

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 4, 2023

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KRISTINA COLE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 17-01568 J. Robert Carter, Jr., Judge

No. W2022-01245-CCA-R3-PC

Petitioner, Kristina Cole, appeals the denial of post-conviction relief from her Shelby County convictions for two counts of conspiracy to possess 300 grams or more of methamphetamine with the intent to sell or deliver in a drug-free zone and two counts of possession of 300 grams or more of methamphetamine with intent to sell or deliver in a drug-free zone. Petitioner contends that she was denied the effective assistance of counsel based upon counsel’s failure to: (1) object to irrelevant and prejudicial text messages introduced at trial; (2) file a *Bruton* motion; (3) contest that Petitioner tracked the package containing the methamphetamine; (4) adequately prepare for trial; (5) object when the State argued that Petitioner’s silence implied guilt; (6) object when the prosecutor “testified during closing argument in order to bolster his own credibility”; and (7) object when the prosecutor intentionally misrepresented evidence during closing argument. Petitioner further asserts that she is entitled to relief based on cumulative error. Following a thorough review, we affirm the judgment of the post-conviction court.

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 J. ROSS DYER and JILL BARTEE AYERS, JJ., joined.

Ben Israel, Memphis, Tennessee, for the appellant, Kristina Cole.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Trial Proceedings

In 2017, Petitioner was indicted for two counts of conspiracy to possess 300 grams or more of methamphetamine with the intent to sell or deliver in a drug-free zone (Counts 1 and 2) and two counts of possession of 300 grams or more of methamphetamine with intent to sell or deliver in a drug-free zone (Counts 3 and 4). *State v. Kristina Cole*, No. W2017-01980-CCA-R3-CD, 2018 WL 5810011, at *1 (Tenn. Crim. App. Nov. 5, 2018), *perm. app. denied* (Tenn. Mar. 28, 2019). At a joint trial with her co-defendants, Jason White and Montez Mullins, Petitioner was found guilty on all charges, and the trial court imposed a total effective sentence of thirteen and one-half years in confinement. *Id.*

This court has previously summarized the evidence presented at Petitioner's trial, as follows:

At trial, Detective Mark Gaia testified that he worked for the Bartlett Police Department ("BPD"). In February 2016, he worked in the narcotics unit of the BPD. Around February 2, 2016, Detective Gaia received a phone call from a detective in Visalia, California, regarding a package that contained methamphetamine that had been shipped from California to an address in Bartlett, Tennessee. The package was addressed to "Bailey Green" and listed 2552 Linwood as the address.¹ After the BPD intercepted the package, officers weighed the package and tested the contents. Detective Gaia testified that the package contained a bag of children's clothing and one pound of methamphetamine. He explained that a pound of methamphetamine would be worth \$12,000 to \$15,000.

Detective Gaia obtained a search warrant, and Detective Jeffrey Swindol conducted a controlled delivery of the package to [Petitioner's] residence at 2552 Jenwood. After [Petitioner] accepted the package, Detective Gaia knocked on the door of her residence, and [Petitioner] let him inside. Once inside, Detective Gaia observed the package inside the house. [Petitioner] gave him permission to search the residence. During the search, Detective Robert Christian found a photograph on the nightstand in [Petitioner's] bedroom that depicted a man wearing a prison uniform. When

¹ Detective Gaia determined that there was not a valid address of 2552 Linwood in Shelby County. He learned that the correct address was 2552 Jenwood.

Detective Gaia asked [Petitioner] about the photograph, she stated that it was her ex-boyfriend, “Timothy Smith,” whose birthday was March 11. Detective Gaia confirmed that the individual in the photograph was [Defendant White] based on “numerous handwritten letters that were addressed to [Petitioner] from [Defendant White] at the Riverbend Maximum Institution near Nashville.”

Detective Gaia collected three cell phones from [Petitioner]: a Verizon HTC phone, a Samsung phone, and an LG phone. He also found a laptop computer. He observed that [Petitioner] had recently tracked a package on the Fed-Ex website from the search history of the computer. The tracking number of the package that [Petitioner] tracked electronically matched the number of the package that the BPD intercepted and delivered to [Petitioner’s] residence. [Petitioner] denied knowing anyone named Bailey or knowing the contents of the package. Detective Gaia identified evidence of several forms of communication between [Petitioner] and Defendant [White], including a handwritten letter from Defendant [White] to [Petitioner]. Detective Gaia also found a receipt for a money order to Defendant [White], which listed his inmate booking number, and a receipt for a purchase by [Petitioner] to Defendant [White] through Union Supply Direct, Inmate Direct Sales. Detective Gaia observed several PayPal and MoneyPak cards in the residence.

While Detective Gaia was discussing the contents of the computer with [Petitioner], the LG cell phone continuously rang. The caller was listed in [Petitioner’s] phone as “Line Boo Other[.]” When Detective Gaia picked up the phone and hit the answer button, [Petitioner] stated that she wanted an attorney. After Detective Gaia placed [Petitioner] under arrest, Dustin White² pulled into the driveway of [Petitioner’s] residence. As he spoke with Mr. White, Detective Gaia noticed that the same phone number that called [Petitioner’s] phone was also continuously calling Mr. White’s phone. Detective Gaia noted that Mr. White was [Defendant White’s] brother and that the phone number that called Mr. White’s phone was listed as “J.” Detective Gaia identified a Google Earth picture that showed [Petitioner’s]

² Detective Gaia refers to this individual as “Dustin Van White.” However, this individual is referred to as “Dustin White” in the remainder of the transcripts. For purposes of clarity, we will refer to him as Mr. White.

residence was approximately 200.62 feet away from Raleigh-Bartlett Meadows Elementary School.³

On [Petitioner's] HTC cell phone, Detective Gaia observed that [Petitioner] sent a photograph of herself to (731) 693-6346. [Petitioner] also received a photograph of Defendant [White] from (901) 573-4218. The photograph message was signed "Da Junk Yard." Detective Gaia noted that the photograph of Defendant [White] appeared to have been taken in a jail cell. Detective Gaia also examined the contact list and text messages on [Petitioner's] HTC cell phone. He observed that the contact number for "Jason White" and "Boo" were the same—(731) 217-2745. He also noted that the contact number for "New Boobear" was (731) 694-7388.

When Detective Gaia examined [Petitioner's] Samsung cell phone, he observed text message exchanges with (731) 694-9127. This phone number used a signature of "COUNTRY CRAZY[.]" [Petitioner] texted the following message to this number: "Hey baby. This is my other number. Lock me in. Love I baby . . . [.]". Throughout [Petitioner's] numerous text message exchanges with this phone number, she frequently referred to the recipient as "BooBear." [Petitioner] also referred to the recipient of messages to (731) 499-3517 as "BooBear." This phone number used "L.L.K.N. J.Y.D." as its signature, and [Petitioner] saved this number in her contact list as "New BooBear." On January 28, 2016, [Petitioner] sent the following message to "New BooBear": "\$ 125 - 890 884 6154[.]" Detective Gaia stated that [Petitioner] was informing Defendant [White] that she loaded \$125 into account number 890-884-6154. Detective Gaia also discovered contacts in [Petitioner's] Samsung cell phone named "BooBear Other Line[.]" connected to (731) 394-1929 and "BooBear Second[.]" connected to (615) 917-3749.

Detective Gaia also examined [Petitioner's] LG cell phone and found a photograph of Defendant [White] that was sent from (731) 693-2611. The sender of the photograph used the following signature: "Da Junk Yard." [Petitioner] sent messages to this phone number and referred to the recipient as "BooBear." [Petitioner] also exchanged text messages with (731) 443-6670 and, again, referred to the recipient of her messages as "BooBear." In May 2015, [Petitioner] texted (615) 564-0303 on her LG cell phone and referred to the recipient as "BooBear." The recipient used the following

³ Sergeant Terrence Riley also testified that [Petitioner's] residence at 2552 Jenwood was located within 1,000 feet of Raleigh Bartlett Meadows Elementary School.

signatures: “\$SAME N***A SINCE DAY1\$” or “\$Loyalty Bring Royalty\$[.]” In July 2015, [Petitioner] began exchanging text messages with (731) 694-9127, and she referred to the recipient as “BooBear.” The recipient used the signature of “COUNTRY CRAZY[.]” [Petitioner] also exchanged text messages with contacts identified as “New BooBear” connected with (731) 499-3517 and “Line Boo Other” connected with (615) 917-3749. [Petitioner] sent the following text messages to the “Line Boo Other” contact on January 27, 2016: “Sender: Kristina Cole, Memphis TN Control # 864-588-3690, \$ 100” and “\$ 75 - 756 663 9348 \$ 30 - 748 829 1871[.]” On February 3, 2016, the day of the controlled delivery, [Petitioner] sent the following text messages to “Line Boo Other”: “Package arrived[.]” “They put the wrong street name. Lucky they knew what it was suppose [sic] to be[.]” and “What do you want me to do with it?”⁴

Detective Gaia testified that he listened to the recordings of [Petitioner’s] outgoing calls while she was incarcerated.⁵ Detective Gaia identified nineteen phone calls where Defendant [White] was part of the conversation with [Petitioner]. In the tenth phone call on the recording, [Petitioner] called a phone number and her older son, Burnest, answered the phone. Burnest connected a third party to the call; Detective Gaia identified this caller as Kimberly White, [Defendant White’s] mother. Ms. White then connected a caller that Detective Gaia identified as Defendant [White] to the call with [Petitioner] by speaker phone. During the call, Defendant [White] told [Petitioner] that “[w]e got some money[.]” “we are going to get a lawyer[.]” and “we are going to get you out.” Defendant [White] also states that “Tez did this s**t” and that “Tez lied to [Petitioner]” and told [Petitioner] that the package contained jewelry. Defendant [White] told [Petitioner] that [Defendant] Mullins was “filling out an affidavit right now” to give to [Petitioner’s] attorney. Defendant [White] also stated that [Defendant] Mullins told [Petitioner] to check the “numbers” and that [Defendant] Mullins was going to “admit to it.” At the end of the phone call, Defendant [White] told [Petitioner] to “[c]all Momma’s phone right now, baby.”

⁴ On cross-examination, Detective Gaia stated that he sent the final text message to “Line Boo Other” on [Petitioner’s] LG phone. He explained that he sent the text message on [Petitioner’s] phone because he was attempting to arrange for the recipient of the package to pick it up.

⁵ Detective Michael Harber of the Shelby County Sheriff’s Office explained that, when an inmate uses a phone while incarcerated, the inmate must use a personal identification number before placing a call. Detective Harber identified a recording of phone calls that [Petitioner] made while she was incarcerated.

[Petitioner] then called a phone number that Detective Gaia identified as Ms. White's phone. During this phone call and other phone calls, Ms. White connected Defendant [White] to the call via speaker phone. During the thirteenth recorded call, Defendant [White] told [Petitioner], "They can't hold you accountable for what you don't know." During several of the calls, [Petitioner] referred to Defendant [White] as "Timothy." Additionally, in several calls, Defendant [White] and [Petitioner] discussed accessing PayPal accounts.

On cross-examination, Detective Gaia clarified that the managers at the California FedEx facility opened the package because they suspected that it contained contraband. A detective in California then contacted the BPD regarding the package. Detective Gaia agreed that the text message exchanges between [Petitioner] and Defendant [White] were not illegal on their face. He also agreed that transferring money into a PayPal account or using a prepaid credit/debit card was not illegal. He stated that Defendant [White] used at least ten different phone numbers to communicate with [Petitioner]. However, Detective Gaia could not confirm that Defendant [White] had exclusive control of the phone numbers.

Special Agent Peter Hall testified that he worked for the Tennessee Bureau of Investigation as a forensic chemist. After the trial court declared Special Agent Hall to be an expert, he stated that the package delivered to 2552 Jenwood contained 441.17 grams of methamphetamine, a Schedule II controlled substance.

Detective Christian testified that he worked in the Investigative Services Narcotics Unit of the BPD. On February 3, 2016, Detective Christian assisted Detective Gaia with executing the search warrant on the residence at 2552 Jenwood. Detective Christian found the photograph of Defendant [White] on [Petitioner's] nightstand. On February 22, 2017, Detective Christian interviewed [Defendant] Mullins. He stated that he did not believe that [Defendant] Mullins was completely truthful during the interview because [Defendant] Mullins said "honestly" and "I swear to God" frequently.

During his interview with Detective Christian, [Defendant] Mullins stated that, at the end of January 2016, he was incarcerated at the "Northeast penitentiary" when another inmate, "Angel," approached him and offered to pay him \$600 if [Defendant] Mullins provided him with a mailing address in Memphis. Angel informed [Defendant] Mullins that the package would

contain “ice,” or crystal methamphetamine. [Defendant] Mullins contacted [Petitioner] and asked if he could send a package with a gift of jewelry for his mother to her address. [Petitioner] agreed, and [Defendant] Mullins gave her address to Angel. Angel then gave [Defendant] Mullins \$300 through PayPal and promised to give him an additional \$300 after the package was delivered. Angel later provided [Defendant] Mullins with a tracking number for the package, which [Defendant] Mullins gave to [Petitioner]. A few days later, [Defendant] Mullins received a text message from [Petitioner] informing him that the package arrived, despite the fact that the package listed the wrong address. [Defendant] Mullins informed Angel that the package arrived and attempted to call [Petitioner]. After he was unable to reach [Petitioner], [Defendant] Mullins called [Petitioner’s] “husband,” Defendant [White].

[Defendant] Mullins asserted that [Petitioner] was unaware that the package contained methamphetamine. [Defendant] Mullins explained that he met [Petitioner] through Defendant [White]. [Defendant] Mullins met Defendant [White] while they were incarcerated in Morgan County in 2012. [Defendant Mullins] also stated that [Petitioner] called him “Boo Bear.” He said that he did not have a romantic relationship with [Petitioner].

Investigator Andrew Brown testified that he worked for the Tennessee Department of Correction as an investigator in the Office of Investigation and Complaints. Investigator Brown met Defendant [White] while Defendant [White] was incarcerated at the Riverbend Maximum Security Institution. On February 3, 2016, Investigator Brown received a phone call from Detective Gaia about Defendant [White]. Based on his conversation with Detective Gaia, Investigator Brown and some other employees went to [Defendant White’s] jail cell and observed Defendant [White] flushing a cell phone down his toilet. Investigator Brown confiscated a cell phone charger but was unable to retrieve the cell phone. Investigator Brown stated that one of the signatures that Defendant [White] used to communicate with [Petitioner], L.L.K.N. J.Y.D., meant “Long Live King Neal Junk Yard Dog[.]” “Long Live King Neal” referred to the founder of the Traveling Vice Lords, Neal Wallace. “Junk Yard Dog” referred to a faction of the Traveling Vice Lords that was organized by Charles Thompson, also known as “Country.” Investigator Brown testified that there was no legitimate reason for an inmate to need a PayPal or Green Dot account. He explained that inmates could receive financial help from friends and family members through JPay, but inmates did not need a non-authorized cell phone to receive funds through JPay and non-inmates could send money to an inmate through

JPay with a computer or smart phone. In Investigator Brown's experience, inmates used PayPal or Green Dot accounts to purchase contraband items such as tobacco products, narcotics, cell phones, or homemade weapons. He acknowledged that he did not know what the specific transactions noted on [Petitioner's] phone were for.

[Petitioner], Defendant [White], and [Defendant] Mullins decided to not testify.

State v. Jason White, No. W2018-00329-CCA-R3-CD, 2019 WL 549652, at * (Tenn. Crim. App. Feb. 11, 2019) (footnotes in original);⁶ *see also Kristina Cole*, 2018 WL 5810011, at *1-4. Upon review, this court affirmed Petitioner's judgments of conviction, and the Tennessee Supreme Court denied further review. *Kristina Cole*, 2018 WL 5810011, at *12.

Post-Conviction Proceedings

Petitioner subsequently filed a timely pro se petition for post-conviction relief. *Kristina Cole v. State*, No. W2020-01607-CCA-R3-PC, 2022 WL 1040006, at *4 (Tenn. Crim. App. Apr. 7, 2022). Following the appointment of counsel, she filed an amended petition in which she alleged that she was denied the effective assistance of counsel at trial. *Id.* Specifically, Petitioner asserted that trial counsel was ineffective for her:

(1) failure to file critical motions including a motion to suppress evidence obtained from a search warrant, a motion to suppress text messages from a cell phone obtained from the search, and a *Bruton* motion regarding a co-defendant's statement; (2) failure to object to inadmissible evidence at trial including hearsay testimony about the package in question, the admissibility of a photograph of Petitioner's computer search history, the admission of text messages, and admission of a Tennessee Bureau of Investigations report on the contents of the package; and (3) failure to object to the State's closing arguments when the State violated Petitioner's Fifth Amendment rights by commenting on Petitioner's silence at trial and when the State testified during arguments.

Id. (footnotes omitted). Following an evidentiary hearing, the post-conviction court entered an order denying relief on November 6, 2020, and Petitioner filed a timely appeal. *Id.* at *6.

⁶ We have quoted this court's factual summary from Defendant White's direct appeal because it contains a summary of Petitioner's jail phone calls with Defendant White.

On appeal, this court summarized the testimony at the post-conviction hearing, as follows:

Trial counsel testified that she was the third attorney retained to represent Petitioner in the instant case. Trial counsel explained that she did not file a *Bruton* motion regarding [Defendant Mullins'] statement because although she believed the statement to be "a little farfetched," Petitioner "maintained that she believed that [the statement] was going to be something that would help exonerate her" and "was insistent that [the] statement was going to be beneficial to her." Trial counsel admitted that she thought the statement was "a little farfetched" and that she told . . . Petitioner that there was a "possibility that if the jury didn't believe it that it might backfire." However, Petitioner "wanted the statement to come in." Upon further questioning by Petitioner's post-conviction counsel, trial counsel reiterated that she had discussed with Petitioner that the statement could be excluded but explained that Petitioner "was insistent that Mr. Mullins' statement was going to be beneficial to her and so I went with it."

Trial counsel testified that after having examined all of the text messages from Petitioner's phone produced in discovery, she did not believe that she could have successfully excluded them even if she had objected to their admission. Thus, she strategized that by admitting all of the text messages, the jury would be inundated with information, and they would not be able to go through "every single one of those text messages." Specifically regarding the text messages concerning the arrival of the package, trial counsel testified that other evidence established that Petitioner was aware that a package was going to be delivered to her. Specifically, trial counsel testified that Petitioner admitted that there was a package, that she knew that the package was coming, and that she had tracked the package. Based on Petitioner's admissions and the evidence, trial counsel could not argue that Petitioner did not know the package was coming, but instead argued that Petitioner believed the contents of the package to be "jewelry and something for [Defendant Mullins'] mother or girlfriend or something like that and [Petitioner] had no knowledge as to what was actually in the package." Based on that theory, trial counsel testified that she did not think Petitioner's knowledge of the package was detrimental information.

When questioned about text messages Detective Gaia may have sent from Petitioner's phone, trial counsel testified that there was no way for her to establish that Detective Gaia had possession of Petitioner's phone and that he was able to send text messages from her phone prior to his entrance into

the house. Trial counsel explained that the timeframe between the execution of the search warrant and when the texts were sent was a matter of a few minutes. Therefore, trial counsel believed that the State had established that Petitioner sent the texts, and trial counsel did not see an ethical way to refute this contention based on the evidence. Trial counsel also testified that she did not consider attempting to exclude the screenshots of Petitioner's search history. Petitioner admitted to trial counsel that she had searched the tracking number for the package she was expecting, and trial counsel did not think there was a basis to exclude the photos of Petitioner's search history. Further, since the trial strategy was to admit that Petitioner was expecting a package containing jewelry, trial counsel did not find the "fact that someone tracks their packages . . . to be detrimental to their case at all."

Trial counsel testified that she did not consider objecting to [Detective] Gaia's testimony that during the search, Petitioner stated that she wanted her lawyer. Trial counsel explained that it was Petitioner's position that the officers were in her house and were treating her "unfairly"; therefore, trial counsel did not think the statement was incriminating or damaging. Trial counsel discussed the statement with Petitioner and testified that Petitioner did not express that she thought the statement was inculpatory or that she wanted it excluded.

When questioned about why she did not object during the State's closing arguments, trial counsel testified that she did not consider objecting to the prosecutor's statements during the State's closing argument because she does not object during closing arguments since "it's not testimony." The State argued that "no one got up on the stand to testif[y] about the version of events that [Defendant Mullins] had suggested." Trial counsel explained that the jury was instructed "that they are not to put any weight on the fact that none of the defendants testified. And that the fact that they did not testify does not in any way impute upon them an admission of guilt or anything of that nature." Trial counsel believed the trial court's instruction was sufficient, and she did not believe that the prosecutor's comment was egregious enough to have objected since the prosecutor "did not specifically say [Petitioner]. There were three other defendants up there. He did not specifically indicate [Petitioner's] silence." The statement was not egregious to the point she thought she needed to object. Trial counsel testified that she also relied on the trial court's instruction regarding "closing arguments not being testimony" in her decision not to object to the prosecutor's statements. Trial counsel was not asked about any other instances of alleged improper closing argument.

The State did not cross-examine trial counsel. The post-conviction court asked trial counsel some questions about her experience. Trial counsel testified that she had been practicing law for nine years at the time of the post-conviction hearing and estimated that eighty-five percent of her practice was in criminal defense. Prior to Petitioner's trial, trial counsel had criminal trial experience in Jackson, Madison County and in Lexington, Henderson County.

Detective Mark Gaia testified that he handled Petitioner's case in his capacity as a detective for the Bartlett Police Department. Detective Gaia explained that Petitioner's address was in Memphis . . . but that the search warrant was executed by the Bartlett police. Detective Gaia testified that he determined that the address on Jenwood was the address to be searched after speaking to detectives from California who explained that the airway bill was "miskeyed." Detective Gaia obtained a photocopy of the handwritten airway bill from the detectives in California and testified that the way it was addressed could be read as either "Linwood" or "Jenwood" and there was no 2552 Linwood in Memphis.

Detective Gaia testified that his report offered only an approximation of the timeframe in which the search of Petitioner's home occurred and that the recording equipment that was used to document the search did not have a timestamp. According to Detective Gaia, the search was executed approximately ten minutes after the package was delivered. Detective Gaia estimated that between fifteen and forty-five minutes passed between the execution of the search and Petitioner's arrest. Detective Gaia did not know what time Petitioner's phone was confiscated but testified that it was after she was arrested. Detective Gaia briefly explained that he obtained Petitioner's search history from her computer by pressing the letter "F" on the keyboard. The State did not cross-examine Detective Gaia.

Id. at *5-6.

Upon review, this court determined that it was unable to properly address the merits of Petitioner's post-conviction claims because the post-conviction court failed to make sufficient factual findings and conclusions of law in its order denying relief. *Id.* at *7. This court reversed the judgment of the post-conviction court and remanded the matter for the post-conviction court to enter an order "in compliance with the requirements of the post-conviction statutes and this [court's] opinion[.]" *Id.*

On remand, the post-conviction court entered a supplemental order on August 30, 2022, addressing Petitioner’s claims, detailing its findings of fact and conclusions of law. This timely appeal follows.

Analysis⁷

On appeal, Petitioner contends that she was denied the effective assistance of counsel based upon counsel’s failure to: (1) object to irrelevant and prejudicial text messages introduced at trial; (2) file a *Bruton* motion; (3) contest that Petitioner tracked the package containing the methamphetamine; (4) adequately prepare for trial; (5) object when the State argued that Petitioner’s silence implied guilt; (6) object when the prosecutor “testified during closing argument in order to bolster his own credibility”; and (7) object when the prosecutor intentionally misrepresented evidence during closing argument. Petitioner also asserts that she is entitled to relief based on cumulative error. The State responds that Petitioner has waived several of her claims and that the claims that have been preserved fail “because counsel’s decisions were strategic and reasonable, as well as because . . . [P]etitioner suffered no resulting prejudice.” The State further responds that Petitioner is not entitled to relief for the cumulative effect of counsel’s alleged errors.

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 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 also 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.

⁷ To assist in the resolution of this appeal, we take judicial notice of the record from Petitioner’s direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987); *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964).

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, this court "need not address both elements if the petitioner fails to demonstrate either one of them." *Kendrick*, 454 S.W.3d at 457. 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 also 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 also 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).

1. Failure to Object to Text Messages

Petitioner contends that trial counsel rendered deficient performance by failing to object to the admission of certain text messages regarding the delivery of a package; Petitioner argues such messages were "irrelevant and prejudicial." Petitioner alleges that trial counsel allowed Detective Gaia to introduce unredacted cell phone records "from several phones allegedly belonging to Petitioner[,] which contained "misleading text messages about delivery of a package totally unrelated to the package of methamphetamine at issue in this case."

Specifically, Petitioner points to the following text message read into evidence by Detective Gaia at trial: “It’s coming by UPS instead of regular mail. It’s on the truck for delivery now.” Petitioner contends that this text message “had nothing to do with delivery of methamphetamine[,]” noting that it was sent two weeks before the delivery that was the subject of the case and was sent to an unknown individual. Petitioner argues that the context surrounding the text message “strongly suggests that [the message] referred to [a] prior conversation[,]” regarding a prepaid card being sent to Petitioner’s residence. Petitioner asserts that trial counsel should have objected to Detective Gaia’s reading of the text message and moved to have that series of text messages redacted from the cell phone records. She argues that the messages were “irrelevant because they did not relate in any way to the delivery of the package containing methamphetamine.” She further argues that, even if relevant, the messages should have been excluded pursuant to Tennessee Rule of Evidence 403 because they were “confusing, misleading, and cumulative” and “suggested to the jury that there was additional drug activity that was not charged in this case.”

The State responds that the testimony at the post-conviction hearing established that trial counsel made a strategic decision “to simply address and distinguish those text messages rather than raise an objection that she felt would fail” and that counsel’s decision is “virtually unchallengeable” under *Strickland*. The State further contends that Petitioner cannot show that she was prejudiced by the introduction of the text messages.

At the post-conviction hearing, trial counsel testified that, after having examined all of the text messages produced in discovery, she did not believe that she could have successfully excluded them even if she had objected to their admission. Thus, trial counsel strategized that, by admitting all of the text messages, the jury would be inundated with information, and they would not be able to go through “every single one of those text messages.” We will not second-guess trial counsel’s reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson*, 197 S.W.3d at 790. Moreover, Petitioner has not established that the text messages at issue would have been excluded had trial counsel objected to them. Because counsel’s strategic decision was not deficient, and because Petitioner cannot establish prejudice, she is not entitled to relief.

2. Failure to File a Bruton Motion

Petitioner next argues that she was denied the effective assistance of counsel based upon trial counsel’s failure to file a *Bruton*⁸ motion to exclude the recorded statement by Defendant Mullins to Detective Christian. She contends that, although Defendant Mullins’ statement was exculpatory on its face, it confirmed that Petitioner was expecting the

⁸ *Bruton v. United States*, 391 U.S. 123 (1968).

package, which was “extremely damaging to Petitioner’s defense[.]” Moreover, Petitioner contends that Defendant Mullins’ statement was “implausible” and “ludicrous” and that “portions of it were demonstrably false.” Petitioner asserts that trial counsel should have objected to the admission of Defendant Mullins’ statement “because it contained transparent lies calculated to exculpate Petitioner and because it established that Petitioner knew that the package was coming to her home” and that counsel’s failure to object constituted ineffective assistance.

The State responds that Petitioner’s theory of defense at trial was that she believed the package contained jewelry, that trial counsel made a reasonable decision not to file a *Bruton* motion, based upon Petitioner’s position, and that the introduction of the exculpatory statement did not cause any prejudice.

At the post-conviction hearing, trial counsel testified that other evidence established that Petitioner was aware that a package was going to be delivered to her. Specifically, trial counsel testified that Petitioner admitted that there was a package, that she knew that the package was coming, and that she had tracked the package. Trial counsel stated that, based on Petitioner’s admissions and the evidence, counsel could not argue that Petitioner did not know the package was coming but instead argued that Petitioner believed the contents of the package to be “jewelry and something for [Defendant Mullins’] mother or girlfriend or something like that and [Petitioner] had no knowledge as to what was actually in the package.” Trial counsel testified that, based on the defense strategy, she did not think Petitioner’s knowledge of the package was detrimental information.

In addressing this issue, the post-conviction court accredited trial counsel’s testimony and found that counsel’s strategy and tactical decisions were based upon Petitioner’s decision as to what the defense would be and on “how best to implement that strategy.” The court found that the theory of defense was clear; “Petitioner was going to receive a package for [D]efendant Mullins[.]” and Petitioner “thought it was jewelry and therefore had no knowledge of or intent to commit a crime.” The court concluded that Petitioner’s contention that trial counsel should have filed a *Bruton* motion to exclude Defendant Mullins’ statement would have been in “direct contradiction” to the defense theory. The court found that trial counsel was prepared and informed by Petitioner as to what defense strategy to employ and that it was only after the strategy was rejected by the jury that Petitioner suggested the possibility of other tactics.

Once again, we will not second-guess trial counsel’s reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Id.* at 790. Trial counsel made a reasonable decision, based upon Petitioner’s position, not to file a *Bruton* motion and to use Defendant Mullins’ statement in furtherance of the defense

theory. Petitioner has not shown deficient performance or prejudice under *Strickland*, and she is not entitled to relief.

3. Failure to Contest that Petitioner Tracked the Package

Petitioner asserts that trial counsel rendered ineffective assistance of counsel based upon counsel's concession that Petitioner tracked the package containing methamphetamine. Petitioner contends that, rather than concede the issue, trial counsel should have objected to the admission of a photograph of Petitioner's computer history, taken by Detective Gaia during the search of Petitioner's home, that showed the package had been tracked. Petitioner argues that, taken at face value, "the photograph was proof that Petitioner had prior knowledge of the package. However, due to the method of preservation, the evidence preserved was wholly untrustworthy." Petitioner asserts that the photograph showed only the FedEx website address and not the time that the site was accessed; furthermore, the photograph did not show the computer but only "a portion of a search history that could have come from any computer at any time."

The State responds that Petitioner waived this claim by failing to include it in her petition or amended petition.

Our review of the record shows that Petitioner raised this issue in her amended petition for post-conviction relief. Under the heading "Failure to properly preserve internet search history[,]," she specifically argued that trial counsel should have objected to admission of the photograph of Petitioner's internet history. Thus, the issue is not waived.

In its original order denying relief, the post-conviction court found, based on trial counsel's testimony, that Petitioner insisted that her defense was to rely upon the statement given by Defendant Mullins "to the effect that . . . Petitioner . . . was told that the package was to contain jewelry that was to be a gift for [D]efendant White's mother" and that Petitioner was "adamant that they should base their defense on this premise." Trial counsel stated that this would explain the text messages and phone calls that indicated Petitioner had been expecting the package and had agreed to receive it. Counsel stated that, for this reason, she did not object to Petitioner's "search history" from her computer. The post-conviction court determined that counsel's strategy "involved not objecting to some of the details because they did not interfere with the defense[,]," noting that counsel did not file a motion to suppress the computer search because "[i]t simply was not necessary for their defense."

Petitioner has not shown deficient performance and resulting prejudice based on counsel's failure to object to the admission of her computer search history and contest that she tracked the package. She is not entitled to relief on this basis.

4. Failure to Adequately Prepare for Trial

Petitioner further asserts that trial counsel failed to adequately prepare for trial and that the defense strategy “was adopted without proper legal analysis.” Petitioner contends that, although trial counsel explained her decisions as strategic, “her actions could be explained equally well as the result of resignation.”

The State responds that this claim was raised for the first time on appeal and is, therefore, waived.

The State correctly observes that Petitioner failed to include this issue in her post-conviction petition or amended petition. Generally, issues not raised in the post-conviction petition are subject to waiver. *See, e.g., Matthew B. Foley v. State*, No. M2018-01963-CCA-R3-CD, 2020 WL 957660, at *7 (Tenn. Crim. App. Feb. 27, 2020) (citing *Lonnie Lee Angel, Jr. v. State*, No. E2018-01551-CCA-R3-PC, 2019 WL 6954186, at *7 (Tenn. Crim. App. Dec. 18, 2019)). However, this court may extend appellate review to issues presented for the first time at the post-conviction hearing “if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection.” *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (citations omitted). Here, the post-conviction court’s written order confined its analysis to the issues raised in the post-conviction petition and did not address this issue. Accordingly, we are constrained to conclude that this issue is beyond the permissible scope of our review and that it is waived. *See id.*

In any event, we note that the post-conviction court accredited trial counsel’s testimony and determined that “counsel in this case was prepared.” Petitioner is not entitled to relief.

5. Failure to Object to the State’s Improper Comment on Petitioner’s Silence

Petitioner next asserts that she was denied the effective assistance of counsel based on trial counsel’s failure to object to the prosecutor’s improper comments on her right to remain silent. Specifically, Petitioner contends that counsel should have objected when “(1) the State elicited testimony by Detective Gaia that Petitioner had asked for a lawyer during the search of her home” and when “(2) the State argued in closing that ‘no one got up on the stand’ to contradict the State’s version of events.” Petitioner asserts that the prosecutor “specifically called the jury’s attention to the fact that the defense did not present witnesses” and “referred to the Petitioner by name and asked who had testified to facts that supported her defense.” She argues that the clear implication of the prosecutor’s comment was “that the jury should infer guilt from Petitioner’s silence” in violation of her Fifth Amendment right to remain silent. She further asserts that, had counsel objected to

the prosecutor's impermissible comments, there is a reasonable likelihood that the result of the proceeding would have been different.

The State responds that trial counsel's decision not to object to Detective Gaia's testimony does not fall below an objective standard of reasonableness because the detective's testimony was not a commentary on Petitioner's right to remain silent and that Petitioner was not prejudiced by trial counsel's decision. The State additionally responds that counsel's reliance on the trial court's instruction to the jury not to place any weight on Petitioner's silence was not deficient performance and that Petitioner has not shown prejudice because the jury is presumed to have followed the court's instruction.

Detective Gaia's Testimony

At trial, Detective Gaia testified that, during a consensual search of Petitioner's residence, he was discussing the contents of a computer with Petitioner when an LG cell phone found inside the residence began ringing continuously. The caller was listed in Petitioner's phone as "Line Boo Other[.]" Detective Gaia said that, when he picked up the phone and hit the answer button, Petitioner stated that she wanted an attorney.

Trial counsel testified that she did not consider objecting to Detective Gaia's testimony that Petitioner stated she wanted her lawyer during the search. Counsel explained that it was Petitioner's position that the officers were in her house and were treating her "unfairly"; therefore, trial counsel did not think the statement was incriminating or damaging.

In any event, Detective Gaia's testimony does not constitute impermissible commentary on Petitioner's right to remain silent. Although a prosecutor may not comment upon or use a defendant's post-arrest silence after *Miranda* warnings are administered to impeach the defendant's testimony at trial, *Doyle v. Ohio*, 426 U.S. 610, 611 (1976), pre-arrest silence may be the proper subject of argument and impeachment. *Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980); *State v. Kennedy*, 595 S.W.2d 836, 838-39 (Tenn. Crim. App. 1979). When Petitioner told Detective Gaia that she wanted an attorney, Petitioner was not under arrest, and no *Miranda* warnings had been given. Because Detective Gaia's testimony related to Petitioner's statements to him pre-arrest, Petitioner's Fifth Amendment rights had not come into play. See *Kennedy*, 595 S.W.2d at 838-39. Accordingly, Petitioner has not established deficient performance or prejudice based on trial counsel's failure to object to Detective Gaia's testimony, and she is not entitled to relief on this issue.

Prosecutor's Statement in Closing Argument

When asked about her failure to object when the prosecutor argued that “no one got up on the stand to testify[y] about the version of events that [Defendant Mullins] had suggested[,]” trial counsel explained that the jury was instructed “that they are not to put any weight on the fact that none of the defendants testified. And that the fact that they did not testify does not in any way impute upon them an admission of guilt or anything of that nature.” Trial counsel believed the trial court’s instruction was sufficient, and she did not believe that the prosecutor’s comment was egregious enough to have objected since the prosecutor “did not specifically say [Petitioner]. There were three other defendants up there. He did not specifically indicate [Petitioner’s] silence.” Trial counsel testified that she also relied on the trial court’s instruction regarding “closing arguments not being testimony” in her decision not to object to the prosecutor’s statement.

In addressing the issue in its supplemental order, the post-conviction court noted, “At one point the prosecutor stated that we only know what took place in the house . . . because Detective Gaia told us about it.” The court found that this “was not a comment on the failure of Petitioner to testify, per se,” and as such, trial counsel’s failure to object was not deficient performance. However, our review of the trial record reveals that it was not the prosecutor but trial counsel who stated in her closing, “We don’t know what took place in that house because the only person that testified to specifics was Detective Gaia.” Trial counsel continued:

Ladies and gentlemen, no proof has come from this witness stand that shows that [Petitioner] intended to possess any methamphetamine. There’s been no proof that there was any agreement between any parties to commit the offense of possession of methamphetamine with the intent to sell and or deliver. That just wasn’t . . . proven. It wasn’t in the evidence.

. . . .

So there is absolutely nothing in the evidence that shows that [Petitioner] had any intention of doing anything with that package. There’s . . . no proof that she knew what was in that package.

So, ladies and gentlemen, the mere presence of [Petitioner] being in that house with that methamphetamine is not enough to show that she knowingly possessed it.

. . . .

It's undisputed. There's been no evidence presented. [Defendant] Mullins said [Petitioner] didn't know anything about it. She had no idea. She was told it was some jewelry.

In rebuttal argument, the prosecutor stated:

So it's not just [Petitioner's] accepting the package. And while I'm on that, which witness came up here and stood before the judge, swore to tell the truth, submitted himself to direct examination either by them or by me, the questions by anybody, that said [Petitioner] is ignorant, said that [Petitioner] don't know what's in that box[?] The only thing you heard was hearsay through [Defendant] White telling her you don't know what's in that package, you didn't know. That's not under oath. That recording was admitted but it's not under oath. It's evidence as such but . . . weigh it accordingly.

It is this comment by the prosecutor that Petitioner has identified—both in her petition for post-conviction relief and in her brief on appeal—as the prosecutor's improper comment on her right to remain silent.

Both the United States Constitution and the Tennessee Constitution “guarantee criminal defendants the right to remain silent and the right not to testify at trial.” *State v. Jackson*, 444 S.W.3d 554, 585 (Tenn. 2014). The Tennessee Supreme Court has previously cautioned that “[t]he subject of a defendant’s right not to testify should be considered off limits to any conscientious prosecutor.” *Id.* at 586 (quoting *State v. Hale*, 672 S.W.2d 201, 203 (Tenn. 1984)) (internal quotation marks omitted). In addition to direct comments on a defendant’s decision not to testify, “indirect references on the failure to testify also can violate the Fifth Amendment privilege.” *Id.* at 587 (quoting *Byrd v. Collins*, 209 F.3d 486, 533 (6th Cir. 2000)) (internal quotation marks omitted). In *Jackson*, our supreme court adopted a two-part test for determining whether a prosecutor’s remark amounts to an improper comment on a defendant’s constitutional right to remain silent and not testify. *Id.* at 587-88. The two-part test analyzes: “(1) whether the prosecutor’s manifest intent was to comment on the defendant’s right not to testify; or (2) whether the prosecutor’s remark was of such a character that the jury would necessarily have taken it to be a comment on the defendant’s failure to testify.” *Id.* at 588. “[T]he question is not whether the jury possibly or even probably would view the challenged remark in this manner, but whether the jury necessarily would have done so.” *State v. Ladarius Lockhart*, No. W2018-00051-CCA-R3-CD, 2019 WL 1753056, at *6 (Tenn. Crim. App. Apr. 17, 2019) (quoting *U.S. v. Sandstrom*, 594 F.3d 634, 662 (8th Cir. 2010)), *perm. app. denied* (Tenn. Oct. 20, 2019). This court reviews a claim of impermissible prosecutorial comment on the right not to testify de novo. *Jackson*, 444 S.W.3d at 588.

Upon review, we conclude that the prosecutor improperly commented on Petitioner's right not to testify and that trial counsel, therefore, was deficient in failing to object to the comment. The prosecutor's remark clearly creates an inference that Petitioner should have presented proof that she did not know what was in the package by testifying at trial.

Nevertheless, we conclude that Petitioner has failed to establish prejudice under *Strickland* because the prosecutor's improper comment was harmless beyond a reasonable doubt. *See id.* at 590-92 (employing a standard of harmless beyond a reasonable doubt to the prosecutor's comments on the defendant's exercise of her constitutional right to remain silent and not testify at trial). In determining whether the prosecutor's comments were harmless beyond a reasonable doubt, we must consider "the nature and extensiveness of the prosecutor's argument, the curative instructions given, if any, and the strength of the evidence of guilt." *Id.* at 591 (citations omitted). In this case, the prosecutor's improper comment was made during rebuttal closing arguments but cannot be described as extensive in the context of the prosecutor's overall argument. No objection was raised to the comment, and no curative instruction was requested or given. However, the trial court did instruct the jury "that they are not to put any weight on the fact that none of the defendants testified. And that the fact that they did not testify does not in any way impute upon them an admission of guilt[.]" The court also instructed the jury that the State had the burden of proving Petitioner's guilt beyond a reasonable doubt, that this burden never shifted but remained with the State throughout the trial of the case, and that Petitioner was not required to prove her innocence. Finally, the evidence supporting Petitioner's guilt, although not overwhelming, was significant. *See Kristina Cole*, 2018 WL 5810011, at *6-7. Accordingly, we conclude that the prosecutor's comment, although improper, was harmless beyond a reasonable doubt and that Petitioner failed to establish prejudice. She is not entitled to relief.

6. Failure to Object When the Prosecutor Bolstered His Own Credibility

Petitioner contends that she received ineffective assistance of counsel based on trial counsel's failure to object when the prosecutor "testified during closing argument in order to bolster his own credibility." Petitioner argues that, during Detective Gaia's direct examination, Detective Gaia "strongly implied that he had not sent any messages from Petitioner's phone" but that, on cross-examination, Detective Gaia was "forced to admit" that, during the search of Petitioner's home, he sent the last text message from Petitioner's phone, which read, "What do you want me to do with it?" Petitioner maintains that trial counsel should have objected when the prosecutor made the following comment during closing: "I didn't ask [Detective Gaia] about [the text he sent from Petitioner's phone]"

because I didn't know about that." Petitioner asserts that, by failing to object, trial counsel allowed the prosecutor to repair his and Detective Gaia's credibility before the jury.

The State responds that counsel was not ineffective for failing to object to the prosecutor's allegedly improper comment.

When questioned at the post-conviction hearing about why she did not object during the State's closing arguments, trial counsel testified that she did not consider objecting to the prosecutor's statements because the statements were "not testimony," and we note that the jury was instructed as such. Moreover, as pointed out by the State, the prosecutor's comment was not an example of bolstering, which instead refers to the admission of a witness's prior consistent statement. *See State v. Hodge*, 989 S.W.2d 717, 725 (Tenn. Crim. App. 1998); *Curtis Cecil Wayne Bolton v. State*, No. E2014-00559-CCA-R3-PC, 2015 WL 4557754, at *15 (Tenn. Crim. App. July 29, 2015), *no perm. app. filed*; *State v. Robert D. Walsh*, No. W1999-01473-CCA-R3-CD, 2001 WL 91949, at *8 (Tenn. Crim. App. Jan. 30, 2001) ("'[B]olstering' generally refers to the situation in which the [S]tate offers a prior consistent statement of the victim to enhance the credibility of her testimony at trial."), *perm. app. denied* (Tenn. June 4, 2001).⁹ Petitioner has not established deficient performance based on counsel's failure to object to the prosecutor's comment as bolstering his own credibility. Moreover, she has not shown that there is a reasonable probability that, but for counsel's lack of objection, the result of the proceeding would have been different. *Goad*, 938 S.W.2d at 370. This claim is without merit, and Petitioner is not entitled to relief.

7. Failure to Object When the Prosecutor Misrepresented Evidence in Closing

Petitioner further contends that she received ineffective assistance of counsel based upon trial counsel's failure to object to the following comment made by the prosecutor during closing argument: "[L]ook through those text messages, I invite you, that's not the only package. It's the only one I can prove it for them. She's getting others." Petitioner contends that the prosecutor's statement was a "blatant misstatement of the evidence" that "implied that the testimony about a second package . . . related to a separate narcotics transaction" when, in fact, the text messages "clearly related to delivery of a package containing a prepaid credit card." She argues that, had trial counsel objected, there is a reasonable likelihood that the result of the trial would have been different.

⁹ We note that the prosecutor's comment also does not amount to improper vouching, which occurs when a prosecutor expresses his or her personal opinion as to a witness's credibility. *See State v. Sexton*, 368 S.W.3d 371, 419-20 (Tenn. 2012); *State v. Goltz*, 111 S.W.3d 1, 6-7 (Tenn. Crim. App. 2003); *Curtis Cecil Wayne Bolton*, 2015 WL 4557754, at *15.

The State responds that the prosecutor's comment was not a misstatement of the evidence, as Petitioner acknowledged that text messages admitted as evidence explicitly referenced the existence of another package received by Petitioner. The State maintains that because the prosecutor did not misrepresent the evidence, counsel's failure to object to the comment was not deficient performance; moreover, Petitioner cannot establish prejudice because any objection would have been overruled.

This court has previously recognized that “[t]he decisions of a trial attorney as to whether to object to opposing counsel’s arguments are often primarily tactical decisions.” *Derek T. Payne v. State*, No. W2008-02784-CCA-R3-PC, 2010 WL 161493, at *15 (Tenn. Crim. App. Jan. 15, 2010), *perm. app. denied* (Tenn. May 11, 2010); *see also Lemar Brooks v. State*, No. M2010-02451-CCA-R3-PC, 2012 WL 112554, at *14 (Tenn. Crim. App. Jan. 11, 2012), *perm. app. denied* (Tenn. May 16, 2012). Trial counsel “often choose not to object to damaging evidence for strategic reasons, such as to avoid emphasizing [the unfavorable evidence] to the jury.” *Derek T. Payne*, 2010 WL 161493, at *15 (internal quotation marks omitted) (alterations in original). As a result, “testimony from trial counsel as to why he or she did not object to the allegedly prejudicial remarks is essential to determine whether trial counsel was ineffective.” *Lamar Brooks*, 2012 WL 112554, at *14. Absent testimony from trial counsel or evidence indicating that counsel’s decision was not tactical, “we cannot determine that trial counsel provided anything other than effective assistance of counsel.” *State v. Leroy Sexton*, No. M2004-03076-CCA-R3-CD, 2007 WL 92352, at *5 (Tenn. Crim. App. Jan. 12, 2007), *perm. app. denied* (Tenn. May 14, 2007).

At the post-conviction hearing, trial counsel testified that she generally does not object during closing arguments because “it’s not testimony” and the trial court instructs the jury about “closing arguments not being testimony[.]” Petitioner elicited no further testimony from trial counsel regarding her failure to object to the prosecutor’s specific statement at issue here. Because the evidence before us indicates that counsel’s decision not to object was tactical, “we cannot determine that trial counsel provided anything other than effective assistance of counsel.” *Id.* Petitioner is not entitled to relief on this issue.

8. 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.” *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). 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, we affirm the judgment of the post-conviction court.

ROBERT L. HOLLOWAY, JR., JUDGE