No. SC92166

In the
Supreme Court of Missouri

LEONARD S. TAYLOR,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable James R. Hartenbach, Judge

RESPONDENT'S BRIEF

CHRIS KOSTER
Attorney General

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3700
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF FACTS

Appellant (Defendant) appeals from a St. Louis County Circuit Court judgment overruling his Rule 29.15 motion for post-conviction relief alleging that trial counsel provided ineffective assistance during the guilt phase of his capital trial.[1]

In May 2005, Defendant was indicted in St. Louis County Circuit Court on four counts of first-degree murder and four counts of armed criminal action for the 2004 murders of his girlfriend Angela Rowe and her three children, Alexus Conley, Acquera Conley, and Tyrese Conley. (L.F. 54-57).[2] The State later filed notice of its intent to seek the death penalty for the murders. (L.F. 82-84). The trial court found that Defendant was a persistent offender. (Tr. 531-33). Defendant was tried before a jury from February 20-29, 2008, with Judge James R. Hartenbach presiding. (L.F. 35-37). Viewed in

---

[1] As explained below, Defendant has elected not to raise any claims of ineffective assistance pertaining to the penalty phase.

[2] The record consists of the legal file (L.F.), trial transcript (Tr.), and motion hearing transcripts (Mot. Tr.([date])) from Defendant's direct appeal, Case No. SC89294, and the legal file (PCR L.F.) and evidentiary transcript (PCR Tr.) from this post-conviction appeal.

the light most favorable to the verdict, the evidence presented at trial showed that:

Angela Rowe had three children (Alexus Conley, Acquera Conley, and Tyrese Conley) whose father was Tyrone Conley. (Tr. 837-38). In 2004, Angela was in a relationship with Defendant. (Tr. 1094). Angela worked all day at her hospital job on November 20, 2004, but she called in sick on November 21, 2004. (Tr. 1162-63).

The last time Tyrone Conley saw Angela and his children was on November 22, 2004, when he met Angela at a restaurant to return the children to her after he had spent the weekend with them. (Tr. 841-42, 845). The children had told him they did not want to go back home. (Tr. 841). Angela was not walking normally and was acting "weird," as if she was in pain. (Tr. 842). A car followed Angela to the restaurant and circled the parking lot while she was there. (Tr. 843-44). Although Tyrone could not positively identify the driver, it appeared to him that it was Defendant. (Tr. 844-45).

Defendant called his older brother, Perry Taylor, who was an over-the-road truck driver, sometime before Thanksgiving Day and asked his brother

for some money.[3] (Tr. 854-55; State's Ex. 196B). Defendant told Perry he needed the money because he had just killed Angela. (State's Ex. 196B). Defendant claimed that Angela came at him with a knife and that he shot her two or three times. (State's Ex. 196B). Defendant then told Perry that he was going to, or already had, killed the children because they had witnessed it. (State's Ex. 196B). After Defendant hung up, Perry called him back and Defendant admitted that he was still at the house. (State's Ex. 196B). Perry then called their mother and told her what had happened.[4] (State's Ex.

[3] Exhibit 196B is an edited version of Perry Taylor's recorded interview with police. (Tr. 1036-40). It was played for the jury after Perry testified at trial and denied, or could not remember, making certain statements to police describing telephone conversations he had with Defendant during which Defendant admitted killing the victims. (Tr. 856, 864, 877). Perry acknowledged making certain statements to police, but said they were false and coerced by police, who, Perry claimed, told him what to say. (Tr. 864-66, 880-84).

[4] Telephone records showed that Perry received a call from his mother on November 24, 2004 at 12:47 a.m. and that the call lasted 350 seconds. (Tr. 1441-42).

196B). Perry had several phone calls with Defendant that evening. (State's Ex. 196B).

Telephone records showed that Defendant called Perry at 11:24 p.m. on November 23, 2004, and the call lasted 662 seconds, that Perry called Defendant back several minutes later and the call lasted for 531 seconds, and that just after midnight on November 24, 2004, Defendant called Perry back and the call lasted 639 seconds. (Tr. 1431-34; State's Exhibits 231, 233). Defendant's wife Debrene Williams called Defendant at 11:45 p.m. on November 23 and at 12:07 a.m. on November 24; those calls lasted 390 and 633 seconds, respectively. (Tr. 1437-38). The records also showed that Defendant called his mother at 11:35 p.m. on November 23, 2004, and that the call lasted 490 seconds. (Tr. 1440; State's Ex. 239). For these calls on November 23 and 24, 2004, Defendant's cell phone accessed a cell phone tower located just a half mile from the victims' house, where their bodies would later be found. (Tr. 1315).

Telephone records also showed that on November 24, 2004, 9 calls were made from the Angela Rowe's home telephone: two calls to Valerie Burke, who is an "old friend" of Defendant's family; five calls to Perry Taylor; and two calls to Southwest Airlines. (Tr. 1528-30; State's Ex. 220). Beginning at 9:50 a.m. on November 25, 2004, all calls to the victims' home phone were forwarded to voicemail, and no outgoing calls were made. (Tr. 1530-31).

While he was out on the road, Perry had a November 24, 2004 telephone conversation with his girlfriend, Betty Byers. (Tr. 1079-80). During this conversation, Byers asked Perry how Defendant was doing. (Tr. 1079-80). Perry told her that she did not want to know what Defendant had done. (Tr. 1079-80). When Byers persisted in asking, Perry told her that Defendant confessed to him that he had killed Angela and her three children. (Tr. 1079-80).

Perry arrived in St. Louis on Thanksgiving Day, November 25, 2004, and Byers picked him up and took him to her house.[5] (Tr. 1064-65, 1072-73, 1080-81). Perry again told her that Defendant had told him that he had killed Angela and the children. (Tr. 1081). Perry said that Defendant had told him that Angela came at him with a knife and cut his finger. (Tr. 1081-82). Defendant said that he shot her once and when Angela got up he shot her again in the head. (Tr. 1081-82). Perry also told her that Defendant admitted killing the children, but did not say how he had done it. (Tr. 1082).

While Perry was at Byers's house on November 25 he received a cell phone call from Defendant. (Tr. 1082). Byers heard Perry saying to

---

[5] The parties stipulated to GPS records of the trucking company Perry worked for showing that he arrived in St. Louis at 3:45 p.m. on November 25, 2004 (Thanksgiving Day). (Tr. 1285-86).

Defendant, "Man, you the fuck still there. Man what the fuck you still doing there." (Tr. 1082-83). Perry told Byers that Defendant was still at the victims' residence waiting for a letter that was supposed to come from Defendant's wife, Debrene Williams, who lived in the state of California. (Tr. 1083). When Perry asked his brother how he could stay in the house with "them people," Defendant replied, "They dead." (Tr. 1083). Defendant also said that he had turned off the heat and turned on the air conditioner. (Tr. 1083). Defendant also told Perry that "the bitch wouldn't let him go." (Tr. 1083).

Between 5:30 and 6 a.m. on Friday, November 26, 2004, Defendant's wife, Debrene Williams, called her sister (Defendant's sister-in-law), Elizabeth Williams, who lived in St. Louis. (Tr. 1245-47, 1249). Elizabeth went to the front door and found Defendant standing there. (Tr. 1247). Defendant, who was wearing brown-tinted glasses, said he had been sleeping in his vehicle in front of her house and asked her if she could take him to the airport. (Tr. 1247-48, 1250). Elizabeth had to call her sister Debrene to determine what time Defendant needed to be at the airport. (Tr. 1249). The Chevy Blazer Defendant was driving, which belonged to his brother Perry, was parked in the street, and Defendant insisted that Elizabeth move it into her garage. (Tr. 869, 1250-51).

Defendant loaded four or five bags into Elizabeth's car. (Tr. 1251). Defendant had so many bags that they all did not fit into the trunk. (Tr.

1252-53). After Defendant loaded his luggage and just before they left for the airport, Defendant walked across the street from Elizabeth's house, made a motion into his jacket, and threw a dark metal, long-barreled revolver into the sewer.[6] (Tr. 1253-54, 1260-61). Elizabeth's daughter also saw Defendant throw "something" into the sewer, though she could not tell what it was. (Tr. 1282-83). In October 2004, Defendant had been seen at a party in possession of a black long-barreled revolver. (Tr. 1096-97).

On the drive to the airport, Defendant told Elizabeth that this would be the last time she would see him alive. (Tr. 1255). He told her that "some people" were trying to kill him. (Tr. 1255). He also said that she was going to

---

[6] On December 2, 2004, the day before the victims' bodies were discovered, a contractor for the sewer district cleaned the sewer in front of Elizabeth Williams's house. (Tr. 1297-1300). A large truck containing a vacuum run by a 200 horsepower motor was used to suck up all the material in the sewer. (Tr. 1296-97, 1298). The vacuum is powerful enough to lift material weighing up to 25 or 30 pounds. (Tr. 1298). On December 7, 2004, the police had sewer district employees search the sewer in front of Elizabeth Williams house looking for the gun. (Tr. 1030-31). They did not find one. (Tr. 1031). The police also searched the dump where the material sucked out of the sewers was left, but they did not find anything there either. (Tr. 1300-02).

hear things about him, but that she should not believe what she heard. (Tr. 1255). He said that some of things she hears might appear on the news. (Tr. 1255). Defendant also told Elizabeth that he needed to get out of St. Louis. (Tr. 1255).

On November 26, 2004, Defendant, using the name Louis Bradley, bought a ticket and boarded a Southwest Airlines flight from St. Louis to Phoenix that departed at 8:10 a.m. on November 26, 2004. (Tr. 1287-88). He then flew from Phoenix to Ontario, California. (Tr. 1287-88). The reservations for this flight were made on November 25, 2004, by a person named "Deb." (Tr. 1287-88).

The next day, Saturday, November 27, 2004, Elizabeth's sister Debrene (Defendant's wife) called her from California. (Tr. 1256, 1263). Elizabeth could hear Defendant in the background yelling for Elizabeth to put the Blazer in the garage. (Tr. 1256-57, 1263). Later in the week, Defendant's brother, Perry Taylor, came to Elizabeth's house and picked up the Blazer. (Tr. 1264). Elizabeth also gave Perry some papers that Defendant had left at her house with instructions for her to give to Perry. (Tr. 1277). The papers were wrapped around a heavy box, which Elizabeth also gave to Perry. (Tr. 1278).

Inside the Blazer, police found a partial box of Winchester .38 special cartridges. (Tr. 1121-23, 1135).

Angela Rowe, who was described as a "good employee," was scheduled to work the Friday, Saturday, and Sunday after Thanksgiving (November 26, 27, and 28, 2004). (Tr. 1164, 1166). Angela did not show up for work or call in to her employer any of those three days. (Tr. 1164-65, 1168-70). The children were in school on Monday, November 22, 2004, and Tuesday, November 23, 2004. (Tr. 1228-29). They did not have school on Wednesday, November 24, 2004, because of Thanksgiving break. (Tr. 1228). The children did not show up for school when school resumed on Monday, November 29, 2004, or on any day thereafter. (Tr. 1229).

Phone records showed that Defendant made one cell phone call to the victims' phone number on Monday, November 22, 2003, and did not call the victims' number after that. (Tr. 1429; State's Ex. 232).

On December, 2004, a Jennings police officer responded to a call to check on the well being of the residents at Angela Rowe's house. (Tr. 820). The officer found the yard full of daily newspapers and the mailbox full of mail. (Tr. 820-21, 835). The newspapers lying in the front yard were dated November 26, 27, 28, and 29, 2004. (Tr. 983-86, 1003-04). All the windows and doors were locked, so the officer asked the fire department to pry open a back window, and he crawled inside. (Tr. 821-22). The officer heard the televisions on with the sound turned up. (Tr. 822, 829, 831). The inside of the house was extremely cold. (Tr. 822, 829, 911). The air conditioner had been

turned on and the thermostat was set on its lowest setting. (Tr. 957-58). The house had not been ransacked, all the doors and windows were locked, and no signs of forced entry were found. (Tr. 821, 824, 829, 914).

Angela was found dead in the bedroom where the officer had entered. (Tr. 826). She had suffered several gunshot wounds. (Tr. 1106-10). In the master bedroom, the officer found Angela's children Alexus (age 10), Acquera (age 6), and Tyrese (age 5) lying side by side on the bed. (Tr. 825, 1188-90). They were all dead with gunshot wounds to the head. (Tr. 825). Although police had information that five people lived at the residence, including Defendant, no one else was found in the house. (Tr. 828, 1043-44).

Angela suffered two gunshot wounds through her lower left arm and a bullet "grazing" wound just below her left breast. (Tr. 1178-79). She had lacerations on the left side of her forehead that occurred near her death. (Tr. 1181). The fatal gunshot wound she suffered was one that entered on the back of the right side of her head that tracked downward toward the front. (Tr. 1182-83). Bullet fragments were recovered from her brain. (Tr. 1111, 1182).

The oldest child, Alexus, had two gunshot wounds to the back of her head. (Tr. 1190). Both shots entered the back of her head and tracked toward the front of it. (Tr. 1190-91). A bullet was found in the crown of Alexus's head. (Tr. 1119, 1190-91). Acquera was also shot twice in the head. (Tr. 1183-84).

Both shots entered just above and in front of her right ear, and the bullets tracked from front to back. (Tr. 1184, 1186). The bullets tracked all the way through the brain and skull, and one bullet fell out and was recovered at the morgue as her body was being moved. (Tr. 1113-14, 1187). There were soot deposits and gunpowder residue on the wounds indicating that the gun was only inches away from her head when it was fired. (Tr. 1185, 1192). Tyrese had a single gunshot wound to the head that entered above and behind his left ear with a downward track going back to front. (Tr. 1189). Based on the position of the children's bodies, the medical examiner opined that the shooter was above them and positioned to the right. (Tr. 1193-94).

The victims all died at about the same time, and their bodies showed signs of decomposition; they had a foul odor and were past the state of rigor mortis. (Tr. 1194, 1196). Based on the atmospheric conditions around the bodies and the fact that the air conditioner was set on its lowest setting, the medical examiner concluded that they had been dead two or three weeks before being found. (Tr. 1195-96, 1219-21, 1223).

All 10 projectiles recovered from the victims' residence and their bodies were fired from the same gun, a .38 or .357 caliber revolver.[7] (Tr. 960, 977, 987-89, 1001-02, 1144-45).

Also inside the house, police found an envelope addressed to Angela with a San Bernadino, California postmark of November 22, 2004. (Tr. 912-13). Inside was an unsigned letter that read:

> Is your man faithful ??? Eventually it all comes out. Enjoy it now. Because he's not yours.

(Tr. 913; State's Ex. 139). In the kitchen, police found a can of Glade air freshener with Defendant's fingerprints on it. (Tr. 1009, 1269-70, 1273).

In a box in the basement, police found a social security card and driver's license for a "Terrence Carter"; Defendant's picture was on the driver's license. (Tr. 920-21).

On December 9, 2004, police were conducting surveillance at Defendant's girlfriend's house in Madisonville, Kentucky. (Tr. 1303-05). At 10 a.m., a man, not Defendant, came out of the house and got inside a maroon Oldsmobile and drove away. (Tr. 1305). Ten minutes later, the car returned and the driver started bringing luggage out of the house and loading it into

---

[7] The firearms examiner testified that .38 caliber shells can also be fired from a .357 caliber revolver. (Tr. 1152).

the car. (Tr. 1305). The driver went back inside and returned with more luggage that he loaded into the car. (Tr. 1305-06). He then opened the right rear passenger door, left the door ajar, and backed up closer to the garage. (Tr. 1305-06). The driver went and looked up and down the street and then got back into the car. (Tr. 1306-07). Defendant then came out of the house, stooping low along the car, and got in the door that the driver had left ajar. (Tr. 1306-07). Defendant closed the door, dove down onto the floorboard, and the car drove away. (Tr. 1306-07).

Police stopped the vehicle and arrested Defendant. (Tr. 1317). Defendant told police his name was Jason Lovely, and in his luggage was a Missouri identity card with the name Jason Lovely on it. (Tr. 1318-19). Also in the luggage were bus itineraries under the name of Jason Lovely showing a departure from San Bernardino, California on November 29 with a destination of Lanett, Alabama. (Tr. 1329). Other items found included an Illinois birth certificate with the name Jason Anthony Richardson, and several pamphlets and books on how to create a new identity. (Tr. 1324-28, 1330; State's Exhibits 154, 155, 156, and 191).

Also in Defendant's luggage was a pair of brown-tinted glasses belonging to Defendant and which he had been seen wearing before the murders. (Tr. 929-30, 1094-95, 1098, 1249-50, 1331; State's Exhibits 124, 168, 169). The glasses tested positive for the possible presence of blood on the

right nose guard area. (Tr. 1372, 1375-77). A confirmatory blood test could not be performed because of the possibility that the entire sample would be consumed and lost for any further testing. (Tr. 1378, 1380, 1397-98). A DNA analyst was able to extract DNA from the stain on the eyeglasses. (Tr. 1467). Although she could not obtain a full genetic profile from the DNA retrieved because of the small sample present, the analyst was able to eliminate the murdered children as the source of the DNA. (Tr. 1468, 1479-80, 1488-89). She could not, however, eliminate their mother Angela as the source. (Tr. 1468, 1503, 1509). The partial DNA profile obtained occurred in only 1 in 12,930 persons in the African-American population. (Tr. 1469).

On February 20, 2008, a week before trial began, Defendant called his brother Perry to let him know that the court had issued a writ of body attachment against Perry and that if Perry left the state and was later arrested, he could fight extradition and could not be brought back to Missouri. (Tr. 1557-63; State's Ex. 259).

Defendant did not testify, but called several witnesses on his behalf. (Tr. 1578-1708). The jury found Defendant guilty on all counts. (L.F. 36, 1186, 1189, 1198, 1201, 1204, 1207).

During the penalty-phase proceeding, the State presented evidence of Defendant's convictions for cocaine possession with intent to distribute, forcible rape, forgery, and stealing. (Tr. 1802-05). In addition to victim-impact

testimony from the victims' family members, the State also presented evidence that in July 2000, Defendant raped his stepdaughter at gunpoint in a vacant parking lot, and that he threatened to kill her, her mother, and her siblings if she told. (Tr. 1805-20).

Defendant informed the court that he had instructed his attorneys that they were prohibited from presenting any evidence or closing argument during the penalty-phase proceeding. (Tr. 1794-95, 1849-50). Defendant explained that it was against his religious beliefs for either him or attorneys to ask the jury to spare his life. (Tr. 1796-98). Defendant did allow his attorneys to offer a stipulation into evidence regarding his behavior while in prison. (Tr. 1794-95, 1821-23).

The jury recommended that Defendant receive four death sentences. (L.F. 37, 1273-80, 1303-04, 1308-09, 1313-14, 1318-19). The trial court sentenced Defendant to four death sentences and imposed four consecutive life sentences for the armed criminal action convictions. (Tr. 1859-61; L.F. 37, 1409-14).

This Court affirmed Defendant's convictions and sentences on direct appeal. (PCR L.F. 324). *See State v. Taylor*, 298 S.W.3d 482 (Mo. banc 2009).

Defendant filed a pro se Rule 29.15 motion for post-conviction relief, and appointed counsel later filed an amended motion. (PCR-L.F. 5-21, 38-227).

Defendant personally informed the motion court during the post-conviction case that he was adamantly opposed on religious grounds to post-conviction counsel asserting any claims relating to the penalty-phase proceeding and that if his directions on this matter were not followed, it would violate his right to freedom of religion under the First Amendment. (PCR Tr. 24-33). The motion court held an evidentiary hearing on some of Defendant's post-conviction claims, and denied an evidentiary hearing on the remaining claims. (PCR L.F. 325). During the evidentiary hearing, Defendant called as witnesses the records custodians for both Sprint and Charter Communications, both of whom had testified at Defendant's trial. (PCR Tr. 36-79, 100-130). He also called Charter's general counsel and Defendant's three trial attorneys. (PCR Tr. 131-202). The motion court later entered a judgment overruling Defendant's motion for post-conviction relief. (PCR-L.F. 323-54).

STANDARD OF REVIEW

This appeal relates solely to the motion court's judgment overruling Defendant's post-conviction motion. Appellate review of a judgment overruling a post-conviction motion is limited to a determination of whether the motion court's findings of fact and conclusions of law are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in post-conviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the defendant must show both (1) that his counsel's performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and (2) that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Barnett*; 103 S.W.3d at 768.

To prove deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at

687. In other words, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In proving that counsel's performance did not conform to this standard, the defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

To prove prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

The post-conviction court is not required to address both components of the inquiry if the defendant makes an insufficient showing on one. *Id.* at 697. "The movant has the burden of proving the . . . claims for relief by a preponderance of the evidence." Rule 29.15(i). "Deference is given to the motion court's superior opportunity to judge the credibility of the witnesses." *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991).

The motion court is not required to hold an evidentiary hearing unless "(1) the motion . . . allege[s] facts, not conclusions, warranting relief; (2) the facts alleged must not be refuted by the files and records of the case; and (3) the allegations must have resulted in prejudice." *Wilkes v. State*, 82 S.W.3d 925, 928 (Mo. banc 2002); *See also Roberts v. State*, 276 S.W.3d 833, 835 (Mo. banc 2009).

ARGUMENT

I.

The motion court did not clearly err in rejecting Defendant's claim that counsel was ineffective for failing to adequately investigate the phone records admitted into evidence at trial to find either (1) that the records contained discrepancies that could be used to impeach the State's witnesses during cross-examination or (2) that the phone companies had disclaimers or otherwise did not guarantee all the information in their records because Defendant failed to carry his burden of proving this claim in that: (1) counsel had valid trial-strategy reasons for not wanting to completely undercut the reliability of the phone records; and (2) counsel had no reason to know that any disclaimers existed.

Moreover, Defendant did not prove *Strickland* prejudice since nearly all the discrepancies had logical explanations and the five unresolved discrepancies between the two companies' records, which contained entries for thousands of phone calls, did not undermine the reliability of the trial since (1) Defendant's allegation of prejudice rests on speculative inferences, (2) any proposed cross-examination on the discrepancies constituted mere impeachment

evidence, (3) and there was overwhelming evidence of Defendant's guilt.

Defendant's freestanding constitutional claim that his due process rights were violated by the admission of "false testimony" should also be rejected because Defendant did not prove that Charter's records custodian's testimony was "false," only that a discrepancy existed between Charter's and Sprint's records.

The record shows that nearly all the discrepancies between Charter Communications' and Sprint's phone records, which were only a handful in records containing entries for thousands of phone calls, had logical explanations. Defendant's claim essentially boils down to five phone calls from murder victim Angela Rowe's home phone that were shown as incoming calls in the Sprint cell phone records of Defendant, his brother Perry, and Angela's sister Gerjuan Rowe, but did not appear as outgoing calls on Charter's phone records for Angela's phone. App. Br. 51-52. But Defendant did not prove which company's records were incorrect or, for that matter, that either company's records were incorrect and that there was not some other explanation for this discrepancy. Instead Defendant assumes, without any proof, that Charter's records were incorrect. He then speculatively asserts, again without proof, that if these five outgoing calls from Angela's phone were not shown on Charter's records, there must have been other outgoing

calls made after the date Defendant left town. On top of that inference, Defendant stacks yet another unproven inference that Angela must have made these other outgoing calls, which means that she was alive after Defendant left town. Defendant's premise is not only unproven, it does not even remotely satisfy any of the elements necessary to prove ineffective assistance of counsel. The motion court did not clearly err in rejecting this claim.

A. The record regarding this claim.

Defendant's amended post-conviction motion alleged that trial counsel were ineffective for failing to adequately examine the phone records admitted into evidence and discover the phone companies' disclaimers, cross-examine the records custodians regarding discrepancies between the two companies' (Sprint and Charter Communications) records, and argue that the records did not show all incoming or outgoing calls. (PCR L.F. 111-35). Defendant also alleged a freestanding constitutional claim that his right to due process was violated because his conviction rested on the "false" testimony from Charter's custodian of records in which she said that Charter's phone records recorded all outgoing calls from Angela Rowe's home phone. (PCR L.F. 135-37).

1. The trial record.

The State charged that Defendant committed the murders in this case between November 22, 2004 and December 3, 2004. (L.F. 736-38).

Before trial, Defendant's trial counsel filed a motion for a court order to obtain Gerjuan Rowe's (Angela's sister) Sprint cell phone records, which the State agreed to. (L.F. 133-34; Mot. Tr. (Mar. 3, 2006) 20-21). The trial court entered an order directing Sprint to disclose those records to defense counsel. (L.F. 155-56).

During a pretrial hearing regarding stipulations that had been entered into between the parties, defense counsel announced that the parties had stipulated to the authenticity of the phone records and that the defense would not object to those records:

> The next one is a stipulation regarding phone records. I think the State intends to bring in some custodians of records but we're not going to be objecting to the authenticity of those records, and I think if we choose to introduce records the same is true for us.

(Mot. Tr. (Jan. 24, 2008) 25). At trial, the State presented evidence of Angela's phone records from Charter Communications for the landline to her residence (scene of the murders) and of cell phone records from Sprint Communications for cell phones belonging to Defendant, Perry Taylor (Defendant's brother), and Gerjuan Rowe (Angela's sister). (Tr. 1411-13, 1510-11; State's Exhibits 220 (Angela's Charter records), 223 (Perry Taylor's

Sprint Records), 224 (Defendant's Sprint records), 252 (Gerjuan Rowe's Sprint records)).[8]

During the testimony of Sprint's custodian of records, Dan Jensen, the prosecutor announced that the parties had stipulated to the admission of the Sprint cell phone records, which had originally been requested by the defense, for Defendant, Perry Taylor, and Gerjuan Rowe. (Tr. 1410-12). Defense counsel objected, however, to demonstrative exhibits (charts and graphs) representing extrapolations from the Sprint records. (Tr. 1419-21). After Jensen's testimony concluded, the court confirmed with the witness that the State's demonstrative exhibits were created using information supplied by Sprint and that Jensen had checked the exhibits against the actual records and found the numbers in the exhibits to be fair and accurate. (Tr. 1454).

Jensen's testimony was limited to what was shown in the Sprint records as the calls that were made and the location of the repoll (phone) switch on the Sprint network the phone accessed. (Tr. 1414-15, 1430-31,

---

[8] During the post-conviction evidentiary hearing, Defendant's counsel stated that PCR Exhibit 2 was the same as State's Exhibit 220 at trial; that PCR Exhibit 7 was the same as State's Exhibit 224 at trial; and that PCR Exhibit 8 was the same as State's Exhibit 223 at trial (PCR Tr. 40-41, 102-03).

1446-48). He said that Sprint records should record all incoming and outgoing calls made within the Sprint network. (Tr. 1415). Jensen said Gerjuan's Sprint records showed 17 outgoing calls to Angela's landline on November 23, but no outgoing calls from November 24 to December 3. (Tr. 1426). He also said Defendant's Sprint records showed no outgoing phone call to Angela's landline after November 23. (Tr. 1429-31).

During cross-examination, Jensen agreed that Gerjuan's records did not show the phone number of any incoming calls her phone received. (Tr. 1451-52). He also said that he could only testify about Sprint's records and could not "speculate about other calls that may have been made from phones that didn't receive Sprint." (Tr. 1452).

During the testimony of Cathy Herbert, Charter Communications' records custodian, the prosecutor asked her to identify Charter's records for Angela's landline. (Tr. 1509-12). Defense counsel did not object, but only after she got Herbert to testify before the jury that Charter's records did not reflect all incoming calls, which the prosecutor acknowledged had always been the understanding between the parties:

Q. Ms. Herbert, the records that you brought are the records that Charter creates; right?

A. Records, yes.

Q. Records. Captures, records. But those records don't necessarily include all telephone activity on a particular Charter subscriber; is that right?

A. They record all outgoing telephone calls and some incoming telephone calls to our subscribers.

Q. So the data you have was the data that was captured by Charter, but it doesn't include all incoming calls?

A. Correct.

[Defendant's Counsel]: And with that understanding, Judge, I have no objection to the exhibit coming in with the understanding that the records are not complete—a complete reflection of all call activity in the house.

[The Prosecutor]: That's been in the agreement from the get go, Your Honor.

(Tr. 1512-13). Herbert later confirmed that Charter was "not in the business of collecting all incoming calls"; "just all outgoing calls." (Tr. 1516). Later during direct examination, she repeated that Charter does not "record all incoming calls." (Tr. 1534).

Similar to what occurred during Jensen's testimony, defense counsel objected to demonstrative exhibits extrapolated from Charter's records. (Tr. 1517-22). Herbert testified she had compared Charter's records to these

demonstrative exhibits (charts and graphs). (Tr. 1517-22). She said that Charter's records showed that beginning at 9:50 a.m. on November 25, 2004, all incoming calls to Angela's home phone "that we know" were forwarded to voicemail and no outgoing calls were made. (Tr. 1530-31).

Kathy Barnes, a friend of Angela's and godmother to one of Angela's children, testified that the last time she spoke to Angela on the phone was November 22, 2004. (Tr. 1237). Although she tried to call Angela for several days after that until November 27, none of the calls were answered and all went straight to voicemail. (Tr. 1238). She said that it was unusual for Angela not to return her phone calls. (Tr. 1238-39).

The defense presented testimony from the murdered children's aunts, Beverly Conley and Sherry Conley, who had originally told police that they spoke with Angela on the phone on November 27 or 28. (Tr. 1672-74, 1681-86). They both agreed that they had been mistaken on the dates they talked to Angela after reviewing Angela's phone records that showed no calls to or from Angela's phone on those dates. (Tr. 1675-79, 1692-95).

During closing arguments, the prosecutor suggested that jurors ask for the phone-record exhibits and review them. (Tr. 1724). The prosecutor's argument involved referring the jury to specific entries in the phone records to show activity, especially the Defendant's, near the time of the murders. (Tr. 1724-26, 1729). The prosecutor also mentioned that Defendant's phone

records showed no outgoing calls to Angela's phone after November 23 and argued the calls stopped on that date because Defendant knew Angela and her children "were gone." (Tr. 1735). The prosecutor pointed out that the records showed that Angela averaged 36 calls per day from November 1 to November 23, but on November 24 and 25 there are only 11 calls made, and 9 of them were attributable to Defendant. (Tr. 1742). The prosecutor also pointed out that the phone records showed no contact between Gerjuan and Angela beginning just after midnight on November 24. (Tr. 1747).

Defense counsel argued that Gerjuan's Sprint records showed a call to a gas station in the early-morning hours of November 28, which corroborated Gerjuan's testimony that she talked to Angela in person on that date. (Tr. 1751-52). She also pointed out the fact that the Sprint records failed to show incoming calls and argued that "when the State tries to suggest that there are no calls between Gerjuan and [Angela], they can't say that because these records do not give you the full picture." (Tr. 1752). She continued that Charter's and Sprint's records did not give a "full and complete picture of the phone activity at that house." (Tr. 1753). She continued this argument by saying that the only way to get a full picture of phone activity is to get both parties' phone records:

> The only way you can possibly have the full picture of the phone activity of that house is to figure out every person who ever called that

> house and get their cell phone records and their land line records. Because those Charter records are not complete. They are a snapshot. They are a partial picture. But you cannot rely on those to tell you the whole story.

(Tr. 1753). Counsel also pointed out that Charter's records were obviously incomplete because while they showed outgoing calls to Angela's close friend, Kathy Barnes, there were no entries showing Kathy Barnes making an incoming call to Angela. (Tr. 1765-66). Counsel said that this did not mean Barnes never called Angela, only that Charter's records were incomplete. (Tr. 1766).

During deliberations, the jury sent out a note asking for, among other things, "all prosecution & defense phone records (Charter, Sprint)." (L.F. 1185).

2. Post-conviction proceedings.

Before the amended motion was filed, Defendant's post-conviction counsel filed a motion seeking an order from the motion court for the disclosure of Beverly and Sherry Conley's phone records to determine whether those records showed any incoming or outgoing calls to Angela's landline after November 26, 2004, the date everyone agrees Defendant left town. (PCR Tr. 7-8). The prosecutor agreed that the order should be issued,

and the court sustained the motion. (PCR Tr. 8; PCR L.F. 37). No further mention of these records or their content appears in the record of this case.

Charter Communications' general counsel (Christopher Avery), who oversaw the company's responses to law-enforcement subpoenas for phone records, testified that sometime between June 2005 and March 2006, Charter started including disclaimers with the records it produced in response to subpoenas. (PCR Tr. 92-95). The purpose of the disclaimer was to make the parties aware of potential errors in the records. (PCR Tr. 96). The disclaimer in use at the time of Defendant's trial (2008) stated that "billing records are subject to human error and Charter cannot always guarantee the accuracy of such records." (PCR Tr. 95; PCR Ex. 12). It further provided that parties "should not rely solely on this information and should always independently corroborate the information Charter provides . . . ." [9] (PCR Tr. 95; PCR Ex. 12).

Avery also testified that he attended two depositions taken by Defendant's trial counsel of Charter employee Cathy Herbert and made on-the-record comments during those depositions. (PCR Tr. 98-99). During these depositions, Herbert said she believed in the accuracy of Charter's records of

[9] A different disclaimer was included in responses beginning in 2009, after Defendant's trial. (PCR Tr. 91-94; PCR Ex. 11).

outgoing calls from its subscribers, but could not be as certain about the accuracy of records showing incoming calls since that information was derived from other carriers. (PCR Tr. 99). Although he had the opportunity to mention the disclaimer, Avery did not do so during the depositions or warn about the reliability of the information. (PCR Tr. 99-100). Avery also reviewed Charter's historical records related to the responses given in Defendant's case and found that no disclaimer was included in the records provided to the parties. (PCR Tr. 100).

Herbert (Charter's records custodian) testified during the post-conviction evidentiary hearing that she compiled the records for the subpoena request, but did not prepare any disclaimer. (PCR Tr. 37-39). She was shown several post-conviction exhibits—essentially copies of trial exhibits marked with a different number for the post-conviction hearing—about which she testified during trial. (PCR Tr. 40-41, 44-47).

Post-conviction counsel directed Herbert to Defendant's Sprint records (PCR Ex. 7; Trial Ex. 224) that showed an entry for incoming calls from Angela's phone on November 22 at 7:55 a.m. (31 seconds) and 7:57 a.m. (16 seconds) and on November 23 at 10:22 p.m. (31 seconds) and 10:27 p.m. (22 seconds). (PCR Tr. 49). She agreed that these two calls were not shown as outgoing calls on Charter's records for Angela's phone (PCR Ex. 2; Trial Ex. 220). (PCR Tr. 50-52). She was also directed to Perry's (Defendant's brother)

Sprint records (PCR Ex. 8) that showed an entry for an incoming call received from Angela's phone on November 24 at 4:53 p.m. (PCR Tr. 52). She agreed that this call was not shown as an outgoing call on Angela's Charter records. (PCR Tr. 53). Herbert could not explain the discrepancy, but added that she could not testify to the accuracy of the Sprint records; she said it was possible that one record or the other was incorrect. (PCR Tr. 53-54).

Herbert was also directed to Gerjuan's Sprint records (PCR Ex. 9; Trial Ex. 252) that showed several outgoing phone calls made to Angela's phone on November 22 and 23. (PCR Tr. 55-65). Herbert agreed that Angela's Charter records did not show incoming calls from Gerjuan's cell phone number on those dates, but that they did show incoming calls for the same times from a different number. (PCR Tr. 56-58, 84-85). Herbert theorized that the phone number showing up on Charter's records could have been a routing number assigned for billing purposes, but she could not determine if that number was in fact a local routing number for Sprint. (PCR Tr. 65, 82-83).

Finally, Herbert was directed to Angela's Charter records that showed several outgoing calls to Gerjuan's phone number on November 22 and November 23, but that Gerjuan's Sprint records did not show an incoming call from Angela's phone number at the same times. (PCR Tr. 66). She said that the discrepancy could be explained by the fact that Charter's records for

Angela's phone were based on call detail reports, but that Gerjuan's Sprint records were billing records, which are different. (PCR Tr. 84-88).

Jenson (Sprint's records custodian) also testified during the post-conviction evidentiary hearing. (PCR Tr. 101). When he was asked about calls appearing as incoming calls on Gerjuan's billing records, but not showing up on Angela's Charter records, he said that he could not "speak to Charter's landline records" as not reflecting outgoing calls. (PCR Tr. 106-10). He also had no explanation for Gerjuan's Sprint records showing several outgoing calls to Angela's phone, but Charter's records for Angela's phone showing a different number calling at those same times. (PCR Tr. 111-12). After he was asked about several outgoing calls shown in Charter's records for Angela's phone not appearing on Gerjuan's Sprint records, Jenson speculated that Gerjuan's records were only billing records; thus, if a call she received was not billable, it would not appear on her billing record. (PCR Tr. 112-15, 121). In addition, if a call is made to a Sprint phone and there is no answer, it is not a billed call since no air time was used, and it would not show up on a billing statement. (PCR Tr. 119-20). He also explained the distinction between billing records and call detail records, which, as the name implies, are more detailed than simple billing records and contain raw data from the network switches. (PCR Tr. 119).

Jenson was also asked to explain why Perry's Sprint records showed two outgoing calls to Defendant's cell phone, but Defendant's records did not show these as incoming calls. (PCR Tr. 116). One possible reason Jenson offered for the discrepancy was that Defendant's phone may have been roaming on another carrier's network, and Sprint would not have a record of that incoming call. (PCR Tr. 118-19, 126-27). Jenson said that while Sprint records were reliable—though he could not guarantee 100% accuracy—they might just be incomplete. (PCR Tr. 128).

Defendant was represented at trial by three experienced public defenders from the Capital Litigation Division (Beimdek, Kraft, and Wolfrum). (PCR Tr. 155-56). Defendant's trial counsel had a combined 82 years of public-defender experience trying criminal cases, including trying well more than 40 capital-murder trials.[10] (PCR Tr. 131, 153-56, 174, 185, 189-90, 199).

Part of the guilt-phase strategy was to find evidence of activity in Angela's house after Defendant left town on November 26. (PCR Tr. 156-57, 165). One piece of evidence the defense relied on to show that Defendant left

[10] Attorney Wolfrum, who had exclusively handled capital-murder trials since 1989, was unable to estimate the number of those cases he had tried. (PCR Tr. 199).

St. Louis after that date and did not return was Defendant's Sprint phone records, and no phone records suggested that he returned after that, until his arrest. (PCR Tr. 158, 187, 202). Defendant's phone records were helpful to the defense. (PCR Tr. 164). Perry's Sprint records were also beneficial to the defense because they showed some inconsistency about his actual location. (PCR Tr. 159, 164). Thus, the Sprint records fit within the defense's trial strategy. (PCR Tr. 159). To be sure, the defense also believed at the same time that Angela's Charter phone records were "devastating to [the defense] in many respects." (PCR Tr. 161, 167-68).

Beimdek, who was primarily responsible at trial for handling the phone-records evidence, testified that Charter told the parties that their records reflected all outgoing calls. [11] (PCR Tr. 147, 186). She said that no disclaimer was mentioned or given when Charter turned the records over to the parties. (PCR Tr. 147-49). While she might have cross-examined Herbert about the disclaimer, she said that the disclaimer language was confusing. (PCR Tr. 148-49). She said that she would have questioned Sprint's witness about not being able to guarantee 100% accuracy of their records. (PCR Tr. 149).

[11] Beimdek testified that all three defense attorneys spent a lot of time with the phone records because of their complexity. (PCR Tr. 163).

Beimdek was unaware that Defendant's and Perry's Sprint records showed incoming calls from Angela's phone, but that Angela's Charter records did not show outgoing calls for those times. (PCR Tr. 142-43). She said if she had known of this discrepancy, she would have brought it out at trial. (PCR Tr. 143-44).

She was also unaware that Gerjuan's Sprint records showed outgoing calls to Angela's phone, but that Angela's Charter records showed incoming calls at the same times, but originating from a different number. (PCR Tr. 143-44). Although she had not thought to check whether the calls were showing up as a different number, she still believed it was more advantageous to the defense to argue that the records failed to record any phone activity. (PCR Tr. 144-45). Besides, she recalled that Herbert admitted at trial that Charter's records did not necessarily show all incoming calls. (PCR Tr. 145). On cross-examination, she said these records were helpful to the defense because they showed phone activity at Angela's house after November 26. (PCR Tr. 162). In any event, she argued to the jury that Charter's records did not show all incoming calls. (PCR Tr. 171).

The defense team never considered objecting to the phone records because they knew the State would call witnesses to lay a foundation for their admissibility. (PCR Tr. 150, 172). Even if Beimdek had known there were discrepancies in the records, she and the other defense attorneys still

did not believe that an objection to the records would be sustained, and that any discrepancies would go to the weight of the evidence, not its admissibility. (PCR Tr. 150, 171-72, 185). She also exploited discrepancies in the phone records during closing arguments and encouraged the jury to look at the various phone records and compare them. (PCR Tr. 162-63, 167-68).

The motion court rejected the claim regarding the failure to discover a disclaimer on the ground that counsel received no disclaimers with the records they requested and were unaware of any disclaimers being used. (PCR L.F. 344-45). The court rejected the claim regarding discrepancies among the phone records on the ground that the records were admissible despite a few discrepancies, most of which were explainable, and that those discrepancies did not make the records inadmissible or the testimony of the records custodians false. (PCR L.F. 347-49). The court found that "the fact that the record of one person shows a call or attempt to call and there is not a corresponding entry on the record of the other person may be due to any one of a number of reasons that have nothing to do with the accuracy of the records themselves." (PCR L.F. 349). Moreover, any "discrepancies affect the weight to be accorded the records, not their admissibility." (PCR L.F. 349). In addition, the record showed that counsel were aware of some of the discrepancies, but that an objection to the records would not have been meritorious. (PCR L.F. 349).

B. Defendant failed to prove ineffective assistance.

Defendant contends that if counsel had adequately reviewed the phone records, they would have discovered Charter's disclaimer language and would have seen "omissions and inaccuracies" that revealed not all outgoing calls were contained in the companies' respective records. This is important, Defendant argues, because it would have diminished the records' ability to show, and limited the State's ability to argue, that calls were not made from Angela's phone during the time period after Defendant left town. But the record shows that counsel had valid trial-strategy reasons for not mounting a wholesale attack on discrepancies between Charter's and Sprint's records or their overall completeness because some of the records supported the defense case. Rather, counsel chose to point out the records' limitations thereby preserving their ability to rely on the records when beneficial to the defense, but limiting their scope when countering the State's arguments.

Moreover, Defendant failed to prove any prejudice because nothing in the record supports his claim that if impeachment or argument about discrepancies between the two companies' records or their completeness had been brought out, there is a reasonable probability of a different result at trial. First, Defendant's claim rests on several unproven, speculative assumptions that do not necessarily follow from what is contained in the records. Second, the alleged "inaccuracies" were *de minimis* when compared

to the number of entries contained in the records. In other words, the jury would not have completely rejected the records' ability to show outgoing calls simply because of a couple of discrepancies between Charter's and Sprint's records. Third, Defendant failed to prove that any alleged inaccuracies or omissions in fact occurred; he only showed a couple of discrepancies in the records and relies on unproven assumptions to suggest that the records were inaccurate. And, finally, there was overwhelming evidence of Defendant's guilt; the phone records played only a supporting role in the State's case.

1. Defendant failed to prove incompetent performance.

"The selection of witnesses and evidence are matters of trial strategy, virtually unchallengable in an ineffective assistance claim." *Williams v. State*, 168 S.W.3d at 433, 443 (Mo. banc 2005) ; *State v. Kenley*, 952 S.W.2d 250, 266 (Mo. banc 1997) ("Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable."). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable." *Strickland*, 466 U.S. at 690. "Trial counsel is given great discretion in which evidence to present to the jury." *Coleman v. State*, 256 S.W.3d 151, 156 (Mo. App. W.D. 2008). "If a decision to forego the presentation of evidence is based on reasonable trial strategy, then it cannot support the finding of ineffectiveness." *Id.*

Missouri courts have held that "[i]neffective assistance will not lie . . . where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy." *State v. Heslop*, 842 S.W.2d 72, 77 (Mo. banc 1992). "It is only the exceptional case where a court will hold a strategic choice unsound." *Heslop*, 842 S.W.2d at 77. "Counsel is vested with wide latitude in defending his client and should use his best judgment in matters requiring trial strategy." *State v. Jones*, 863 S.W.2d 353, 360 (Mo. App. W.D. 1993). Appellate courts should avoid applying "hindsight" when examining such claims. *Id.*

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The reasonableness of counsel's actions must be viewed as of the time counsel's conduct occurred, taking into consideration the circumstances of the particular case. *Id.* at 690. The proper standard is to "determine, whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* "Counsel has limited time and resources, and if there is a strategy that does not look promising, he may 'cho[o]se not to expend his limited resources to that end. This is a

reasonable strategic decision.'" *Zink v. State*, 278 S.W.3d 170, 181 (Mo. banc 2009) (quoting *State v. Brown*, 902 S.W.2d 278, 298 (Mo. banc 1995)).

One of Defendant's claims is that counsel were ineffective for failing to discover Charter's disclaimer. But the record shows that Charter failed to provide the parties with the disclaimer and nothing in the record suggests that counsel should have reasonably discovered it. *Compare State v. Lopez*, 836 S.W.2d 28, 36 (Mo. App. E.D. 1992) (holding that counsel cannot be deemed ineffective for failing to timely endorse a witness of which she was unaware); *State v. Cobb*, 820 S.W.2d 704 (Mo. App. S.D. 1991) (holding that counsel cannot be found ineffective for failing to object to a false statement made during closing argument when counsel was unaware of the statement's falsity). In any event, trial counsel testified that even if she had known of a disclaimer, she might not have used it because its language was confusing.

Defendant next contends that counsel should have exploited the alleged inaccuracies or omissions in the phone records to argue that they were not reliable for essentially any purpose. But counsel testified that some of the records actually benefitted the defense. For example, the records showed Defendant left town on November 26, which limited the State's ability to prove Defendant had the opportunity to kill the victims and enhanced the defense's ability to argue that perhaps someone else did. Consequently, a full-out attack on the records' accuracy by the defense would have been contrary

to counsel's trial strategy to exploit the records when they were beneficial to the defense. Considering the vast number of entries in the records, further cross-examination about a discrepancy involving five calls would have had no effect on the trial.

Defense counsel did argue, however, that the records did not provide a complete picture of phone activity. This was a reasonable trial strategy that allowed for the records' accuracy when it benefited the defense, but reminded jurors that not all phone activity was necessarily included in the records. Pointing out that a very few entries that were either potentially incorrect or omitted in the thousands of entries contained in the records would not have furthered the defense's strategy. "Ordinarily, a defendant is not entitled to relief merely because defense counsel elects not to present evidence of dubious impeachment value." *Twenter*, 818 S.W.2d at 643. The defense got the records custodians to concede that not all phone activity may be reflected in the records.

2. Defendant failed to prove prejudice.

Defendant failed to carry his burden of proving that he was prejudiced by counsel's failure to adduce impeachment evidence regarding the alleged discrepancies in the phone records or the existence of disclaimers regarding the accuracy or completeness of the phone records.

When determining whether a defendant has suffered prejudice from counsel's errors, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The movant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

Missouri courts have held, therefore, that in order to receive postconviction relief, a movant must prove that his trial counsel's "deficient performance prejudiced the defense." *Ayres v. State*, 93 S.W.3d 827, 830 (Mo. App. E.D. 2002). If the movant fails to plead facts showing prejudice, it is unnecessary to perform additional inquiry. *Id.*

In *Strickland*, the Court explained what a movant must show in order to prove counsel was ineffective:

> The defendant 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.

Strickland, 466 U.S. at 694. To establish prejudice from the failure to call a witness or offer evidence, a postconviction movant must prove that the testimony or evidence would have provided a viable defense. *See Kates v. State*, 79 S.W.3d 922, 927 (Mo. App. S.D. 2002).

"Ordinarily, a defendant is not entitled to relief merely because defense counsel elects not to present evidence of dubious impeachment value." *Twenter*, 818 S.W.2d at 643. *State v. Phillips*, 940 S.W.2d 512, 524 (Mo. banc 1997) ("The mere failure to impeach a witness, however, does not entitle a movant to postconviction relief"). "[N]either the failure to call a witness nor the failure to impeach a witness will constitute ineffective assistance of counsel unless such action would have provided a viable defense or changed the outcome of the trial." *State v. Ferguson*, 20 S.W.3d 485, 506 (Mo. banc 2000).

The first defect in Defendant's claim of prejudice is his failure to prove that the phone records actually contained inaccuracies or omissions. During the post-conviction evidentiary hearing, the records custodians offered several explanations why one record might show a call being made, while the record for the phone on the other end of that call might not. Defendant presumes that because Defendant's and Perry's Sprint records showed a couple of incoming calls from Angela's landline that the Sprint records must be correct and Angela's Charter records must contain omissions. But

Defendant presented no proof that this was actually the case. It may be that the Sprint records are incorrectly showing incoming phone calls from Angela's landline, rather than the Charter records omitting the calls. Since the records custodian for the respective companies confidently testified that their systems recorded outgoing calls, this explanation appears more likely than Defendant's speculative presumption.

Defendant also points out that the Charter records were used to convince Sherry and Beverly Conley that they were mistaken about the date that they last talked to Angela on the phone. But, again, Defendant presumes that alleged omission of outgoing calls in the Charter records dictates that other calls, such as ones to the Conleys, also were not recorded. But the best evidence of this would be to offer the Conleys' phone records to show that they actually received calls from Angela. Although during this post-conviction case Defendant sought, and was given, a court order requiring production of these phone records, they were not mentioned or offered into evidence during the evidentiary hearing.

Defendant's prejudice argument is not only speculative, it also stacks one unsupported inference upon another. Defendant contends that the fact that the Charter records do not show a couple of outgoing call for a date before Defendant left town means that there were other outgoing calls made after he left town that are also not showing up on the records. He backs up

that speculative claim with the equally speculative argument that someone in Angela's house made other calls. Finally, he presumes that Angela made outgoing calls after Defendant left town, which means she was alive and that Defendant could not have killed her and her children. But Defendant offered not one shred of proof to back up these speculative assertions. He simply argues that an apparent discrepancy in the records proves that Angela was making outgoing phone calls after Defendant left town. This is a woefully insufficient basis on which to prove *Strickland* prejudice. *See Williams v. State*, 168 S.W.3d at 433, 442 (Mo. banc 2005) (holding that postconviction allegations containing "speculative conclusions" of prejudice are insufficient to even warrant an evidentiary hearing); *Allen v. State*, 233 S.W.3d 779, 786 (Mo. App. E.D. 2007); *Nunley v. State*, 56 S.W.3d 468, 469 (Mo. App. S.D. 2001) ("Conclusionary speculations in motion for post-conviction relief are not substantive evidence that trial counsel was ineffective.").

The record shows that outgoing phone activity for Angela's phone dropped off dramatically after November 24 and that no outgoing phone calls were made. (Tr. 1530-31). Defendant offered no proof that any outgoing phone calls were actually made after Defendant left town, and he simply relies on an apparent discrepancy between Sprint's and Charter's records for a date before Defendant left town to make unsupported presumptions. "It is well-settled that a movant's failure to present evidence at a hearing to

provide factual support for a claim in his or her post-conviction motion constitutes an abandonment of that claim." *Cole v. State*, 223 S.W.3d 927, 931 (Mo. App. S.D. 2007) (quoting *Watson v. State*, 210 S.W.3d 434, 438-39 (Mo. App. S.D. 2006)). A motion court does not clearly err "in refusing to grant relief on an issue which is not supported by evidence at the evidentiary hearing." *Id.* (quoting *State v. Boone*, 869 S.W.2d 70, 78 (Mo. App. W.D. 1993).

Defendant's claim of prejudice is also refuted by the overwhelming evidence of his guilt. The majority of the prosecutor's closing argument focused on evidence other than the phone records showing that Defendant was guilty. (Tr. 1720-48). This evidence included Defendant's confession to his brother, Perry, that he committed the murders and his later telling Perry on the eve of trial that a writ of body attachment had been issued and that Perry could leave Missouri and fight extradition; the discovery of DNA, presumably from blood, consistent with Angela's DNA on Defendant's sunglasses; Defendant's fingerprints on a can of air freshener in Angela's house where her and her children's decomposing bodies would later be found; Defendant's cryptic statements to his sister-in-law that she might hear things on the news about him that she should not believe; Defendant's discarding of a revolver into a sewer on his way to the airport to leave town under a false name; the finding of .38 special cartridges in the car Defendant was driving

just before he left town (the victims were killed with either a .38 or .357 caliber revolver); and Defendant's elaborate scheme to avoid police once he left town and his giving a fake identification once he was apprehended.

On direct appeal, this Court, in considering Defendant's claim that he was prejudiced by the exclusion on hearsay grounds of certain evidence, noted that Defendant was not prejudiced because that "evidence pales in the light of [Defendant]'s confession and other corroborating evidence." *Taylor*, 298 S.W.3d at 499. When the record contains "overwhelming evidence of guilt, such that it cannot be reasonably said that, but for the challenged actions of trial counsel, the jury would have found the movant not guilty beyond a reasonable doubt, the movant suffers no prejudice and his or her claim of ineffective assistance of counsel must be denied." *Anderson v. State*, 66 S.W.3d 770, 778 (Mo. App. W.D. 2002).

Gill v. State, 300 S.W.3d 225 (Mo. banc 2009), on which Defendant relies, is distinguishable. In *Gill*, counsel was found ineffective in a capital-murder case for failing to further investigate the contents of the victim's computer, of which counsel was aware and had seen a report of its contents. *Id.* at 233-34. The State presented good-character evidence regarding the victim during the penalty phase; the victim's computer, on the other hand, contained child pornography and other sexually-related material that could have rebutted this evidence. *Id.* at 228-30. Moreover, counsel in the co-

defendant's case had made the prosecutor aware of the computer's contents, and the prosecutor in that case chose not to present good-character evidence about the victim. *Id.* at 230-31. That the defendant was prejudiced was "highlighted" by the fact that his co-defendant was sentenced to life without parole, while the defendant in *Gill* received a death sentence. *Id.* at 234.

Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995), is distinguishable because in that case counsel failed to adduce evidence available to him that the expert witness had performed an additional test showing that the victim's blood type was not on the defendant's knife, but the prosecution relied on other testing by the same expert to argue that the victim's blood type had been on the knife. *Id.* at 707-09.

Defendant's reliance on *Black v. State*, 151 S.W.3d 49 (Mo. banc 2004), is also misplaced. In *Black*, the court held that counsel was ineffective for failing to impeach a witness in a first-degree murder case on "the key issue of deliberation," which, the court noted, was a "central, controverted issue on which the jury focused during deliberations." *Id.* at 57, 58. This Court noted that the evidence known to the defendant's counsel in that case was not only impeachment evidence, but was also evidence that would have been admissible as substantive evidence. *Id.* at 53. In other words, the evidence at issue in *Black* was central to the controverted issue of deliberation, which had to be proved to find Defendant guilty of first-degree murder and subject

to the death penalty. *Id.* This Court held that "[h]ad that testimony been impeached, little would have remained to support the finding of deliberation." *Id.* at 58. *Black* is inapposite to Defendant's case.

C. Defendant's conviction was not obtained through the knowing use of perjured testimony.

Defendant suggests that the record shows Defendant was convicted with "false" evidence because Charter's records custodian testified that Charter's records showed all outgoing calls, but Sprint's records showed outgoing calls from Angela's landline to a Sprint customer that were not reflected in Charter's records. App. Br. 70. Although post-conviction claims of newly discovered evidence are not cognizable in post-conviction proceedings, Missouri courts have allowed an exception "when it is later discovered that 'the state knowingly used perjured testimony." *Ferguson v. State*, 325 S.W.3d 400, 406-07 (Mo. App. W.D. 2010) (quoting *State v. Cummings*, 838 S.W.2d 4, 7 (Mo. App. W.D.1992)) ("To prevail on this theory, [the defendant]] must show (1) the witness' testimony was false; (2) the state knew it was false; and (3) the conviction was obtained as a result of the perjured testimony.").

Defendant concedes that the State did not knowingly adduce perjured testimony at trial and asks this Court to re-evaluate Missouri law in this area to permit relief if the prosecution relies on any testimony that turns out to be false. Aside from the fact that no perjured testimony was presented in

Defendant's case, Defendant's claim suffers from a fundamentally fatal defect that he has overlooked. Nothing in the record proves that Charter's custodian gave "false" testimony. Charter's records showed no outgoing call, while Sprint's records for other phones showed an incoming call from Angela's phone. While one record or the other may have been incorrect—another assumption that is not necessarily true—, nothing shows that it was, in fact, Charter's records that were incorrect, much less that the custodian's testimony based on those records was "false." Moreover, since both Charter's and Sprint's custodians would not guarantee the accuracy of their records for incoming calls, Defendant's reliance on the Sprint records to show an incoming call from a Charter number and the resulting inference that Charter's records are inaccurate is dubious.

Defendant's invitation for this Court to revise Missouri law regarding the knowing use of perjured testimony is unwarranted. The cases he cites for the proposition that the use of false testimony to obtain a conviction, even if the prosecution was unaware of its falsity, involve the presentation of perjured testimony or, in one case, false testimony from a governmental source. App. Br. 71-79.

These cases have no application in Defendant's case. Unlike these other cases, Defendant failed to actually prove that any "false" testimony was actually adduced at his trial; he simply presumes it was based on an

apparent discrepancy in the phone records. This does not rise to the level of the use of perjured or false testimony that is the focus of the out-of-state cases discussed by Defendant.

II.

The motion court did not err in rejecting Defendant's claim that counsel were ineffective for failing to object to admission of the phone records or to Charter's custodian's testimony that six yellow-coded incoming calls to Angela's landline likely went to voicemail because Defendant failed to carry his burden of proving counsel acted incompetently or that Defendant was prejudiced in that: (1) counsel had trial-strategy reasons for not objecting to the phone records; (2) any objection to the phone records or to Herbert's (Charter's records custodian) opinion testimony would not have been meritorious; (3) Herbert testified that she could not definitively rule out that someone picked up the phone; (4) both records custodians testified that the phone records may not reflect all incoming calls; and (5) there was overwhelming evidence of Defendant's guilt.

A. The record regarding this claim.

Defendant's amended post-conviction motion alleged that counsel were ineffective for failing to object to admission of Charter's and Sprint's telephone records and to the testimony of Charter's custodian of records (Cathy Herbert) that the "yellow" calls highlighted on an exhibit showing Angela's phone records for her Charter landline showed calls that went to

voicemail. (PCR L.F. 104-10). Defendant alleged an objection would have been meritorious because the phone records were inaccurate or inconsistent and Herbert was not qualified as an expert to testify about information provided by other phone companies. (PCR L.F. 104-10). Defendant did not specifically allege how admission of this evidence and testimony prejudiced him other than simply stating the result of the trial would have been different without it. (PCR L.F. 104-10).

1. Trial record.

Just before jury selection began, the trial court held a hearing on Defendant's motion in limine concerning the testimony of Cathy Herbert, the records custodian for Charter. (L.F. 1027-28; Tr. 773). The motion sought to exclude Herbert's testimony about whether a particular call in the records showed an "off-hook call or a call directed to voicemail." (L.F. 1028). Defendant contended that Herbert's testimony on this topic was "speculative and therefore inadmissible" because she "cannot definitively answer that question based upon the available records." (L.F. 1028). Defendant's counsel explained that Herbert's deposition showed that her opinion was based on speculation:

> [Defendant's Counsel]: Paragraph 4 witness Cathy Herbert, she was recently re-deposed and there was some question of whether certain calls at [Angela's] house . . . after the date of November

26th, 2004, were off the hook calls or calls directed to voicemail. And basically her testimony was that she could not be certain—now, she will, if allowed, speculate. But that is—I mean, I think the question [the prosecutor] posed to her was asking for an educated guess in the deposition. And she will, if allowed, speculate but it's our position that it is basically speculation and not admissible.

The Court: You folks have me at a disadvantage because I'm not sure what Paragraph 4 relates to.

[Defendant's Counsel]: Cathy Herbert is a Charter phone records custodian. And it is an issue in this case whether calls in the phone records at the [Angela's] house . . . were off the hook calls or actually answered, or someone was using the phone in the residence or not. And she cannot definitively say, it's my understanding, based on her deposition testimony. Now she has, I think, she showed us in the deposition she's willing to speculate but she can't say definitively.

The Court: She can't say what?

[Defendant's Counsel]: Whether they are off the hook calls—

The Court: What is an off the hook call? I don't know what that is.

> [The Prosecutor]: Your Honor, it's when a call comes in it's either picked up by a person or it also could be picked up by a machine and not a person, it just goes active for a few seconds.

(Tr. 775-76). The prosecutor then explained what testimony the State intended to present through Herbert, who the prosecutor believed would be qualified as an expert witness in this area, which were that certain yellow-coded incoming calls on Angela's phone records were likely forwarded to voicemail, rather than picked up, or answered, by someone:

> If I could, we had two depositions of [Herbert]. The first deposition was a while ago, it was based on the information we were given from her. She is a custodian but she's also a technician in the fact it's her job to make sure Charter bills correctly and the number crunching and the machines that produce all the information and how they bill; that's her job. We did a second deposition because when I went out and saw her, Charter had re-dated their system, and when she re-ran the records we had requested, it never added any phone calls, they were the same records, but what it calls into question some calls instead of being white to green showed incoming call, they went yellow. And her explanation of that is their new system picks up other servers that say Verizon or Sprint. And it's not complete information but when it changes the time it was her opinion when a yellow call falls under the voicemail time, the

> times are perfectly matched. And it was her opinion if she were to go to the call and say what that is whether it's an off hook, or if it was voicemail that was kicked out of voicemail, she would say it's voicemail. But she still at the time of her deposition could not rule out somebody picking up the phone. So I mean that's the defendant's argument and that's our argument that it's voicemail from our understanding—but she's still going to testify that she can't rule out the fact that somebody could have picked it up. We don't under[stand] the motion here. I mean she's with basically more information from the first time we deposed her, it's her opinion that they are probably voicemail calls and not pickups, but she cannot rule them out.

(Tr. 776-77). The trial court deferred any ruling on the admissibility of Herbert's testimony until she testified and an objection was made. (Tr. 778).

Herbert testified that she had been in the telecommunications industry for 13 years and that in addition to being Charter's custodian of records, she also "configure[d] the equipment that provides telephone service to telephone subscribers" and the "type of equipment that records the records," which she basically described as a "telephone switch," which she had worked with for 6 years. (Tr. 1510). She testified about State's Exhibit 220 (PCR Ex. 2), which was Charter's phone records for Angela's landline that contained color-coded entries, or "cells." (Tr. 1513-14). The exhibit showed the date, calling number,

number called, call time, and duration. (Tr. 1514). The green cells represented Angela's phone number and the blue cells were Charter's voicemail systems number. (Tr. 1514). Thus, an entry line with a green cell and a blue cell represented an incoming call being forwarded to voicemail. (Tr. 1514-15). An entry with two green cells represented the subscriber calling their own number to check their voicemail. (Tr. 1514-15). An entry with a green cell and a white cell showed an outgoing call made by Angela's landline. (Tr. 1515). And a white-to-green entry was an incoming call made to Angela's landline. (Tr. 1516).

Herbert was later asked about yellow color-coded cells that appeared on the phone records, and she explained that those entries probably represented, in her experience, incoming calls that were either answered or directed to voicemail:

> Q. Okay. Now, as your experience at Charter have you ever had to deal with—and could you explain to jury what these yellow calls—not right now represent, but what are they? And how do you decide what they are?
>
> A. The call records highlighted in yellow are actually records of calls incoming to our subscriber. They're provided to us by another carrier for internal billing purposes. So they're not recorded

necessarily by the same equipment that recorded the other records that we provided.

Q. Okay. And I said—when I point to that, that word is unknown?

A. Correct.

Q. That means you don't have all the information?

A. Correct.

Q. So that's an outside call from a different system coming into this house, or this Charter customer?

A. Correct.

Q. Okay. Now, basically the call can be two options; is that correct? Well, it could either be incoming call or a call to voice mail?

A. It can either be answered or forwarded to voice mail.

Q. Okay. And if it's regular forward to voice mail it goes green to blue, but why is it yellow? Let me let you explain it.

A. Yellow just indicates it's an incoming call record provided out of those records that we didn't record. So prior to that record there is a record that shows a call being forwarded to voicemail. So if I were to look at this, upon looking at these two pages, as well as the others all the way back through October because the time differences being different between our network and other carriers' networks, the portion of this call that got forwarded to

voice mail appears to precede it, and that pattern reflects itself throughout the entire copy.

(Tr. 1532-33). Herbert explained that she had examined all the yellow-coded calls on Angela's phone records and had done similar examinations on other records while she worked at Charter, which she described as "her job." (Tr. 1534). Herbert was then directed to a yellow-coded entry on Angela's phone records, and she explained that this was probably an outside call that went to voicemail based on the fact that a preceding entry of the same duration showed a call going to voicemail:

Q. What's that make you think right off the bat?

A. From my experience with these it appears that this call went to voice mail because of the preceding record showing the same duration. And that same pattern repeating itself throughout the records. As you can see the next call is the same duration twenty-nine seconds, twenty-nine seconds. And the times because of the difference in our networks the calls looks like it appears to have come before, and they're all about a minute over.

Q. Okay. And for this to be what it appears to be a voice mail, the yellow call needs to follow a voice mail; correct?

A. In this representation it would because this was recorded by us, and then the other carrier that we receive these records from would have recorded this portion.

(Tr. 1535). She explained that any discrepancy in duration times between calls were attributable to "the difference in the timing between our network and [that of] other carriers." (Tr. 1536). For the six yellow-coded entries occurring on Angela's records after November 25 until December 3, her opinion was that those calls "could be" calls that went to voicemail, but she could not rule out that the calls may have been picked up because she was not there and the information came from an outside carrier:

Q. . . . [A]fter looking at records like this before and going through all these records, and studying these records and knowing how the systems works; after you've looked at these specific six calls as compared to other calls in this record, and not being able to rule out that it's a pick up, could they be voice mail calls?

A. Yes.

Q. Okay. And the reason you can't rule out a pick up is?

A. Because I wasn't there.

Q. Besides that, the yellow ones show insufficient—

A. We don't have any further information on those records from that carrier.

Q. Because it's an outside carrier?

A. Correct.

(Tr. 1537-38).

During cross-examination, Herbert explained that a set of records originally produced to the parties had been reformatted after a problem was discovered regarding the difference in formatting for the records provided to Charter by a different carrier:

Q. Okay. Now, you originally provided some records at our request back in January of 2007; is that right?

A. That sounds about right.

Q. And I'm going to show you what I've marked as Defendant's Exhibit LL.

* * * *

Q. All right. And these are the records that you originally provided to us almost a year ago, or a little more than a year ago; is that right?

A. Correct.

* * * *

Q. . . . Now, sometime after you provided these records to us and actually explained them to us in a deposition on January the 24th

of 2007, you created these additional records that you have with you today; is that right?

A. The—yes.

Q. Okay. And those are the records that are marked—

[The Prosecutor]: Your Honor, object. Just to be more clear I believe they developed a new system and that's why the records are changed. She didn't do anything personally.

[Defendant's Counsel]: All right. The new records are marked Exhibit 220. I'll clear it up.

Q. (By [Defendant's Counsel]) Now, those records were generated by the equipment that Charter has just within the past few weeks; is that right?

A. These were—the difference between the two records is that I found in reviewing the records for testimony I found that there was a difference in the way the duration of the call between the records that we record and the records that are given to us by a third party have a different amount of number of digits. So in formatting the original set of records it was unable to take account the missing digits in the duration for only those calls provided to us by the outside carrier. So upon evaluation and looking at them, I was able to determine there was a discrepancy,

and I was able to go back and correct that to correct the durations for those calls.

Q. And when did you make those corrections?

A. As soon as I saw the problem.

Q. And when was that?

A. It's been—I don't really know for sure, several weeks.

(Tr. 1539-41).

Herbert again conceded that she could not rule out the possibility that someone answered the phone. (Tr. 1548). She also acknowledged, yet again, that Charter does not record all incoming calls to a subscriber's residence. (Tr. 1551). She also agreed that "just because Charter doesn't have a record of a particular call, [that] doesn't mean a call wasn't made." (Tr. 1552). Defense counsel concluded her questioning by having Herbert state, once again, that she could not "definitely say they [the yellow-coded calls] were not answered by something." (Tr. 1552-53).

On redirect, Herbert said that the reformatted records were "more accurate" because the durations were corrected for those calls. (Tr. 1553).

During closing argument, the prosecutor stated that Herbert concluded that the yellow-coded calls went into voicemail based on her past experience of seeing similar patterns but that "[s]he cannot rule out that somebody picked up the phone because it's incomplete information from another

server." (Tr. 1743). But, he argued, that even if you believe somebody did pick up those yellow calls, it was not Angela; otherwise, the records would show multiple other calls being made by her, which would be consistent with her pattern before November 23. (Tr. 1744).

2. Post-conviction proceedings.

During the post-conviction evidentiary hearing, Herbert said that when Defendant's trial was held, her job title at Charter was "Confidential Service Translation Engineer."[12] (PCR Tr. 37).

Herbert was directed to her trial testimony about the reformatting of certain improperly formatted records Charter received digitally from other carriers and about her opinion that some incoming calls to Angela's phone shown on the records went into voicemail. (PCR Tr. 70-74). Herbert, who had worked for several phone carriers since 1993, explained that for billing purposes electronic information was digitally transmitted between telephone carriers, each of whom had their own network of equipment. (PCR Tr. 75-76, 78-81). She said that the information received from other carriers was not in a readable form ("improperly formatted") and had to be reformatted. (PCR Tr. 74-75). She realized that the call durations reported by the other carriers in a

[12] She was working for another telephone company when the post-conviction evidentiary hearing was held. (PCR Tr. 37).

different format were "way off," which was attributable the fact that the outside carriers were not using "the same algorithm that was used to format the Charter [call] durations." (PCR Tr. 76). Herbert used a computer program for the reformatting, but agreed that during a pretrial deposition she could not "work out" how the formula in the program performed this reformatting. (PCR Tr. 76-79). But she explained that the reformatting did not add or subtract time for the duration of the calls, it simply enabled Charter to read the other carrier's digitally-transmitted information:

> . . . I think I know why this is confusing. It's not really necessarily that it was off an hour, it's not like that. It's not like it added 30 minutes or took off 30 minutes. It's that you're looking at a string of nine digits and every place holder means something else.
>
> . . . [S]o the algorithm actually interprets that because there's a key code somewhere that you have to figure out, okay, this here means it was this . . . because it goes down to the hundredths of a second, and there's other fields involved in that same field.
>
> * * * *
>
> . . . And it's because it's transmitted digitally, it's transmitted in a format that normally a machine reads. So in a way that we were able to pull them out is to pull that machine language out, and then I guess

translate it to, so to speak, into something that . . . somebody could read.

(PCR Tr. 78-79).

Beimdek, one of Defendant's trial attorneys, did not know whether there was a trial-strategy reason for not objecting to Herbert's opinion testimony that records showing incoming calls to Angela's phone after Defendant left town probably went to voicemail. (PCR Tr. 136-38). She did, however, cross-examine Herbert on the fact that Herbert was not at the house and could not be certain that the phone calls went to voicemail. (PCR Tr. 161).

The motion court rejected this claim on the ground that while Herbert was not offered as an expert witness, she had the training and experience that qualified her to offer opinions about matters in the records. (PCR L.F. 343). In addition, the court found that the failure to object to the records was reasonable trial strategy since any objection would have been without merit. (PCR L.F. 343-44).

B. Defendant failed to prove ineffective assistance for counsel's failure to object to the phone records.

Defendant's first claim under Point II is that counsel were ineffective for failing to object to admission of the phone records.[13] The record regarding this claim is extensively detailed in Point I. That record shows counsel had valid trial-strategy reasons for not objecting to the records since they also benefitted the defense. (PCR Tr. 159, 164).

Moreover, trial counsel were convinced that any objection to admission of the phone records would be unavailing and that any discrepancy in the records would go to their weight, not their admissibility. (PCR Tr. 150, 171-72, 185). The record supports this judgment. At trial, the records custodians explained that their records were generated by computer monitoring of the companies' telephone switches showing outgoing calls and some, but not necessarily all, incoming calls. (Tr. 1413-17, 1430-31, 1446-48, 1512-13, 1516). This was a sufficient foundation to allow admission of the records. *See State v. Dunn*, 7 S.W.3d 427, 30-32 (Mo. App. W.D. 1999). Defendant's suggestion that *Dunn* requires a different result misapprehends the holding

[13] In Point I, on the other hand, Defendant asserts that counsel were ineffective for failing to impeach the State's evidence with particular portions of these phone records.

in that case. The issue in *Dunn* was whether the trial court had erred in admitting phone records into evidence; and on the record before it, the court determined the records were admissible. *Id.* at 431-32. Defendant's suggestion that *Dunn* describes the exclusive manner in which to lay a foundation for admission of phone records does not logically follow from the court's holding.

The trial record is not as detailed as it might be regarding these foundational matters because the parties stipulated to admission of the phone records. But since this is a post-conviction case, it was incumbent on Defendant to prove that no foundation existed for admission of the records on the ground that out of thousands of entries, perhaps five unresolved discrepancies between Charter's and Sprint's records existed. This is insufficient to prove that the records were inadmissible under the law. *See State v. Green*, 674 S.W.2d 615, 621 (Mo. App. E.D. 1984) (holding that "numerous discrepancies on dates, names and addresses" in medical records "would go to the weight and not the actual admissibility"). *Compare Taylor*, 298 S.W.3d at 500 (holding that if "the jury is fully informed" the fact that a presumptive blood test may react positively to substances other than blood "affects the weight given to the evidence, not its admissibility"). Thus, Defendant has failed to prove that any objection counsel may have lodged against admission of the records would have had any merit. "Counsel cannot

be deemed ineffective for declining to make a non-meritorious objection." *State v. Kreutzer*, 928 S.W.2d 854, 878 (Mo. banc 1996).

C. Defendant failed to prove ineffective assistance for counsel's failure to object to Herbert's opinion testimony.

Defendant's second claim under this Point is that counsel were ineffective for failing to object to Herbert's opinion testimony regarding the yellow-coded calls contained in Charter's billing records on the ground that she was not sufficiently familiar with outside carriers. Defendant failed to prove this claim because the record shows that Herbert had worked for several phone carriers since 1993. Moreover, Herbert was not testifying about what other companies' records showed; she was testifying about Charter's records which were based in part on the passing of digitally transmitted information for billing purposes. The reformatting of that information was a routine practice in the telephone industry, and the record shows that Herbert had the expertise and experience to offer opinion testimony that the yellow-coded calls in Charter's records were ones that likely went to voicemail.

"Generally, it is within the trial court's sound discretion to admit or exclude an expert's testimony." *State v. Bowman*, 337 S.W.3d 679, 690 (Mo. banc 2011). If "a witness has 'sufficient experience and acquaintance with the phenomena involved to testify as an expert,'" that person may give expert testimony. *State v. Rhone*, 555 S.W.2d 839 (Mo. banc 1977) (quoting *Hyman*

v. Great Atlanta & Pacific Tea Co., 225 S.W.2d 734, 736 (Mo. 1949)). But a "witness may be competent to testify as an expert though his knowledge touching the question at issue may have been gained by practical experience rather than by scientific study or research." *Id.* (quoting *Herman v. American Car & Foundry Co.*, 245 S.W. 387, 389 (Mo. App. St.L. 1922)). "Expert testimony is admissible when the subject of the testimony is one on which the jurors otherwise would be incapable of drawing a proper conclusion from the facts in evidence." *Bowman*, 337 S.W.3d at 690.

Defendant had the burden of proving that an objection to Herbert's testimony regarding the yellow-coded calls would have been meritorious. Not only has Defendant failed to prove that an objection would have been sustained, the record shows just the opposite: that any objection would have been overruled since Herbert's testimony was clearly admissible. *See Elliott v. State*, 215 S.W.3d 88, 95 (Mo. banc 2007) (holding that any "weakness in the factual underpinnings of the expert's opinion" affects only "the weight that testimony should be given and not its admissibility").

Defendant has also failed to prove that he suffered any prejudice from Herbert's testimony about the few yellow-coded phone calls because Herbert readily conceded at trial that she was not present in Angela's house when those calls came in and that it was possible someone could have picked them up. But, as explained in Point I, Defendant cannot rely on unsupported

speculation that if someone picked up those calls, that the person doing so was Angela. In addition, while the phone records supported the State's argument that the victims were already dead when Defendant left town, they played only a supporting role in establishing the State's case. Defendant's guilt was established by the evidence described in Point I, which included, among other things, his confession, his flight to avoid apprehension, and his disposal of a gun into a sewer.

Defendant's reliance on *State v. Daniels*, 179 S.W.3d 273 (Mo. App. W.D. 2005), is misplaced. In *Daniels*, police investigators obtained positive Luminol tests—a presumptive test for the presence of blood—on several items found in the defendant's house and car, but performed no confirmatory tests to establish the presence of blood. *Id.* at 282. Some of the items on which confirmatory blood tests were later performed proved not to be blood. *Id.* at 279-80, 282. Other samples recovered for confirmatory testing were inadvertently destroyed by police. *Id.* at 280. Later testing of areas inside the house with a Hemastix—another presumptive blood test—revealed that no blood was present in the areas that tested positive in the Luminol tests. *Id.* at 279-80. The State's witnesses were allowed to opine that the positive Luminol tests revealed the presence of blood in the defendant's house despite the fact that no confirmatory tests were ever performed and that the ones that were performed on several items showed that no blood was present. *Id.* at 284.

Further compounding the problem was the fact that the State argued in closing that the positive Luminol tests conclusively revealed the presence of blood. *Id.* at 284-85. Defendant's case is obviously distinguishable.

The holding in *CACH, LLC v. Askew*, 358 S.W.3d 58 (Mo. banc 2012), another case on which Defendant relies, is inapposite. That case stands for the unremarkable proposition that "a document that is prepared by one business cannot qualify for the business records exception merely based on another business's records custodian testifying that it appears in the files of the business that did not create the record." *Id.* at 63. The record at issue in this case was Charter's business record, not the record of some other company. The mere fact that part of Charter's record was derived from the computer-generated data electronically transmitted by another phone company in the regular course of business and as part of an accepted practice in the phone industry does not make Charter's records or Herbert's testimony inadmissible.

Moreover, the yellow entries at issue correlated with a voicemail entry generated by Charter's equipment. Herbert was primarily relying on data generated by Charter's equipment in opining that the yellow-coded calls to Angela's house were forwarded to Charter's voicemail. Finally, Herbert's testimony showed that she was familiar with the data generated by other phone companies since she had to reformat that data so that the information

could be incorporated into Charter's records. *Id.* at 64-65; *see also State v. Carruth*, 166 S.W.3d 589, 591 (Mo. App. W.D. 2005) (holding that "[f]ingerprint cards can be admitted under the business records exception even when the qualifying witness is not the person who took the fingerprints as long as the record shows that the witness "has knowledge of the standard procedures used by a particular jurisdiction to collect fingerprints from arrestees").

The motion court did not clearly err in rejecting this claim.

III.

The motion court did not clearly err in overruling, without an evidentiary hearing, Defendant's claim that counsel was ineffective for failing to use the phone records (1) to impeach Byers's testimony that Perry was at her home on November 25; (2) to show that a call was made to Southwest Airlines from Angela's landline on November 23 when Angela was still presumably alive; and (3) to show that during a 20-day period in October and early November, Defendant made no calls to Angela's phone because these claims are refuted by the record.

A. The record pertaining to this claim.

In his amended motion for post-conviction relief, Defendant alleged (in part 8(E)) three separate claims of ineffective assistance for failing to "adduce favorable evidence." (PCR L.F. 74-85).

First, that counsel was ineffective for failing to use the phone records to impeach the testimony of Betty Byers (Perry Taylor's girlfriend) that Perry was at her home on Thanksgiving (November 25, 2004), which is the date Byers testified that she overheard a phone call between Perry and Defendant, who was at the victims' house with their dead bodies. (PCR L.F. 74-85).

Second, that counsel was ineffective for failing to use the phone records to show that a call to Southwest Airlines was made from Angela's phone on

November 23, 2004, and that other calls attributable to Angela were made after this time, which would have countered the State's argument that the calls made to Southwest Airlines from Angela's phone on November 24 showed Defendant making arrangements to leave after the murders. (PCR L.F. 74-85).

Third, that counsel was ineffective for failing to use Angela's Charter phone records to show that no calls were received from Defendant between October 17, 2004, and November 5, 2004, a period of 20 days. (PCR L.F. 74). Defendant claimed prejudice because the records showed that Defendant did not have telephone contact with Angela during a period before the murders occurred, which would have countered the State's argument that Defendant did not call Angela's landline after November 26, 2004,because he knew Angela and her children were dead. (PCR L.F. 74-85).

1. Byers's claim.

Although Defendant's brother, Perry Taylor, an over-the-road trucker, told police during a videotaped interview that Defendant had admitted to him that he had committed the murders, Perry testified at trial—after being arrested on a writ of body attachment—that his statement was false and that police had told him what to say. (Tr. 856, 861-66, 880-84, 897-98, 900-01). Perry also testified that after he arrived in St. Louis around Thanksgiving Day (November 25), Betty Byers, a female friend of his, picked him up and

took him to her house where Perry spent the weekend. (Tr. 857, 867-68, 873). But Perry claimed that he did not remember telephone and face-to-face conversations with Byers before and after Thanksgiving during which Perry told her that Defendant admitted murdering the victims. (Tr. 873-75).

Betty Byers, who dated Perry during 2004, testified that she talked to Perry on the phone the day before Thanksgiving (November 24, 2004) and that Perry told her that Defendant admitted to him that he had killed the victims. (Tr. 1077-1080). She testified that she picked up Perry on Thanksgiving Day and brought him to her house, where Perry again told her that Defendant had admitted committing the murders. (Tr. 1080-82). She said that while Perry was at her house on Thanksgiving Day (November 25), Defendant called Perry and they had a discussion about Defendant remaining in the house with the dead bodies. (Tr. 1082-83). She also said that Defendant told Perry that "the bitch wouldn't let him go" and that he had turned on the air conditioner. (Tr. 1083).

Perry's phone records showed that he called Byers's home and cell phones multiple times on November 25 and that the last call between them was at 9:46 p.m. (Tr. 1078; State's Ex. 223). Perry's records also show numerous phone calls between him and Defendant on November 25 and 26. (State's Exhibits 223 and 224). The prosecutor argued that the records

showed phone contact between Perry and Byers on November 25. (Tr. 1728-29).

Defense counsel impeached Byers with her three convictions for stealing U.S. mail, soliciting prostitution, and unlawful use of a weapon. (Tr. 1085). Counsel also impeached Byers with her deposition in which she said that the first time she learned that Defendant confessed to the murders was on Thanksgiving Day. (Tr. 1088-89).

The motion court rejected the Byer's-impeachment claim because defense counsel adequately impeached Byers on her recollection of events notwithstanding counsel's failure to confront Byers with phone records showing calls between Byers and Perry on Thanksgiving Day. (PCR L.F. 336).

2. Southwest-Airlines and no-contact claims.

Angela's Charter records showed two calls to Southwest Airlines on November 24. (Tr. 1528-30; State's Exhibits 213 and 220). The records also show another call to Southwest Airlines (800-435-9792) on November 23, 2004 at 2:25 p.m. (State's Ex. 220).

The court rejected the Southwest-Airlines claim because it was based on pure speculation that a call to the airlines on November 23 showed Defendant planned to go out of town before the murders occurred:

> On one hand, the call could show that a trip was planned before the murders. On the other hand, the call may have been made in contemplation of the murders.

(PCR L.F. 336). The motion court rejected the claim involving phone records showing Defendant not making calls to Angela during a 20-day period a month before the murders as being "speculative." (PCR L.F. 336-37).

B. Defendant's claims are refuted by the record and are based on speculative assertions of prejudice.

Defendant contends that if counsel would have impeached Byers's testimony that she was with Perry on November 25, Thanksgiving Day, with phone records showing that she talked to Perry on the phone that night, this would have shown that Perry was not at Byers house. Defendant also claims that this would have also impeached Byers's testimony that she heard Defendant and Perry talking on the phone while Defendant was at the victims' house after they had been murdered. But simply because Perry and Byers talked on the phone on November 25 does not mean that Perry was not also at Byers's house on that day. Moreover, the records show contact between Defendant and Perry on both November 25 and 26, and no one disputes that Perry was at Byers's house after Thanksgiving. Consequently, impeaching Byers's with the phone records would not have diminished the credibility of her testimony. Besides, Byers had already been effectively

impeached by defense counsel on other matters. In addition, the failure to impeach a witness is rarely grounds for a claim of ineffective assistance. *See Phillips*, 940 S.W.2d at 524; *Ferguson*, 20 S.W.3d at 506. Finally, even if counsel had further impeached Byers on this minor point, there is no reasonable probability the result of the trial would have been different.

The claims regarding a call to Southwest Airlines the day before November 24 at a time when Angela was presumably alive and regarding counsel's failure to point out to the jury that the phone records showed another occasion before the murders when Defendant did not call Angela's phone for several days in a row were properly rejected without an evidentiary hearing because they are based on speculative claims of prejudice. Simply because another call was placed to the airlines the day before the murders were presumably committed would not have proven that it was less likely Defendant committed them since he already had plans to leave town before the murders. In fact, such evidence could have been more damaging to the defense because the State could have argued that Defendant was already making plans to flee the state even before he had committed the murders, which would suggest that he planned to commit the murders and was arranging his getaway before committing them.

Finally, evidence that Defendant did not call Angela's phone from his Sprint cell phone for a 20-day period over a month before the murders to

prove that he frequently did not call her number would have been of little or no benefit to the defense case considering the overwhelming evidence of guilt. Just because Defendant did not call Angela's phone for 20 days a month before the murders were committed would not have diminished the State's argument that his failure to call after the murders reflected his knowledge that the victims were dead. This allegation of prejudice is simply too speculative and remote to warrant an evidentiary hearing. *See State v. Kruger*, 926 S.W.2d 486, 489 (Mo. App. E.D. 1996) (holding that the motion court did not clearly err in denying an evidentiary hearing when the defendant's post-conviction "motion did not contain specific allegations or facts warranting relief" and was "based on speculation"). The motion court was not clearly erroneous in denying his request for an evidentiary hearing

Defendant's claim of prejudice is refuted by the record. The jury had all the phone-record evidence before it, and nothing suggests that if counsel would have highlighted or impeached witnesses with this information that the result of his trial would have been any different.

Defendant's reliance on *Coleman v. State*, 256 S.W.3d 151 (Mo. App. W.D. 2008), is misplaced since that case is readily distinguishable. In *Coleman*, the court found counsel ineffective for failing to present evidence of the defendant's pre-existing foot injury to refute the prosecution's evidence that the defendant kicked in a door and injured his foot before running away

from the scene of a burglary. *Id.* at 156-57. The evidence in *Coleman* went to the central issue of the defendant's identity as the perpetrator of the crime, while the evidence here was akin to impeachment evidence, the efficacy of which was based on speculation and conjecture.

IV.

The motion court did not clearly err in rejecting, without an evidentiary hearing, Defendant's claim that trial counsel were ineffective for failing to object to the prosecutor's comment during jury selection and to a comment the prosecutor made during closing arguments because the record refutes these claims in that the comment during jury selection was not a misstatement of the law and this Court rejected a plain-error claim regarding the closing-argument statement comment on direct appeal.

A. The record regarding this claim.

In his amended motion for post-conviction relief, Defendant alleged (in Part 8(H)) that trial counsel were ineffective for failing to object on two occasions.

First, that counsel should have objected to the prosecutor's closing-argument statement that Angela's phone records showed no phone calls between Angela and her sister, Gerjuan, after November 24, 2004. (PCR L.F. 95-97). Defendant claimed he was prejudiced because the prosecutor misstated the evidence because he knew that Gerjuan's testimony that she received a phone call after November 24 from Angela, who allegedly told Gerjuan that she was at a gas station, was excluded as hearsay. (PCR L.F. 95-97).

Second, that counsel should have objected during jury selection when the prosecutor stated that whether panel members leaned toward one punishment or the other (death or life without parole) was inconsequential as long as they could keep an open mind. (PCR L.F. 100-01). Defendant claimed he was prejudiced because the prosecutor's statement constituted a misstatement of law. (PCR L.F. 101).

1. Jury-selection claim.

During the death-qualification portion of jury selection, the prosecutor repeatedly told panel members that everyone must keep an open mind about punishment and never foreclose the possibility of sentencing Defendant to life without parole. (Tr. 226-27, 291-92, 456-58). He then pointed out that the case involved the "critical fact" that young children were murdered, and he wanted assurance from the panel members that they could keep an open mind. (Tr. 227-28, 295, 455-56). He also said to one group that "it doesn't matter if you might have leanings one way or another, what matters is that you're able to keep an open mind and keep an open mind up until the point that you're asked to deliberate and follow the Court's instructions about deciding unanimously on aggravation." (Tr. 229). In answering a question from a panel member in another group who said she could not get past the fact that children were murdered, which would lead her to automatically impose death, the prosecutor said to her that it was "okay to have a lean" but

the real "question" was whether she could "keep an open mind and consider both punishments." (Tr. 296). In responding to several comments from panel members in another group who indicated that the fact that children were murdered would be difficult for them, the prosecutor stated:

> I don't expect any of you to hear that a mother and her children were killed and you're thinking I'm leaning towards one particular sentence or another. And that's okay. The question to you now is can you keep an open mind and still consider both punishments knowing what you know at this point.

(Tr. 461).

The court rejected the jury-selection claim without an evidentiary hearing on the ground that the prosecutor's statement was not a misstatement of the law. (PCR L.F. 340-41).

2. Closing-argument claim.

The trial court ruled that Gerjuan's deposition testimony that Angela called her from a gas station pay phone on November 27, 2004, was plainly hearsay and would not be read to the jury because the sole source of her knowledge that Angela was calling from a pay phone was based on what Angela told her. (Tr. 1651-57). But the court allowed the jury to hear Gerjuan's testimony that Angela called her on the night of November 28th.

(Tr. 1663). It simply excluded inadmissible hearsay testimony that Angela was calling from a pay phone. (Tr. 1663).

During opening closing argument, the prosecutor told jurors that Gerjuan Rowe was mistaken about the date she received the phone calls from Angela and that the telephone records of the numbers belonging to the two women did not show any calls after November 24th:

> Gerjuan Rowe. Look at the records here on Gerjuan Rowe. Phone calls from the victim's house to Gerjuan. Those two calls I told you about the early morning hours, twenty-two minutes after midnight on the 24th. That's her sister. We played—we read into evidence Gerjuan's depo. Of course Gerjuan first time says last time I talked to her was the 20th and 21st, the correct weekend. But when she's questioned again she changes.
>
> She has drug problems, drug convictions. Very upset about this. You heard the depo. She kind of makes it to where the 27th, 28th where all these phone calls were happening, there's trouble, there was a falling out, she said. Probably the defendant and the victim.
>
> Look at the amount of calls that happened on the 21st, 22nd, 23rd. She's correct, she has the wrong weekend.
>
> I also asked Dan Jensen, did you go through Gerjuan Rowe's records line by line? And when was the last time her outgoing called

> the victim's house? November 23rd. So whatever the defense wants to say about Gerjuan Rowe what you know from these facts is that the last call—Charter counts only outgoing calls, the last outgoing call to Gerjuan Rowe was on the 24th at 12:22 a.m., twenty-two minutes after midnight. And that's from the victim to her sister Gerjuan Rowe.
>
> And if you look at the records, Gerjuan Rowe's Sprint, which captured the incoming and outgoing, you will not find the victim's number after 11/23. Two cell phone companies or one house company and one cell phone, there's absolutely no communication between these two women, sisters, from 11/24 after the—after twenty-two minutes after the hour ever again.

(Tr. 1746-47).

Defense counsel reminded the jury that the State's telephone records did not tell the entire story of telephone communication between Gerjuan and Angela, that Gerjuan testified during her deposition that she saw Angela on November 27, and that Gerjuan's cell phone records show a call to the gas station pay phone at about the same time she testified that she was talking to Angela on her cell phone:

> And we know that Leonard Taylor is not in St. Louis on the 27th, and yet Gerjuan Rowe sees Angela face-to-face. You don't have to rely on phone records when you see somebody face-to-face.

* * * *

Now, the State says there's no phone records after the 23rd or 24th. There's a couple of things you need to know about. They emphasize heavily the phone activity of Leonard's cell phone and Perry's cell phones, and calls to various people on November 23rd. But there's a record of a call in their records at 11:52 where Gerjuan Rowe calls Angela. And to see that you have to look at the Sprint records that we got, Defendant's Exhibit BB.

Do you remember you heard when we read the testimony of Gerjuan Rowe she said get my records, I've talked to her, get my cell phone records.

* * * *

And one of the things that Gerjuan says is that she talks—or gets a call from Angela on the night of the 28th. And if you look at the cell phone records, the Sprint records, and they're minute, these Sprint records are just not as easy to read even with reading glasses. But there is a call that shows up in those records, a Sprint call at 4:36 a.m. on the 28th.

And you heard the testimony of Gerjuan that she was out walking, and that she had phone contact with her sister, and there's a call where Gerjuan calls the Amoco Station, and that fits right with the

time that Gerjuan says she's out walking and is talking on her cell phone to Angela.

Gerjuan says I talked to her on Sunday night, too, about 7:00 p.m. And so that's why when she says to the police it hasn't even been a week because she's remembering that call, that Sunday night call at 7:00 p.m. that she had with her sister that she drew upon as remembering the last time she talked to her sister.

And the thing about the Sprint records is that they don't record the numbers of incoming calls. If you look at those they just say incoming, so when the State tries to suggest that there are no calls between Gerjuan and Angela, they can't say that because these records do not give you the full picture. And Gerjuan says get my records, to the police, get them, I've been talking to her. But the police didn't get those records.

One of the things you'll see when you look at those Charter records, and you can either look at the original records that they provided back a year ago or you can look at the new ones, but either way when you look through those records and you have a list of all the phone numbers that have been agreed to in this case, and you'll see what Gerjuan's phone number is, it never ever shows up as an incoming call to Angela's house. Gerjuan's cell phone never shows up in

those Charter records as calling that house. But if you look at Gerjuan's Sprint records you will find that there are many calls to Angela's house.

Gerjuan's getting charged by Sprint for calling Angela, but the Charter people are not capturing that call. And you heard that from Cathy Herbert, we don't collect all data of all phone calls. So, yes, those records from Charter they show the data that Charter collected, but they are not the full and complete picture of the phone activity at that house. The only way you can possibly have the full picture of the phone activity of that house is to figure out every person who ever called that house and get their cell phone records and their land line records.

Because those Charter records are not complete. They are a snapshot. They are a partial picture. But you cannot rely on those to tell you the whole story.

(Tr. 1749-53).

This Court considered a claim regarding these same closing-argument statements on direct appeal and found that the trial court had not plainly erred in allowing these statements. *Taylor*, 298 S.W.3d at 509-10.

The motion court rejected the closing-argument claim without an evidentiary hearing on the ground that the State's argument was not objectionable and Defendant suffered no prejudice because the jury heard

evidence and argument from the defense that Gerjuan met with and spoke to Angela after Defendant left town. (PCR L.F. 339-40).

B. Defendant's claims are refuted by the record.

The motion court did not clearly err in rejecting either of Defendant's failure-to-object claims because the prosecutor's comment during jury selection did not misstate the law and the prosecutor's statement during closing argument did not misrepresent the evidence or refer to evidence that had been excluded.

1. Jury-selection claim.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court held that a State cannot automatically exclude jurors from a death-penalty case simply because they had "conscientious scruples against capital punishment" or were opposed it. *Id.* at 512; *see also Wainwright v. Witt*, 469 U.S. 412, 418 (1985). The Court refined this doctrine in two cases following *Witherspoon*. *See Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (noting that a person who has a fixed opinion against or does not believe in capital punishment may nevertheless be able to follow the law and fairly consider imposition of the death penalty in a particular case); *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (holding that prospective jurors were properly disqualified when they were unable to set aside their personal beliefs or convictions regarding capital punishment and take an oath to follow the law).

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court, in considering the holdings of these previous cases, held that the standard for establishing whether a prospective juror in a capital case may be excused for cause is whether that person's views about capital punishment would prevent or substantially impair the performance of that person as a juror:

> This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45; *see also Witt*, 469 U.S. at 424; *Johnson*, 22 S.W.3d at 187 ("The relevant question is whether a venireperson's beliefs preclude following the court's instructions so as to 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

Thus, the prosecutor's comment during jury selection that whether any panel members had leanings toward one punishment or the other was not a misstatement of the law because he went on to say that what mattered was their ability to set aside their beliefs and fairly consider both punishments. This was an accurate statement of law.

Defendant makes much of the fact that the prosecutor informed the jury of the "critical fact" that three of the murder victims were children. This was permissible under *State v. Clark*, 981 S.W.2d 143 (Mo. banc 1998), and would have likely been mentioned by defense counsel when they addressed the panels if the prosecutor had not already brought it up. In fact, the mention of this critical fact worked to the defense's benefit because it identified several panel members who were potentially biased against Defendant since he was alleged to have murdered young children. Nothing in the record remotely suggests that the prosecutor informed panel members that it was permissible to be predisposed to imposing a death sentence because some of the victims were young children.

"The method of conducting a voir dire examination is usually a matter of trial strategy lying within the sound discretion of trial counsel." *Id. See also Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) and *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997) (holding that an attorney's actions during voir dire are considered to be matters of trial strategy). Missouri courts presume that attorneys act "professionally" in making decisions during jury selection and that "any challenged action was a part of counsel's sound trial strategy." *Strong v. State*, 263 S.W.3d at 644 n.3. The record does not support Defendant's claim that counsel were ineffective for failing to object since the prosecutor's statement was not objectionable.

"Counsel cannot be deemed ineffective for declining to make a non-meritorious objection." *State v. Kreutzer*, 928 S.W.2d at 878.

Defendant's motion also fails to contain any allegations specifically showing how he was prejudiced. "[T]here is generally no basis for finding a Sixth Amendment violation [for ineffective assistance of counsel] unless the accused can show how specific errors of counsel undermined the reliability of the [verdict]." *United States v. Cronic*, 466 U.S. 648, 659 n.26 (1984). Here, Defendant alleges that if an objection was made, a reasonable probability exists that the result of the trial would have been different. But he does not allege a single fact showing either that the failure to object undermined the reliability of the jury's verdict or that any biased juror sat on his jury. Nothing in the record suggests that the jurors specifically identified in his brief were unable to follow the court's instructions and fairly consider both punishments. The mere failure to object during jury selection does not establish a Sixth Amendment violation; the defendant must plead and prove prejudice.

In a similar context, this Court noted in *Strong v. State* that even if trial counsel acted incompetently in failing to raise a *Batson* challenge to the State's peremptory strikes, prejudice must still be shown:

> Demonstrating that the alleged error had some conceivable effect on the outcome of the trial is not sufficient. Rather, [the defendant] must

show that, absent the alleged error, there is a reasonable probability that he would have been found not guilty.

Id. at 647.

In *Glass v. State*, 227 S.W.3d 463 (Mo. banc 2007), the motion court rejected a capital defendant's claim that counsel was ineffective for failing to ask the jury panel "whether they would consider age, *family background*, alcohol addiction, drinking on the night of the murder, good character, and lack of significant criminal history as mitigating circumstances," notwithstanding trial counsel's post-conviction testimony "that it was a mistake not to question the venire panel regarding these matters." *Id.* at 474 (emphasis added). This Court held that this finding was not clearly erroneous because the defendant "cannot establish prejudice" since he "made no showing at the evidentiary hearing that the jurors were unable or unwilling to consider the evidence presented," especially considering that "[a]ll of the jurors stated that they were willing to follow the court's legal instructions." *Id.*

In *Morrow*, this Court held that the motion court did not clearly err in refusing to grant an evidentiary hearing on a capital defendant's claim that counsel was ineffective for failing to ask questions about specific mitigation issues during jury selection because the "contention rests upon speculation," since the record provided "no basis upon which to conclude" that the jurors

would have responded that they would not consider mitigation evidence under those circumstances. *Morrow*, 21 S.W.3d at 827. *See also Hultz v. State*, 24 S.W.3d 723, 726 (Mo. App. E.D. 2000) (holding that to prove prejudice "resulting from defense counsel's ineffective assistance during the jury selection process, a post-conviction movant must show that a biased venireperson ultimately served as a juror").

Although Defendant implies that a biased juror might have sat on his jury based on the fact that at least two heard the prosecutor's comment, the record contains nothing to support such speculation. *See Williams v. State*, 168 S.W.3d at 433, 442 (Mo. banc 2005) (holding that post-conviction allegations containing "speculative conclusions" of prejudice are insufficient to warrant even an evidentiary hearing). Defendant relies on several cases suggesting that prejudice may be presumed in certain circumstances involving alleged errors committed by counsel during jury selection. But the United States Supreme Court has held that even if a defendant proves deficient performance, courts may not presume prejudice; it must be proved. *See Florida v. Nixon*, 543 U.S. 175, 178 (2004). A presumption of prejudice is reserved only for those rare cases in which "counsel entirely fails to subject

the prosecution's case to meaningful adversarial testing."[14] *Id.* at 190. This circumstance, along with the complete denial of counsel or being represented by counsel with a conflict of interest, is the only time that prejudice may be presumed. *See Cronic*, 466 U.S. at 659, 662 n.31. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26. Defendant's presumption-of-prejudice principle is inconsistent with the United States Supreme Court holdings mentioned above.

The earliest case on which Defendant relies for this principle is *Presley v. State*, 750 S.W.2d 602 (Mo. App. S.D. 1988), in which the court held that *Strickland* prejudice could be presumed in a case in which trial counsel failed to move to strike for cause an allegedly biased veniremember. *Id.* at 607. This Court later interpreted *Presley* as holding that a separate showing of

---

[14] In *United States v. Cronic*, 466 U.S. 648 (1984), the Court "illustrated just how infrequently the 'surrounding circumstances [will] justify a presumption of ineffectiveness[.]'" *Nixon*, 543 U.S. at 190 (quoting *Cronic*, 466 U.S. at 662). There, the Court "reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial." *Nixon*, 543 U.S. at 190.

prejudice is not required when the circumstances show that prejudice was so likely that a case-by-case inquiry is unnecessary. *Moss v. State*, 10 S.W.3d 508, 514 (Mo. banc 2000). Both *Presley* and *Moss* were handed down years before the Supreme Court's decision in *Nixon*. The Southern District later described *Presley* as a case in which a potential juror expressly said that he would be prejudiced toward the defendant. *Tripp v. State*, 58 S.W.3d 108, 111 (Mo. App. S.D. 1998). *Presley* was also later described as a case in which the record showed that "the accused's lawyer became confused about which venire member gave responses indicating prejudice against the accused." *State v. Eastburn*, 950 S.W.2d 595, 607 (Mo. App. S.D. 1997).

Another factor that makes *Presley* inapposite here is that *Presley* involved the State's appeal from a motion court's judgment granting the defendant a new trial because counsel was ineffective for failing to make a motion to strike a potential juror for cause. *Presley*, 750 S.W.2d 603-04. Thus, the opinion in *Presley* can be simply read as the appellate court's determination that the State had failed to carry its burden of showing that the motion court clearly erred in granting post-conviction relief. *See Ogle v. State*, 807 S.W.2d 538, 545 (Mo. App. S.D. 1991).

The presumption-of-prejudice principle enunciated in *Presley* was unfortunately relied on by the Western District in *State v. McKee*, 826 S.W.2d 26 (Mo. App. W.D. 1992), another ineffective-assistance-of-counsel case in

which counsel failed to strike for cause two allegedly biased veniremembers. *Id.* at 28-29. In *McKee*, like *Presley*, the record showed that trial counsel became confused about which veniremember made certain statements. *Id.* at 28.

Ten years later, in *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002), a death-sentenced defendant claimed that trial counsel had been ineffective for failing to read juror questionnaires from two veniremembers who expressed a bias in favor of the death penalty. *Id.* at 631-32. In one questionnaire, the jury-panel member, who later became the jury foreman, stated that the "laws are 'way too soft' on criminals, that "more jails" should be built," and to "give out longer sentences and fewer paroles." *Id.* at 632. His comments about the death penalty were: "make executions public. If a criminal knew he was being executed in a public square in front of thousands of people, he might [think] twice about committing a murder." *Id.* Another juror stated in his questionnaire that he disfavored "endless appeals," "parole boards," "good time," and "clergy to pamper a killer," and wrote: "if he is found guilty, do it." *Id.* Defendant's trial counsel testified that he "about vomited" and was "flabbergasted" after he later realized that he had completely overlooked the two questionnaires. *Id.* at 632. He said that there is no chance that he would have left these veniremembers on the panel and that this was "the most egregious mistake I've ever made in the trial of a case." *Id.*

Although this Court's opinion stated that the "complete failure in jury selection is structural error," it still went on to find that counsel's failure to read the questionnaires and question the veniremembers during jury selection sufficiently undermined the outcome of the defendant's case, especially in the death-penalty context, and that the defendant had proved *Strickland* prejudice by a preponderance of the evidence. *Id.* at 633. Nothing in the opinion suggested that prejudice may be presumed in these types of cases.

Four years later, this Court found in *Anderson v. State*, 196 S.W.3d 28 (Mo. banc 2006), that counsel was ineffective for failing to strike a veniremember who said that the defense would have to convince him that the capital defendant was not deserving of capital punishment. *Id.* at 39-40. The record showed that counsel's failure resulted from a note-taking error. *Id.* at 40 n.7. Relying on *Knese*, this Court reiterated that the failure to strike a juror in a capital case who expresses a predisposition to impose or reject the death penalty constitutes "structural error" in a capital case and a death sentence imposed by a jury infected with such error must be vacated. *Id.* at 40. The opinion contains no specific statements suggesting that prejudice was presumed; this Court simply found ineffective assistance of counsel and remanded the case for a new penalty-phase proceeding. *Id.* at 42.

In *James v. State*, 222 S.W.3d 302 (Mo. App. W.D. 2007), the court found that counsel was ineffective for failing to strike a veniremember who said that she would want the defendant to testify and would have trouble following an instruction telling her that she could not take his failure to testify into consideration. *Id.* at 305. The *James* court, relying solely on *McKee*, simply presumed prejudice from counsel's failure to strike this veniremember.

In *Strong v. State*, this Court expressly rejected the principle that *Strickland* prejudice may be presumed or that errors occurring during jury selection should be deemed "structural error": "[T]his Court holds that counsel's failure to raise a *Batson* objection, absent any attempt by [the defendant] to demonstrate that unqualified persons served on the jury, does not amount to a structural defect that entitles him to a presumption of prejudice. *Strong*, 263 S.W.3d at 648. The court in *Strong* also rejected a claim of presumed prejudice based on the holdings in *Knese* and *Anderson*:

> Both *Knese* and *Anderson* are distinguishable from the case at bar. In those cases, defendants showed by a preponderance of the evidence that counsel's errors resulted in the empanelling of biased jurors, depriving the defendants of their right to a fair and impartial jury. In this case, however, [the defendant] has not made such a

> showing. At most, [the defendant] can only demonstrate that qualified venirepersons were excluded from the jury.

Strong, 263 S.W.3d at 647-48.

Defendant's reliance on *Presley*, *McKee*, and *James*, as authority to excuse him from proving *Strickland* prejudice is misplaced. *See Pearson v. State*, 280 S.W.3d 640, 645-46 (Mo. App. W.D. 2009) (noting that *Presley*, *James*, and *McKee* "hold that where a venireperson has admitted significant bias and has not been rehabilitated, counsel's failure to challenge the biased juror overcomes the presumption of effectiveness because of the magnitude of the threat to the defendant's right to a fair trial"). To the extent these cases suggest that prejudice may be presumed on claims of ineffective assistance of counsel with respect to jury selection, they are inconsistent with United States Supreme Court holdings indicating that prejudice must be shown in all but the rarest of cases and with this Court's most recent holding in *Strong*. Here, Defendant only speculatively implies that since two jurors heard the prosecutor's comment, they were unfairly biased against Defendant.

2. Closing-argument claim.

Contrary to Defendant's claim, the prosecutor did not misrepresent the evidence during closing argument. He simply pointed out that Gerjuan Rowe's cell phone records show no calls from Angela Rowe's number after

November 23rd. He directed his comments to what the telephone records showed. The defense pointed out that Gerjuan Rowe testified that she talked to her sister late on November 28th and that her cell phone records showed that she called the gas station on that same date around the time she claimed she had talked to Angela. Both sides argued what the evidence showed and the reasonable inferences that could be derived from it.

On direct appeal, this Court considered whether the prosecutor's statement complained of here constituted plain error. In rejecting this claim, this Court noted, however, that the prosecutor had not referred to any inadmissible evidence during closing argument:

> The State did not refer to the inadmissible statement in Gerjuan's testimony that Rowe had told Gerjuan that she was calling from a pay telephone. In making its closing arguments, the State referred to Gerjuan's and Rowe's telephone records to refute Gerjuan's testimony that she spoke to Rowe after November 24th. The telephone records as well as Gerjuan's testimony that she spoke to Rowe on November 28th were admitted as evidence. It was not plain error to allow these statements.

Taylor, 298 S.W.3d at 510.

Despite this holding in his direct appeal, Defendant nevertheless contends that under this Court's holding in *Deck v. State* this Court should

conclude in this appeal that Defendant suffered *Strickland* prejudice. Although this argument may be theoretically viable, it certainly has no practical merit under the facts of this case.

Although "[t]he [plain error and *Strickland* prejudice] tests are not equivalents," "this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland* test." *Deck v. State*, 68 S.W.3d 418, 427-28 (Mo. banc 2002). It appears that Defendant would like this Court to find that his is one of those rare cases where *Strickland* prejudice can be found after an appellate court has already determined that the same claim did not constitute plain error.

But this Court did more than simply reject Defendant's direct-appeal claim based on his failure to prove manifest injustice; rather, it specifically noted that the prosecutor had not referred to inadmissible evidence in making his argument. Defendant's case is not one of those rare cases that falls within the narrow gap between *Strickland* prejudice and manifest injustice under the plain-error standard of review.

Defendant's reliance on *State v. Wacaser*, 794 S.W.2d 190, 196 (Mo. banc 1990), is misplaced. That case, which stands for the unremarkable proposition that a "prosecutor should not serve if he has access to privileged

information which might be used to the defendant's detriment," is inapposite here.

The motion court did not clearly err in denying these claims.

CONCLUSION

The motion court did not clearly error, and its judgment overruling Defendant's motion for post-conviction relief should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3700
Fax: (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 23,594 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was served through the electronic filing system on August 13, 2012, on:

Jeannie Willibey
920 Main Street, Suite 500
Kansas City, Missouri 64105
(816) 889-7699
jeannie.willibey@mspd.mo.gov

/s/ Evan J. Buchheim
EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3700
Fax (573) 751-5391
evan.buchheim@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI