not the nurse who had performed the victim's exam and that the physical findings were consistent with the absence of sexual abuse. She stated that the physical findings were also consistent with sexual abuse.

The jury convicted [Petitioner] of rape of a child and aggravated sexual battery.

Id. at *1-4.

B. Direct Appeal

Relevant to the issues raised in this appeal, in the direct appeal, Petitioner contended that the trial court improperly considered the recording of the victim's forensic interview during the pretrial severance hearing, arguing that it was hearsay. *Id.* at *6.

At the severance hearing, the State introduced the victim's forensic interview and a recorded telephone call between the victim's mother and [Petitioner]. [Petitioner] objected to the forensic interview on hearsay grounds and objected to the prosecutor's request that the court . . . listen to the recorded material in chambers rather than playing the recordings in open court. The prosecutor noted that the forensic interviewer was present at the severance hearing and could testify to satisfy the statutory requirements pertinent to the advocacy clinic and the interview prior to the admission of the forensic recording. However, defense counsel stated that even if the strictures of the statute were satisfied, the defense believed that the forensic

> interview would only be admissible at trial and not at the hearing. The trial court stated that it would consider the two recordings in chambers, it noted that the defense would have access to the recordings in order to know what had been put before the court, and the hearing was continued. When the hearing resumed, the recorded telephone call between [Petitioner] and the victim's mother was played in court.

This court concluded that the forensic interview recording was not hearsay because it was not offered for its truth:

> In deciding the motion to sever, the trial court was not called upon to determine the truth of the victim's accusations in the video. The trial court was instead called upon to determine what allegations were leveled against [Petitioner] and whether the alleged crimes constituted part of a larger, continuing plan or conspiracy. For the purposes of severance, the video was evidence not of the fact that [Petitioner] committed rape of a child and aggravated sexual battery but of the fact that the State possessed evidence which would show two separate crimes committed on the same victim at different times and locations. In other words, even if the trial court had found the victim's assertions not credible, the video would have been relevant to establish that [Petitioner] was accused of having digitally penetrated the victim at one address and accused of having fondled the victim about one month later at a different address. The circumstances of the accusations were relevant to determine whether there was a larger, continuing plan or conspiracy and whether any of the alleged offenses would be relevant to a material issue other than propensity.

Id. at *7. This court also noted that the Tennessee Rules of Evidence, including Rules 801 and 802 regarding hearsay, do not generally apply in hearings to determine the admissibility of evidence. Because ruling on a motion to sever required the trial court to assess whether evidence of one offense would have been admissible in the trial of the other offense, this court concluded that the trial court did not err in considering the forensic interview recording. *Id.* at *8.

C. Post-conviction proceedings

After this court affirmed Petitioner's convictions, he filed a timely pro se post-conviction petition. In relevant part, Petitioner asserted that trial counsel provided ineffective assistance by failing to (1) inform him during plea negotiations that he would be subject to community supervision for life (CSL) and registration on the sex offender

registry (SOR) if he was convicted at trial, which resulted in his rejecting several favorable plea offers; (2) object to the admission of the victim's forensic interview recording during a pretrial severance hearing; and (3) object to the racial composition of the jury venire. Petitioner also argued that the cumulative effect of these errors deprived him of a fair trial.

The post-conviction court subsequently appointed post-conviction counsel, who withdrew in April 2021 in anticipation of moving to California. Second post-conviction counsel withdrew in July 2021 due to a change in employment. Third post-conviction counsel was permitted to withdraw in September 2021, at which time initial post-conviction counsel, who had evidently not relocated, was re-appointed. Post-conviction counsel represented Petitioner at the March 2022 post-conviction hearing; no amended petition was filed.

At the post-conviction hearing, Sumner County Circuit Court Clerk Kathryn Strong described the process by which the jury venire was selected. She stated that the clerk's office computer system pulled data from the Tennessee Department of Safety using the driver's license and identification card information of 100,000 Sumner County residents. In 2017, the system pulled new data every two years. The system then randomly selected 250 jurors per month for jury duty. Some summons were returned as undeliverable, and some prospective jurors asked to be excused or have their duty delayed. Ms. Strong identified the November 2017 voir dire list containing the personal information of 110 jurors. The jurors completed questionnaires about their job, marital status, and children; the questionnaire did not ask for the jurors' race or ethnicity, although sometimes that information was imported from the Department of Safety. Ms. Strong averred that it was impossible to discriminate against prospective jurors because the process was done randomly. She said that there was no way to tell a prospective juror's race from the voir dire list.

Ms. Strong testified that the prospective jurors were assigned a number and that, on the day of jury selection, she drew numbers out of a bag to call prospective jurors for voir dire. Ms. Strong said that she did not know to which juror a number corresponded until the juror stood up. She stated that her office did not manually remove jurors from the prospective juror roll unless they asked to be excused from jury duty.

Ms. Strong identified a page from a record book she kept, which reflected the case style, case number, and a handwritten list of the jurors and alternates who served at trial. She stated that her office did not document the jurors' races and that she was unaware of any previous "errors in this process." She denied that systematic exclusion of Hispanic people occurred during jury selection.

The post-conviction court noted that since 1980, when he began serving as an Assistant District Attorney, many challenges had been made to the jury selection system in Sumner County and that it had never been deemed unconstitutional.

Trial counsel testified that he was retired and that he served as an Assistant Public Defender for eighteen years, during which time he represented Petitioner. He stated that Petitioner had "fair English skills" with reading, writing, and speaking, but that English was not Petitioner's first language. Counsel said that he used an interpreter in all meetings discussing substantive matters. Counsel had handled sex offense cases "many, many times."

Trial counsel testified that he discussed plea negotiations with Petitioner "[e]xtensively" and that the State offered Petitioner thirty years, twenty years, twelve years, ten years, and eight years. Counsel noted that the offers never included a lesser offense than rape of a child or aggravated sexual battery, both of which included mandatory CSL. Counsel said that he discussed CSL and the SOR with Petitioner on "numerous occasions," gave Petitioner copies of written materials detailing the directives and requirements of CSL and the SOR, gave Petitioner time to read the materials, and offered to have a translator read the materials to Petitioner in Spanish.

Relative to the motion to sever, trial counsel testified that he objected to the trial court's considering the forensic interview recording as hearsay. When asked whether it would have been better to object on Sixth Amendment grounds based upon *Crawford v. Washington*, 541 U.S. 35 (2004), counsel stated that a general hearsay objection was "most relevant" and that a *Crawford* objection did not "occur to" him. Counsel affirmed that he had read *Crawford* at some point.

Trial counsel did not recall the racial composition of the jury at Petitioner's trial. He stated that he paid attention to the answers prospective jurors gave to questions during voir dire and what kind of jurors they would be. He did not recall the questions asked during voir dire.

On cross-examination, trial counsel testified that he had been licensed to practice law for twenty-three years before his retirement, that he had sat first chair in ten to twenty trials, and that he had handled more than 100 child sex offense cases, predominantly between 2014-19. He agreed that he was very experienced in criminal litigation and child sex abuse cases when he represented Petitioner. Counsel had handled about six motions to sever, often in child sex abuse cases. Trial counsel affirmed that he had asked the prosecutor in a meeting before the post-conviction hearing whether *Crawford* applied to pretrial hearings.

Upon examination by the post-conviction court, trial counsel testified that, before he joined the Public Defender's Office, he was in private practice for between four and four and a half years doing mostly criminal defense work.

Petitioner testified that trial counsel only conveyed the number of years and percent of service when he communicated plea offers to Petitioner. He stated that the State offered him thirty years, twenty years, twelve years, and eight years, respectively. Petitioner stated that he spoke English "to a certain extent" and that counsel was sometimes accompanied by an interpreter. Petitioner noted that his English had improved since his trial because he was in a work training program in prison.

Petitioner testified that the first time he heard about CSL was after his sentencing hearing, when someone from the State visited him and asked him questions he did not understand. Petitioner averred he only knew what post-conviction counsel and "legal aid" at the prison told him. Petitioner also denied knowing the SOR requirements until he learned about CSL. Petitioner asserted that, if he had known of CSL, he would not have gone to trial because it made "no sense . . . getting a 35-year punishment, and then on top of that, have all these punishment[s] for the rest of your life. It would . . . only make sense to take a shorter amount, knowing you're still going to be placed on this punishment."

Upon questioning by the post-conviction court, Petitioner testified that he would have accepted the eight or twelve-year plea offers, which also included CSL.

Relative to the *Crawford* issue, Petitioner testified that he had learned by legal research that testimonial hearsay was when "somebody can't show up. But . . . [they] were not unavailable at that time." When asked by the post-conviction court how he could understand the concept of testimonial hearsay but not CSL, Petitioner averred that he did not fully understand testimonial hearsay.

Petitioner testified that "a few black people" were on his jury, but no Hispanic people. He asserted that he would "[m]ore than likely" know on sight or by the way jurors spoke if they were Hispanic. Petitioner stated that the lack of Hispanic jurors was unfair, commenting, "I think that was a problem or . . . just being—I don't know—discriminated."

On cross-examination, Petitioner denied that on February 24, 2017, trial counsel told him that the State's twenty-year offer included CSL and registering as a sex offender, gave him written copies of the requirements, left them with him to read, or offered to explain them. Petitioner maintained that counsel did not explain the CSL and SOR requirements when communicating the March 6, 2017 offer for twelve years, which

involved pleading guilty to two counts of aggravated sexual battery. Petitioner did not recall rejecting a ten-year offer on March 9, 2017. When the prosecutor observed that Petitioner did not recall many of his conversations with trial counsel, Petitioner responded, "So it's okay if [trial counsel did not] recall, but it's not okay if I don't?"

Petitioner testified that trial counsel took notes occasionally during their meetings and that he was unsurprised that counsel noted the date and the information he discussed with Petitioner. Petitioner opined that counsel lied during his post-conviction testimony about having explained CSL to him.

Petitioner testified that an inmate named Steve, who had been "practicing" as a "legal aide" for twenty years, helped him draft his post-conviction petition. When asked whether Steve told him that the verdict could be set aside if counsel did not explain CSL to him, Petitioner said, "It was explained to me certain stuff that [was] done wrong[.]" When asked if he understood that his only chance to avoid CSL was to go to trial in hopes of an acquittal, Petitioner stated, "I don't know. I guess." He acknowledged that he went to trial and was convicted.

Upon examination by the post-conviction court, Petitioner testified that he was thirty or thirty-one years old at the time of his trial. He stated that he had a ninth-grade education in his home country and was literate in Spanish. He averred that he could read and write a little bit in English. Petitioner acknowledged that he was an undocumented immigrant. Petitioner said that several things occurred during the trial that he did not fully understand. He did not take notes of his conversations with trial counsel.

The State recalled trial counsel as a witness. Counsel stated that, in each of his case files, he kept a chronological "master sheet of contacts," in which he documented every communication and the date. He said that he made separate notes documenting any substantive matters discussed during those communications. Counsel had reviewed his contemporaneous notes of a "number of times" he spoke to Petitioner about plea offers and had composed a list for the post-conviction hearing, which reflected[1] the following:

On February 24, 2017, trial counsel took Petitioner SOR materials, CSL materials, and the directives; he offered to explain the materials to Petitioner and have them translated into Spanish. Petitioner told him that he would accept an eight-year offer.

On March 9, 2017, a court date occurred, and trial counsel had spoken to the prosecutor a couple of days earlier, during which the prosecutor made a twelve-year offer

[1] Trial counsel verbally described his notes; they were not exhibited to the post-conviction hearing. Although it is not reflected in the transcript, Petitioner notes in his brief that trial counsel testified via Zoom.

for two counts of aggravated sexual battery, including CSL and registration as a sex offender.

On June 12, 2017, trial counsel noted that the State indicated that it would accept an eight-year offer, which included CSL and SOR requirements. Petitioner had told counsel that he would accept an eight-year offer one or two weeks earlier, but rejected the offer when counsel conveyed it during a visit one or two days later.

Trial counsel testified that, if Petitioner had expressed a concern about CSL, he was certain he would have told Petitioner that CSL was required whether he pled guilty or was convicted at trial. Counsel did not recall CSL being "the hang-up" for Petitioner relative to his decision to proceed to trial.

On cross-examination, trial counsel testified that Petitioner's case file was "huge" and that the file might contain a copy of the CSL and SOR handouts he gave Petitioner. He described the handouts as one and two-page standardized documents; he noted that updated versions of the documents were likely at the courthouse. Counsel did not believe Spanish translations of the documents existed, but he said his notes reflected that he offered to have an interpreter read the documents to Petitioner.

The post-conviction court announced oral findings of fact and conclusions of law. Relative to Petitioner's lack of knowledge that he would be subject to CSL, the court noted trial counsel's testimony that all of the plea offers included CSL, that counsel provided Petitioner with written materials about CSL and the "sex offender directives," and that counsel offered Petitioner interpreters to assist him in understanding them. The court credited counsel's testimony and acknowledged counsel's contemporaneous notes and his experience as a defense attorney and with child sex offense prosecutions. The court concluded that counsel was not deficient.

Relative to the admission of the victim's forensic interview at the severance hearing, the post-conviction court found that trial counsel made an objection to hearsay and that Petitioner's issue amounted to "extreme nitpicking." The court noted that Tennessee Rule of Evidence 104 "makes it extremely lenient in these kinds of pretrial hearings on the admissibility of evidence." The court found that the admission of hearsay in a pretrial hearing did not amount to ineffective assistance. The court observed that Petitioner had only taken issue with the forensic nurse's statements when the victim's statements on the recording also qualified as hearsay. The court found that counsel was not deficient and that the proper statutory procedure for admitting forensic interviews had been followed.

Relative to the composition of the jury venire, the post-conviction court credited Ms. Strong's testimony regarding the technology and procedures used by Sumner County and found that they were racially and ethnically neutral. The court found that because the jury venire was chosen randomly, exclusion of a specific race of people was impossible. The court noted that the constitution only required racially neutral selection and that no constitutional violation had occurred. The court further found that no cumulative error occurred.

Subsequently, post-conviction counsel withdrew from Petitioner's case in July 2022 in anticipation of moving to California for work. The post-conviction court did not appoint new counsel after relieving him.

The post-conviction court issued an August 2, 2022 written order denying relief, in which the court found that trial counsel's representation was not deficient "in any respect" and that counsel represented Petitioner "very well" at trial and on direct appeal. The court incorporated its oral findings by reference and attached a copy of the hearing transcript to the order.

On August 8, 2022, Petitioner filed a motion in the post-conviction court requesting that post-conviction counsel be relieved and that Petitioner be permitted to proceed pro se. Petitioner asserted that he wanted to appeal, but that he did not want another attorney appointed and wished to represent himself.

Petitioner filed an August 22, 2022 pro se notice of appeal in this court. This court noted that post-conviction counsel had not been granted permission to withdraw and directed the Appellate Court Clerk to forward a copy of the order to post-conviction counsel. Order, *Jose Gonzalez Bonilla v. State*, No. M2022-01157-CCA-R3-PC (Tenn. Crim. App. Aug. 30, 2022). Thereafter, the post-conviction court provided this court with a copy of its order granting post-conviction counsel permission to withdraw; the order did not appoint another attorney. This court remanded the case to the post-conviction court to determine whether Petitioner wished to have another attorney appointed or to waive the right to appellate counsel. Order, *Jose Gonzalez Bonilla v. State*, No. M2022-01157-CCA-R3-PC (Tenn. Crim. App. Sept. 13, 2022).

On September 21, 2022, Petitioner filed an "express waiver of right to appointed counsel on appeal" in the post-conviction court, in which he "provide[d] his express written [waiver] of the appointment of counsel on appeal[.]" Petitioner also filed a motion in this court seeking to proceed pro se. This court forwarded the matter to the post-conviction court. Order, *Jose Gonzalez Bonilla v. State*, No. M2022-01157-CCA-R3-PC (Tenn. Crim. App. Sept. 27, 2022).

In a November 7, 2022 order, the post-conviction court found that Petitioner "was adamant [at a hearing] that he wanted to represent himself, in spite of this [c]ourt's recommendation of appointed counsel." The court concluded that Petitioner knowingly and voluntarily waived his right to appointed counsel on appeal. Attached to the order were two documents Petitioner filed listing grievances he had regarding communication with his attorneys and the post-conviction court. Petitioner asserted that two legal aides at the prison had thirty-five years' experience with post-conviction proceedings and that he was confident that they would help him adequately with his appeal.

Petitioner also filed a motion for this court to take judicial notice of the record in his direct appeal, which we granted. Order, *Jose Gonzalez Bonilla v. State*, No. M2022-01157-CCA-R3-PC (Tenn. Crim. App. Nov. 22, 2022).

Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because counsel (1) did not inform Petitioner during plea negotiations that he would be subject to CSL and registration on the SOR if he was convicted at trial; (2) failed to object to the admission of the victim's forensic interview recording during the pretrial[2] severance hearing; and (3) failed to object to the composition of the jury venire. Petitioner also argues that the cumulative effect of these errors requires relief. The State responds that counsel provided effective assistance and that no cumulative error occurred.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such

[2] We note that the introduction and "Questions Presented for Review" section of Petitioner's brief avers that trial counsel was ineffective for failing to raise a *Crawford* objection to the forensic interview recording "at the severance hearing and trial"; however, the body of Petitioner's arguments in both his principal and reply briefs only refer to the severance hearing. The post-conviction court did not issue findings of fact relative to a *Crawford* objection at trial, and the State has not briefed any such issue. To the extent that Petitioner has attempted to raise an issue related to trial counsel's failure to make a *Crawford* objection at trial, it has been waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"); Tenn. R. App. P. 27(a)(7) (stating that an appellant's brief shall contain an argument "setting forth . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on[.]")

findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's 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." *Strickland*, 466 U.S. at 689; *see Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must 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." *Id.* (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

A. CSL/SOR requirements

Relative to trial counsel's informing Petitioner about mandatory CSL if he was convicted at trial, the record supports the post-conviction court's findings that counsel informed Petitioner about the requirements, that counsel provided Petitioner with written materials to assist in his understanding, and that counsel offered to have an interpreter explain the materials to Petitioner. Counsel's recollection was aided by his contemporaneous file notes, which he said documented several discussions of plea offers, including CSL and SOR requirements. Further, counsel testified that all of the plea offers included CSL. The post-conviction court credited trial counsel's testimony over that of Petitioner, and we will not disturb its finding in this regard. *Fields*, 40 S.W.3d at 456; *see Kendrick*, 454 S.W.3d at 457. Petitioner has not established deficient performance or prejudice under *Strickland*, and he is not entitled to relief on this basis.

B. Forensic interview at severance hearing

The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The fundamental right of confrontation applies through the Fourteenth Amendment to the states." *State v. Cannon*, 254 S.W.3d 287, 301 (Tenn. 2008); *see McDonald v. Chicago*, 561 U.S. 742, 764-765 (2010). Article I, section 9 of the Tennessee Constitution also guarantees this right of confrontation, providing "[t]hat in all criminal prosecutions, the accused hath the right to . . . meet the witnesses face to face[.]" Tenn. Const. Art. I, § 9. "[O]ne of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Berger v. California*, 393 U.S. 314, 315 (1969).

Although Tennessee's courts have not explicitly examined whether the right to confrontation exists in pretrial severance hearings, "this [c]ourt has previously stated that [t]he right to confrontation is a trial right and does not apply in suppression hearings.'" *State v. Bonds*, 502 S.W.3d 118, 138 (Tenn. Crim. App. 2016) (internal citations and quotation marks omitted); *see generally United States v. Hernandez*, 778 F.Supp.2d 1211, 1226 (D.N.M. 2011) (stating that "[t]here is no binding precedent from the Supreme Court

or this court concerning whether *Crawford* applies to pretrial suppression hearings" and noting that confrontation rights apply only to trial). Likewise, this court has recognized that the right to confrontation does not extend to sentencing hearings. *State v. Stephenson*, 195 S.W.3d 574, 590 (Tenn. 2006) (discussing that federal appellate courts have "continue[d] to hold that the Sixth Amendment right of confrontation does not apply at sentencing, even after *Crawford*"), *abrogated on other grounds by State v. Watkins,* 362 S.W.3d 530 (Tenn. 2012).

Petitioner acknowledges in his brief that "the law in this specific area is unclear" and requests that this court determine the issue in his favor. However, the existing caselaw counsels against applying *Crawford* to pretrial proceedings, and in the context of ineffective assistance of counsel, this conclusion undermines both *Strickland* prongs. We cannot conclude that trial counsel was deficient for failing to raise a futile objection. Similarly, Petitioner has not proven that the failure to lodge a *Crawford* objection prejudiced him because the trial court would have overruled it. We note that this court found on direct appeal that the forensic interview was not hearsay because it was not offered for its truth, but instead for the purpose of orienting the trial court to the allegations and to aid it in resolving the severance issue. *Jose Gonzalez Bonilla*, 2020 WL 3791677, at *7. Petitioner is not entitled to relief on this basis.

C. Jury venire

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Am. VI. "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). The United States Supreme Court explained that drawing a jury from a "fair cross section of the community" requires that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *State v. Hester*, 324 S.W.3d 1, 39 (Tenn. 2010) (quoting *Taylor*, 419 U.S. at 538). To "establish a prima facie violation of the fair cross section requirement," however, a

> defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

State v. Davidson, 509 S.W.3d 156, 237 (Tenn. 2016) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

The record supports the post-conviction court's conclusion that Sumner County does not systematically exclude Hispanic people from the jury selection process. Ms. Strong testified that the 250-person jury pool was randomly chosen every six months by a computer program, which used the Department of Safety's driver's license and identification card information. Generally, these records did not document a juror's race or ethnicity. After prospective jurors were excused from jury duty or rescheduled as necessary, each member of the jury venire was assigned a number. At the beginning of jury selection for a given case, Ms. Strong drew numbers out of a bag to call prospective jurors for voir dire, and she did not know to whom a number corresponded until the juror stood up. Similarly, her handwritten ledger documenting the names and numbers of the jurors and alternates who served at Petitioner's trial did not document their races. We note that, other than Petitioner's general recollection that some African-American jurors were present in the jury venire or the petit jury—it was unclear to which he referred—and his assertion that he would have recognized Hispanic jurors by their appearance or speech, no evidence was introduced to establish the racial composition of the jury.

Because no evidence indicates that Sumner County systematically excludes Hispanic jurors from the jury venire, Petitioner has failed to establish that trial counsel was deficient for not objecting to the racial composition of the jury. Petitioner is not entitled to relief on this basis.

D. Cumulative error

Finally, Petitioner argues that cumulative error warrants reversal. The cumulative error doctrine recognizes that there may be many errors committed in trial proceedings, each of which constitutes mere harmless error in isolation, but "have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *Hester*, 324 S.W.3d at 76. To warrant review under the cumulative error doctrine, there must have been more than one actual error during the trial proceedings. *Id.* at 77. In other words, only where there are multiple deficiencies does this court determine whether they were cumulatively prejudicial. In this case, because we have not found more than one error, cumulative error review is unwarranted.

Conclusion

Based on the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT L. HOLLOWAY, JR., JUDGE