

**IN THE
MISSOURI SUPREME COURT**

LEONARD TAYLOR,)	
)	
Appellant,)	
)	
vs.)	No. 92166
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21ST JUDICIAL CIRCUIT, DIVISION 14
THE HONORABLE JAMES R. HARTENBACH, JUDGE**

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Leonard Taylor, incorporates the jurisdictional statement from his original brief.

STATEMENT OF FACTS

Appellant, Leonard Taylor, incorporates the statement of facts from his original brief.

POINT I

The hearing court clearly erred in denying Appellant's claim regarding omissions and inaccuracies in the telephone records, because 1) counsel failed to (a) adequately examine the records, (b) cross-examine the records custodians regarding omissions and inaccuracies in the records, and (c) elicit that Charter and Sprint did not guarantee the accuracy of its records, and 2) the Charter records custodian testified falsely that the Charter records of the victims' telephone contained *all* outgoing calls, thereby violating Appellant's rights to due process, a fair trial, the effective assistance of counsel, and to be free from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends. 5, 6, 8, 14, and Missouri Constitution, Art. I, Secs. 10, 18(a), 21, in that the jury did not hear that the Charter records did not include all outgoing calls, the Sprint records did not contain a complete record of all calls made, the Charter records sometimes reflected a different number than the actual incoming number, and Charter and Sprint did not guarantee the accuracy of its records. Appellant was prejudiced, because: the State used the phone records to prove calls *not* made (when the records were not reliable for that purpose); the State used the records to discredit defense witnesses' initial statements concerning their last phone contact with the victims; and the jury relied on false testimony in reaching its verdicts. But for the false testimony and counsel's failures, there is a reasonable probability of a different outcome of the trial.

Strickland v. Washington, 466 U.S. 668 (1984);

U.S. Const., Amends. V, VI, VIII, XIV;

Mo. Const. Art.I, Secs. 10, 18(a), 21;

Rule 29.15.

POINT II

Appellant, Leonard Taylor, incorporates Point II from his original brief.

POINT III

Appellant, Leonard Taylor, incorporates Point III from his original brief.

POINT IV

Appellant, Leonard Taylor, incorporates Point IV from his original brief.

ARGUMENT I

The hearing court clearly erred in denying Appellant's claim regarding omissions and inaccuracies in the telephone records, because 1) counsel failed to (a) adequately examine the records, (b) cross-examine the records custodians regarding omissions and inaccuracies in the records, and (c) elicit that Charter and Sprint did not guarantee the accuracy of its records, and 2) the Charter records custodian testified falsely that the Charter records of the victims' telephone contained *all* outgoing calls, thereby violating Appellant's rights to due process, a fair trial, the effective assistance of counsel, and to be free from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends. 5, 6, 8, 14, and Missouri Constitution, Art. I, Secs. 10, 18(a), 21, in that the jury did not hear that the Charter records did not include all outgoing calls, the Sprint records did not contain a complete record of all calls made, the Charter records sometimes reflected a different number than the actual incoming number, and Charter and Sprint did not guarantee the accuracy of its records. Appellant was prejudiced, because: the State used the phone records to prove calls *not* made (when the records were not reliable for that purpose); the State used the records to discredit defense witnesses' initial statements concerning their last phone contact with the victims; and the jury relied on false testimony in reaching its verdicts. But for the false testimony and counsel's failures, there is a reasonable probability of a different outcome of the trial.

Part 1—Ineffective Assistance of Counsel for Failure to Adequately Examine the Phone Records and Adduce Evidence of Omissions and Inaccuracies in the Records and Evidence that Charter and Sprint did not Guarantee the Accuracy of its Records

In arguing that Mr. Taylor did not prove *Strickland* prejudice, the State misstates Mr. Taylor’s argument in this post-conviction appeal. For example, the State asserts that: “Defendant’s claim rests on several unproven, speculative assumptions that do not necessarily follow from what is contained in the records” (Resp. Br., pp. 44); “Defendant’s prejudice argument is not only speculative, it also stacks one unsupported inference upon another” (Resp. Br., p. 51); “Defendant contends that the fact that the Charter records do not show a couple of outgoing calls for a date before Defendant left town means that there were other outgoing calls made after he left town that are not showing up on the records” (Resp. Br., p. 51); “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....” (Resp. Br., p. 51-52); “But Defendant offered not one shred of proof to back up these speculative assertions” (Resp. Br., p. 52); “He simply argues that an apparent discrepancy in the records proves that Angela was making outgoing calls after Defendant left town. This is a woefully insufficient basis on which to prove *Strickland* prejudice” (Resp. Br., p. 52).

This is not Mr. Taylor’s argument. Mr. Taylor is not drawing any inferences from the phone records; rather, he is asserting the opposite, i.e., that certain inferences *cannot* be and should not have been drawn from the records. Specifically, the phone records

were not reliable to prove calls not made and yet the State repeatedly used the records for that purpose at trial.

Further, Mr. Taylor absolutely attempted to offer evidence to show that the victims made outgoing calls after Mr. Taylor left town. Specifically, he called Sherry and Beverly Conley at trial regarding phone calls that they received from the victims after Mr. Taylor left St. Louis (Tr. 1672-74, 1682, 1707-08). The defense also presented the deposition of Gerjuan Rowe, who testified that Angela called her at 3:00 a.m. or 4:00 a.m. on November 28 (G.R. Depo, 26, 60-61, 73-75, 83-84).

The State also argues in its brief that the “alleged ‘inaccuracies’ were *de minimis* when compared to the number of entries contained in the records” (Resp. Br., p. 44-45). However, this also misses the point—even with the limited number of available phone records and the limited time period covered by those records,¹ Sprint’s records showed incoming calls from Angela’s Charter landline, during the time period charged, without any corresponding outgoing call on Charter’s record of Angela’s landline (PCR Tr. 41-53; App. Br. Appendix A-1-A-7). This in fact demonstrated that Charter’s records could

¹ Charter’s record of the victims’ landline telephone starts on October 16, 2004, ends on December 4, 2004, and is 28 pages (Movant’s Exhibit 2A; State’s Exhibit 220). Sprint’s two sets of records of Leonard Taylor’s cell phone start on November 20, 2004, end on December 6, 2004, and are 24 and 26 pages (Movant’s Exhibits 7, 7A; State’s Exhibits 224, 260). Sprint’s record of Perry Taylor’s cell phone starts on November 24, 2004, ends on December 5, 2004, and is 21 pages (Movant’s Exhibit 8; State’s Exhibit 223).

not prove calls not made, and Charter's Senior Counsel testified at the post-conviction hearing that Charter does not guarantee the accuracy of its records (PCR Tr. 96-97).

The State also asserts that no prejudice occurred, because the evidence of Mr. Taylor's guilt was overwhelming (Resp. Br., pp. 45, 53-54). However, the evidence of Mr. Taylor's guilt was not overwhelming. Apart from a miniscule amount of DNA located on a pair of Mr. Taylor's glasses, which could not be confirmed as Angela Rowe's blood or DNA, there was no physical evidence linking Mr. Taylor to the crimes (Tr. 1374-75, 1378, 1380, 1387, 1398, 1467-68, 1479-80, 1500, 1505). At trial, Perry Taylor recanted his statement that his brother had confessed, and there was evidence that Perry had been pulled over, arrested, and interrogated by the police on two prior occasions (in Georgia and New Jersey), before telling the police, after being stopped and interrogated again, that his brother had confessed (Tr. 855-56, 892-94, 900, 1058). Betty Byers' testimony that Perry talked on the phone with his brother at her home on Thanksgiving and asked him why he was still at the victims' home, does not match up with the phone records or Perry's testimony (Tr. 866-68, 874, 1078-83, 1412; St. Ex. 223, pp. 5-6; Mov. Ex. 8).²

² This issue is addressed in Argument III of Appellant's Brief. The only night that Perry and Leonard Taylor would have both been in St. Louis, during the time period in question, was Thanksgiving, November 25 (Gainey Transportation Records showed Perry returning to St. Louis on Thanksgiving, and Lambert Airport Surveillance showed Leonard leaving on November 26) (Tr. 1285-86, 1288). Betty Byers' testified at trial that

A review of the State's case establishes that the State relied on various pieces of circumstantial evidence, along with Perry's prior, inconsistent statement, to argue that Mr. Taylor committed the murders. The phone records, and the inferences the State drew from those records, were a big piece of the State's circumstantial-evidence case. A review of the trial demonstrates this: the State called records custodians for Sprint and Charter, not just to seek a foundation for the admission of the records but to explain the records and the charts that the State created from the records (Tr. 1410-1454, 1509-1553); the State created numerous charts and exhibits from the phone records (St. Exs. 212, 213, 215, 217, 218, 219, 225, 226, 227, 230, 231, 233, 234, 235, 236, 237, 238, 239, 241, 242, 251, 260); and the State emphasized the phone records in closing argument (Tr. 1724-1726, 1728-29, 1731, 1734-36, 1742-44, 1746-47, 1773-74, 1775, 1778). Most importantly to this claim, the State drew improper inferences regarding the phone records, i.e., that the records showed all outgoing calls and, therefore: Mr. Taylor never called back to the victims (because he knew they were dead) (Tr. 1735); Mr. Taylor did not call his wife on December 3 until after 5:30 p.m. (because he then learned that the police had found the bodies) (Tr. 1736); the victims never called Beverly or Sherry Conley after November 26 and the Conleys were mistaken (Tr. 1742-43, 1774, 1775);

Perry talked to Leonard Taylor at her home on Thanksgiving and asked Leonard why he was still at the victims' home (Tr. 1082-83). But the phone records showed that Perry Taylor called Betty Byers' number several times on Thanksgiving, November 25, so he would not have been at her home then (St. Ex. 223, pp. 5-6; Mov. Ex. 8).

and Angela did not speak with her sister, Gerjuan, after November 26 and Gerjuan was mistaken (Tr. 1746-47, 1773-74, 1775).

The *Strickland* Court emphasized the reliability of the verdict or result of the trial, when determining whether counsel's omission prejudiced the defense: "[T]he defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the case at bar, counsel's omission prejudiced the defense, as the jury was led to believe that the Charter records disproved the Conleys' initial statements to the police. Counsel failed to subject the State's evidence to adversarial testing and thereby failed to prevent the jury from deliberating with a false impression of what the records proved. Counsels' oversight affected the reliability of the result, because the jury employed improper inferences and false testimony in reaching its verdict.

The State also asserts in its brief that 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" (Resp. Br., p. 44, 47-48). However, the record does not support the State's argument. Counsel testified at the post-conviction hearing that they *did not even know* that Charter's records did not show all outgoing calls (PCR Tr. 142-43, 179, 194). Obviously, the defense strategy was based on what counsel knew at the time (Tr. 186-87). And all three attorneys testified that if they had known that the Charter records did not show all outgoing calls, they would have brought that out at trial (PCR Tr.

143, 166, 179-80, 194). Although Attorney Beimdiek testified that the defense was “stuck” with Charter’s representation that its records showed all outgoing calls, that was not actually the case. Had counsel adequately examined the records, counsel would have noticed that Charter’s records did not show all outgoing calls. Because counsel did not adequately examine the phone records, they were unaware the Charter’s records did not show all outgoing calls. Counsel did not and could not have made a strategic decision about issues of which they were unaware (PCR Tr. 143, 166, 179-80, 194).

Similarly, counsel testified that, if they had known of other issues with the phone records, they would have made those issues known to the jury, including that: Sprint’s records of Gerjuan’s cell did not show all incoming calls (PCR Tr. 146, 181, 196-97); there were instances when Sprint’s records of Perry’s cell indicated calls to or from his brother but there was not a corresponding call on Leonard Taylor’s records (PCR Tr. 146-47, 181-82, 197); and Charter and Sprint did not guarantee the accuracy of its records (PCR Tr. 147-49, 182, 198).

Last, the State asserts in its brief that post-conviction counsel obtained a court order for the phone records of Beverly and Sherry Conley but subsequently, no further mention of these records appears in the record of the case (Resp. Br., pp. 35-36, 51):

Defendant also points out that 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 the 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.

(Resp. Br., p. 51). First, the State misstates Mr. Taylor's argument. Mr. Taylor's defense at trial was that he left town on November 26 and would not know what occurred at the home after that. In the post-conviction case, Mr. Taylor asserted that the Charter records were not reliable to discredit the Conleys' initial statements to the police that the children had called them the weekend of November 27-28 (Tr. 1672-74, 1682, 1707-08). Yet the State used the records for that purpose, and the jury was given a false impression of what the records could actually prove.

Second, the State is unreasonably inferring that post-conviction counsel was even able to obtain phone records for all of the Conleys' telephone numbers and that any record post-conviction counsel was able to obtain was a call detail record (as opposed to a record of a bill). These are unreasonable inferences from information outside the record and cannot be drawn from the fact that post-conviction counsel obtained court orders in 2010 for phone records from 2004 (PCR L.F. 37; PCR Tr. 8).

Mr. Taylor respectfully requests that this Court reverse the denial of Rule 29.15 post-conviction relief and remand the case for a new trial.

Part 2—Leonard’s Convictions were obtained in Violation of his Rights to Due Process and to be Free from Cruel and Unusual Punishment, because the Jury relied on False Testimony in reaching its Verdicts.

Appellant, Leonard Taylor, incorporates Part 2 of Argument I from his original brief.

ARGUMENT II

The hearing court clearly erred in denying Appellant's claim that trial counsel was ineffective for failing to object to: 1) the admission of the Charter and Sprint phone records; and 2) the Charter records custodian's testimony regarding her change of the durations of the "yellow" incoming calls, which data was collected and recorded by outside carriers, and her opinion that those incoming calls went into voicemail, because this denied Appellant his rights to the effective assistance of counsel, due process and freedom from cruel and unusual punishment, as guaranteed by the U.S. Constitution, Amends.5,6,8,14, and Missouri Constitution, Art.I,Secs.10,18(a),21, in that: 1) Charter and Sprint's computer systems were not shown to produce accurate results and the records custodians testified at the post-conviction hearing that Charter and Sprint did not guarantee one hundred percent accuracy of their records; and 2) the Charter records custodian was not sufficiently familiar with the outside carriers' practices to reformat and interpret the outside carriers' data. Leonard was prejudiced because: 1) the State used the Charter and Sprint records to prove calls *not* made (when the records were not reliable for that purpose); and 2) the State used the Charter records custodian's testimony and opinion about the "yellow" incoming calls to argue that those calls went into voicemail (as the victims had been killed).

Appellant, Leonard Taylor, incorporates Argument II from his original brief.

ARGUMENT III

The motion court clearly erred in denying a hearing on Appellant's claim that counsel was ineffective for failing to adduce, through cross-examination of State witnesses, favorable evidence from the phone records, including evidence: 1) to impeach Betty Byers' testimony that Perry Taylor was at her home on Thanksgiving and told her that Appellant confessed; 2) that there was a phone call to Southwest Airlines on November 23, 2004 (and calls attributable to the victims were made after that); and 3) that, according to Charter's records of the victims' landline, there was no call to or from Appellant from October 17 -November 5, a twenty-day period of time, because this denied Appellant due process, a fair trial, effective assistance of counsel, and subjected him to cruel and unusual punishment, U.S. Const., Amends.5,6,8,14; Mo. Const., Art. I, Secs.10,18(a),21, and Rule 29.15(h), in that the amended motion alleged facts, not conclusions, that entitled Appellant to relief, namely that counsel unreasonably failed to adduce evidence favorable to the defense, which prejudiced Appellant, in that the evidence would have impeached Byers' testimony and would have shown that inferences the State drew from the phone records were not warranted.

Appellant, Leonard Taylor, incorporates Argument III from his original brief.

ARGUMENT IV

The motion court clearly erred in denying a hearing on Appellant's claim that counsel was ineffective for failing to object to: 1) the prosecutor's statement during voir dire that the panel members could have a lean towards the death penalty where children were killed; and 2) the prosecutor's closing argument that the phone records did not support Gerjuan's testimony that she spoke with Angela on November 28, because this denied Appellant due process, a fair trial, effective assistance of counsel, the right to a fair and impartial jury, and subjected him to cruel and unusual punishment, U.S. Const., Amends.5,6,8,14; Mo. Const., Art. I, Secs.10,18(a),21, and Rule 29.15(h), in that the amended motion alleged facts, not conclusions, that entitled Appellant to relief, namely that: 1) the prosecutor's statement during voir dire misstated the law; and 2) the prosecutor's closing argument commented on evidence that had been excluded at the State's request. The motion also properly alleged prejudice, in that the prosecutor's improper comments resulted in a substantial deprivation of Appellant's right to a fair trial.

Appellant, Leonard Taylor, incorporates Argument IV from his original brief.

CONCLUSION

Based on Arguments I and II, Appellant respectfully requests that the Court vacate the convictions and death sentences and remand the case for a new trial. Based on Arguments III and IV, Appellant respectfully requests that the Court reverse the motion court's denial of relief without a hearing and remand the case for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Mr. Evan Buchheim, Assistant Attorney General, Office of the Attorney General, is a registered user of the electronic filing system and, on August 28, 2012, a complete copy of this document was delivered to Mr. Buchheim through the electronic filing system, at evan.buchheim@ago.mo.gov.

/s/ Jeanne Willibey
 Jeanne Willibey

Certificate of Compliance

I, Jeannie Willibey, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains approximately 3,490 words, which does not exceed the 7,750 words allowed for an appellant's brief.

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