Case No. 20170957-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

TISHA LYNN MORLEY,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for child abuse homicide, a first degree felony, in the Second Judicial District, Weber County, the Honorable Scott Hadley presiding

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INTRODUCTION

Alisha and Chris Penland had two sons—eight-month-old Lincoln and his three-year-old brother (Brother). When Alisha dropped off her two sons at the daycare run by Defendant just before 7:00 that morning, Lincoln was healthy and well. But when Chris arrived that evening just after 5:00 to pick up the two boys, Lincoln was unresponsive. Alisha and Chris rushed Lincoln to the local hospital. After CT scans revealed a large fracture at the base of Lincoln's skull, bleeding inside the skull, and swelling of the brain, Lincoln was life-flighted to Primary Children's Hospital where he was put on a respirator. Nine days later, Lincoln died. In addition to the large skull fracture, with accompanying bleeding and swelling of the brain, Lincoln suffered

extensive retinal hemorrhages and folds, strained neck muscles, bleeding in the spinal column of the back, and small bucket-handle fractures in both of Lincoln's arms.

After the discovery of a large crack in the daycare's changing table and consultation with medical experts, the State charged Defendant with child abuse homicide. Medical experts concluded that Lincoln's injuries were the result of shaking and shaking with impact.

Two weeks after Lincoln sustained his fatal injuries, a four-year-old child (Child) at the daycare reported that before their lunch, Brother threw Lincoln on the floor, kicked him, stood on him, and shut his head in a door, all while Defendant was downstairs texting. According to Child, Lincoln was bleeding on his head, crying, and died by the time Defendant came upstairs. But Child's story was suspect for several reasons. For example, Lincoln's head injuries did not result in any bleeding, as Child described. And contrary to Child's claim that Lincoln died then and there, Defendant reported that she consoled Lincoln when he cried and that Lincoln ate two or three times after the alleged incident with Brother. Additionally, experts consulted by the prosecutor concluded that Child's account would not result in the constellation of injuries suffered by Lincoln, and that it was highly unlikely that Brother could create the force necessary to cause the injuries.

At trial, the prosecution called a biomechanical engineer, who testified, among other things, that the constellation of injuries suffered by Lincoln can be explained by an adult grabbing Lincoln by the arms, shaking him, and causing his head to strike a firm object. On appeal, Defendant argues that counsel was ineffective for not objecting to this testimony as outside a biomechanical engineer's expertise. But this claim fails at the outset because Defendant cannot show prejudice. Several of the State's medical experts testified likewise. And Defendant has not argued that the testimony exceeded their expertise.

The prosecution also introduced at trial photos of a CPR doll lying on the changing table with its head over the crack and a video of Brother trying to lift a weighted CPR doll. Defendant argues that counsel was also ineffective for not objecting to these exhibits under evidence rule 403 because the doll was not the exact height of Lincoln, and Brother's motivations for lifting the doll were different than at the daycare. But for the same reasons identified in his first ineffective-assistance claim, Defendant has not shown prejudice—absent the exhibits, the evidentiary picture was still the same.

Neither did counsel perform deficiently for not objecting. To establish deficient performance, Defendant must show that all competent counsel would have objected. He cannot. In the first place, counsel is not ineffective

for not making futile objections. Here, any challenge to the exhibits' admission would have failed—the jury was aware of the differences and the exhibits were probative in showing that striking Lincoln's head on the changing table could cause the crack and that Brother was not likely capable of lifting Brother as claimed in Child's report. And even if counsel could have successfully challenged the exhibits, that does not mean that all competent counsel would have objected. In this case, counsel strategically used the exhibits to show that investigators had made up their mind about who caused Lincoln's injuries without considering Child's account.

STATEMENT OF THE ISSUES

Was trial counsel constitutionally ineffective for not objecting to:

(A) the forensic engineer's testimony about the possible causation of the child victim's fatal injuries; and

(B) the photographs of the CPR doll on the changing table (SE84-86) and video of the child victim's three-year-old brother attempting to lift the weighted CPR doll (SE135)?

Standard of Review. A claim of ineffective assistance of counsel raised for the first time on appeal is a question of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344. That said, "[j]udicial scrutiny of counsel's performance [is] highly deferential," and the court must therefore "indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

STATEMENT OF THE CASE

A. Summary of proceedings and disposition of the court.

Defendant was charged with child abuse homicide, a first degree felony, in violation of Utah Code Ann. § 76-5-208 (Westlaw, 2019), for recklessly causing the death of Lincoln. R1. Following a 12-day trial, a jury found Defendant guilty as charged. R1602,6595. More than two months later, Defendant moved to arrest judgment and asked the court to enter a conviction to the lesser included offense of negligent homicide. R1708-19. After briefing and oral argument, the district court denied the motion. R1827-28,2000-01. Defendant was sentenced to a term of five years to life in prison. R1925-27.[1] She timely appealed to the Utah Supreme Court, which thereafter transferred the case to this Court for disposition. R1975,1982-83,1998-99.

B. Summary of relevant underlying facts.

In February 2014, Alisha and Chris Penland had two young sons—eight-month-old Lincoln and his three-year-old brother (Brother). R4264,4269. Brother was small for his age, but healthy. R4279. Lincoln too

[1] Defendant was also later ordered to pay $7,752.30 in restitution—an amount to which she stipulated. R1989-90.

was small for his age—probably lower than the third percentile for weight—but he too was otherwise healthy. R4266,4279,4328. In mid-February, the Penlands changed daycare providers from Mrs. Penland's cousin to defendant Tisha Lynn Morley, who operated "tots & tykes Day Care" from her home in Roy, Utah, and who had cared for Brother a couple years earlier. R4270-73; SE5. The arrangement called for Defendant to care for the two brothers two days a week from about 7:00 a.m. to 5:00 p.m.. R4281.

1. Lincoln arrives at Defendant's daycare happy and healthy, but leaves unresponsive.

At 6:50 a.m. on just the third day of care with Defendant, Mrs. Penland dropped off the two boys with Defendant. R4285-87. Two other children were already there, asleep on two separate couches. R4289. Lincoln was not then injured or in any distress. R4285-96,4335. "He was his normal self, smiling, happy, [and] playful." R4285,4335. Before leaving for work, Mrs. Penland told Defendant that Lincoln had awoken at 4:00 that morning, she had fed him a couple of ounces of milk, and he "may not be hungry right away." R4288. Lincoln was a light eater and had lost interest in milk from a bottle about a month or so before. R4267-68,4329.

A few minutes after 3:00 that afternoon, Mrs. Penland texted Defendant asking how her boys were doing. R4290-92; SE34. Defendant responded about an hour later, but Mrs. Penland did not see the message until that

evening. SE35; R4292-93. In the text, Defendant generally described Lincoln's eating and sleeping habits that day, but reported nothing out of the ordinary. SE35.[2] She said nothing about Brother. *Id.*

Just after 5:00 p.m., Mr. Penland arrived at Defendant's home to pick up Lincoln and Brother. R4336-37; SE33. As Mr. Penland got Brother ready to leave, Defendant brought Lincoln to him and said that she had just laid him down 15 to 20 minutes before. R4338. Defendant then informed Mr. Penland that Lincoln had vomited on himself and took him to change his shirt as Mr. Penland got Brother ready to leave. R4339. As he did, Mr. Penland noticed that Defendant became increasingly upset because she was unable to awaken him. R4339.

Defendant handed Lincoln to Mr. Penland and he noticed that Lincoln's legs were cold to the touch and his head was limp. R4339. Defendant took Lincoln down the hallway and tried to awaken him by splashing water

[2] The text read: "Doing ok. Lincoln seems to be doing better but he has slept a lot. He had two ounces when he got here then fell asleep until nine. Had some apples/sweet potato mixed with cereal and some cheerios. At noon he had some beans but didn't even eat half and absolutely would not take a bottle. He fell asleep from one to three. When he got up he had the rest of the beans and some puffs. Drank one more ounce and is back asleep right now." SE35.

on him, but without success. R4339-40. As Defendant became progressively more agitated, she repeatedly asked what they should do. R4340.

Mr. Penland dialed 9-1-1, but immediately hung up believing that he might just be panicking. R4340. He then called the pediatric care unit at McKay-Dee Hospital, but hung up about 45 seconds later when he could not get through to anyone. R4340-43. Penland called his wife, told her she needed to get home right away, and drove home with the boys to await his wife's arrival. R4294,4343. While waiting for his wife to get home, Mr. Penland moved Lincoln's head a couple of times but it was limp and his breathing was very shallow. R4343-44.

2. Lincoln passes away nine days later after doctors determine that he cannot survive without life support.

Mrs. Penland arrived home five to ten minutes later and, after calling their pediatrician's office and being directed to get to the hospital as fast as they could, the Penlands sped to the emergency room at McKay-Dee Hospital. R4294-97,4344.[3] While en route, Mrs. Penland climbed into the backseat with Lincoln and tried to wake him, but with no success. R4297-98. As she caressed his face, she noticed the right side of his head felt bumpy and she

[3] While driving home, Mrs. Penland took a call from Defendant apologizing and saying she did not know what happened. R4295-96.

could tell that something was not right with his head. R4298. She later observed some bruising on the right side of his head near his ear. R4308.

Once at the hospital, doctors inserted an IV in Lincoln's shin and wheeled him in for CT scan. R4299-4300. At the request of one of the doctors, Mrs. Penland called Defendant to find out whether Lincoln could have ingested any medication. R4300. Defendant said no. R4300. Defendant told Mrs. Penland that she had been trying to think of anything that could have happened and the only thing she could think of was that during lunch, Lincoln had been rocking in the high chair and "bonked" his head. R4300. She said that Lincoln "cried for just a little bit, but then he seemed to be fine." R4300. Defendant again apologized, and said that nothing had ever happened like that to her before and told Mrs. Penland that she hoped she could trust her. R4300-01. Still unaware of the cause of Lincoln's distress, Mrs. Penland told Defendant, "It's okay. It's not your fault." R4301,4318-19.

After completing the CT scan, an ER physician told the Penlands that Lincoln had a severe skull fracture and needed to be life-flighted to Primary Children's Hospital (PCH) R4301,4346. Lincoln was put on a ventilator at Primary Children's Hospital and doctors told the Penlands that they would need to wait for the swelling in Lincoln's brain to go down before doing an MRI to determine what kind of condition he would be in. R4307,4350. Three days

later, doctors performed the MRI and discovered the damage was worse than they had hoped—he would not survive absent life support. R4307,4350.

Doctors presented the Penlands with two options: they could keep Lincoln on life-sustaining equipment and take him home, knowing that he would never regain consciousness, or they could take him off the ventilator and allow him to pass away. R4307. A few days later, after allowing family members to say their goodbyes, the Penland's took Lincoln off life-support. R4307,4350. As his mother lay next to him, Lincoln passed away early the following morning. R4307,4350.

3. Lincoln's injuries were extensive.

Examinations by physicians and pathologists before and after Lincoln's death, including CT scans, MRIs, and autopsies, revealed that Lincoln had that day suffered a constellation of injuries to his head, brain, eyes, arms, neck, and spine:

(1) deep bruising behind his ear (R5420, SE99);

(2) a severe "diastatic" skull fracture (where the edges of the fracture are separated) that began from behind the right ear and extended across the back of his head, going underneath the bottom of the skull towards the front of his head (R5420,6223; SEs102,169);

(3) bleeding on, and swelling of, his brain (R4610,5421, SEs103-104);

(4) retinal hemorrhages in both of his eyes (R5420, SEs108-120);

(5) "bucket-handle" fractures in the humerus (long upper bone) of both of his arms (R5421); and

(6) ligament strains in his neck and "a moderately large collection of blood" (posterior epidural hematoma) in the sacral area of the mid to lower back (R4613).

4. The medical examiner concluded that Lincoln's death was not accidental, but caused by another person.

Following an autopsy, the medical examiner concluded that the "cause of death was blunt force injury of the head" and ruled the manner of death a homicide—meaning that it was caused by another person. R5385-86,5444-45.

C. The prosecution and defense presented to the jury two competing theories of who caused Lincoln's death.

The jury at trial was presented with two competing theories of who caused Lincoln's death.

The State argued that Defendant caused the injuries by shaking Lincoln and slamming him into a changing table that had a large, circular crack in it—which Defendant admitted she had not seen until after Lincoln was injured. *See* SEs53-64; SE134 (video recording of Morley's interview in her home on day of injury).

Defendant argued that three-year-old Brother was the likely cause of Lincoln's injuries. *See* R4255-61,6380-6400. Defendant pointed to an interview conducted two weeks after Lincoln was injured of a four-year-old child (Child) who was at the daycare that day. R4790. Child reported seeing Brother throw his "little boy" on the floor, kick him, stand on his stomach, and shut the door on his head. SE128 (video recording of interview). Child said that this occurred after breakfast, but before lunch, in the front room while Morley was downstairs texting on her phone. *Id.* Child claimed that the baby was bleeding on his head and was already dead when Defendant came upstairs. *Id.* Child said that the baby was still on the floor when Morley made lunch. *Id.* The defense also argued that the crack in the changing table was caused by Morley's four-year old child, R4259, who claimed during an interview that she broke it when she stood on it, SE132 (interview).

In support of Defendant's theory that Brother could have caused Lincoln's injuries, the defense called Dr. Janice Ophoven, a pediatric forensic pathologist, who testified that the injuries suffered by Lincoln could have been caused by Brother. *See* R5736-5937.

In support of its position that Defendant was responsible for Lincoln's injuries, the State called four medical experts: (1) Dr. Bruce Herman, a child abuse pediatrician at Primary Children's who consulted on Lincoln's

treatment after he was admitted into the hospital, R4582-4706; (2) Dr. Nick Mamalis, an ophthalmic pathologist at the University of Utah's Moran Eye Institute who autopsied Lincoln's eyes after his death, R4497-4562; (3) Dr. Pamela Ulmer, the assistant medical examiner who performed the autopsy on Lincoln, R5377-5510; and (4) Dr. Gary Hedlund, a pediatric neuroradiologist at Primary Children's, R6172-6269. In addition, the State called David Ingebretsen, a biomechanical engineer, R4852-4993.[4]

SUMMARY OF ARGUMENT

Biomechanical engineer's testimony. Defendant argues that his trial counsel was constitutionally ineffective for not objecting to the biomechanical engineer's testimony that the constellation of injuries suffered by Lincoln can be explained by an adult grabbing him by the arms, shaking him, and forcibly striking his head against a firm object. Defendant has not proven either deficient performance or prejudice. But this is a case where the Court need look no further than prejudice.

Excluding the biomechanical engineer's testimony would not have changed the overall evidentiary picture enough to make a more favorable outcome reasonably likely. All of the State's medical experts at trial testified

[4] The relevant portions of the testimony of the State's expert witnesses are included in the Argument.

likewise—the constellation of Lincoln's injuries were consistent with shaking and shaking with impact of Lincoln's head. And none of those medical experts believed that Brother's alleged interaction with Lincoln would cause all of the various injuries, nor did they believe that Brother was capable of applying the force necessary to cause the basilar skull fracture.

In any event, contrary to Defendant's claim, the biomechanical engineer's testimony that Lincoln's injuries could be explained by an adult grabbing him by the arms, shaking him, and striking his head against a firm object is precisely the area of expertise to which he is qualified to opine—the forces that could be generated to cause bodily injuries. Thus, any objection to the testimony would have failed. Competent counsel is not required to make futile objections. Moreover, because four other experts came to the same essential conclusion, a competent attorney could reasonably choose not to object.

Exhibits involving CPR doll. The prosecution introduced photos of a CPR doll lying on the changing table and a video of Brother trying to lift a weighted CPR doll. Defendant argues that counsel was ineffective for not objecting to these exhibits because the doll was not the exact height of Lincoln, and Brother's motivations for lifting the doll were different than at the daycare. He contends that as a result, their probative value was substantially outweighed by the risk of misleading the jury.

Defendant has not shown that no competent attorney would have elected not to object. In the first place, competent counsel is not required to make futile objections. The jury knew the doll was not identical in size to Lincoln, and they were aware that Brother's motivations may not have been the same. Thus, there was no risk of misleading the jury. And the exhibits had substantial probative value. The photos helped the biomechanical engineer explain how Lincoln's head could crack the changing table. It was not necessary for the doll to be the exact height as Lincoln—the point was not where Lincoln would lie. The point was that if Lincoln's head struck the changing table in that location on the table, it could cause the resulting crack. And the experiment in which Brother was asked to lift the weighted doll—which was still 4 pounds lighter than Lincoln—was probative in showing that Child's account was unlikely. In other words, counsel could conclude any challenge to the evidence would have failed.

But even if counsel could have successfully challenged the evidence, that does not mean that all competent counsel would have objected. There are a myriad of reasonable ways to represent a client. In this case, counsel used the exhibits to argue that police blindly pursued their preconceived theory to the detriment of a fair examination of Child's account. It cannot be said that no reasonable counsel would have chosen that same course.

ARGUMENT

Trial counsel was not constitutionally ineffective for not objecting to the biomechanical engineer's testimony or to the photos and a video of a CPR doll used as demonstrative exhibits.

Defendant contends that his trial counsel was constitutionally ineffective assistance because he did not object to: (1) the biomechanical engineer's testimony on the possible cause of Lincoln's injuries; and (2) using the photographs of the CPR doll on the cracked changing table (SEs84-86), and the video of Brother trying to lift the weighted CPR doll (SE135) as demonstrative exhibits. To prevail, Defendant must prove both that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court must affirm if the defendant fails to prove either element. *See id.*

A. Defendant has not overcome the substantial burden of proving that trial counsel was ineffective for not objecting to the biomechanical engineer's testimony.

Defendant claims that trial counsel was constitutionally ineffective when he did not object to certain testimony of David Ingebretsen, a forensic biomechanical engineer called by the State. Aplt.Br. 33-42. He argues that although Ingebretsen "was qualified to testify about the effect of certain forces on the human body, [Ingebretsen] lacked the medical training necessary to opine about the exact causes of [Lewis's] specific injuries." Aplt.Br. 33.

Specifically, Defendant complains that counsel did not object to Ingebretsen's testimony that:

> (1) Lincoln's injuries were "all very easily explained and simply explained" by "an adult grabbing [Lewis] by the arms, shaking [him], and while shaking, forcibly causing his head to strike … a firm object," R4914, "which is perfectly explained by the fracture in [the] changing table," R4944;
>
> (2) "the object [struck by the head] has to have essentially an edge or a lip so that it struck [Lincoln] right back here on the mastoid bone," R4914;
>
> (3) shaking the child and striking his head "explains the fracture … the diffuse injuries … the hematomas … the entire constellation" and "is a perfect explanation for the retinal hemorrhaging and folds" (but also testifying that "those can be caused, again, independently, by other means"), R4923; and
>
> (4) the blood vessel ruptures in Lewis's lower back "fits perfectly with the idea of grabbing [Lewis's] arms and shaking," R4925.

Aplt.Br. 40-41. Defendant argues that by so testifying, Ingebretsen "exceeded the scope of his biomechanical expertise and [improperly] testified about the precise cause of a specific injury." Aplt.Br. 41 (cleaned up).

1. Defendant has not proven he was prejudiced by the bio-mechanical engineer's testimony.

This Court can reject Defendant's ineffectiveness claim without even considering counsel's performance because she has not shown prejudice. As explained in *Strickland*, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing" on either one of the two ineffective-assistance elements. 466 U.S. at 697. "In particular," *Strickland* noted, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* That is the case here.

Defendant complains that his trial counsel did not object to Ingebretsen's testimony that the whole of Lincoln's injuries were easily explained by someone grabbing him by the arms, shaking him, and striking his head against a firm object. But to prove prejudice, Defendant must prove that a successful objection would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely. *Strickland*, 466 U.S. at 695-96. "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). Defendant must instead show a

"substantial" likelihood of a different result. *State v. Nelson*, 2015 UT 62, ¶28, 355 P.3d 1031. Defendant has not met that burden here. Four other experts offered materially indistinguishable testimony. And Defendant has not argued any basis for objecting to that testimony.

Dr. Herman, the child abuse pediatrician at Primary Children's Medical Center, testified that the "*constellation* and the *degree* and the *number* of injuries" suffered by Lincoln were "*very consistent and specific for abusive injuries by shaking or shaking with impact*." R4626 (emphasis added). He explained that the bleeding into the spinal fluid surrounding the brain was consistent with "*severe shaking and/or shaking with impact*," by the tearing or shearing of "bridge vessels" that go from the brain to the bigger vessels around the brain. R4611-12 (emphasis added). He explained that the "sacral thoracic epidural hematoma" in Lincoln's back was likely "the *result of his back hyperextending and hyperflexing during a period of … shaking*, similar to the neck." R4688 (emphasis added).

Added to all this, Dr. Herman testified that the skull fracture and corresponding head injuries "implies significant impact," akin to an auto accident where the child is unrestrained, a bike accident where a child collides with a car or is going down a hill and crashes, or shaking by an adult and slamming or impacting his head against something. R4603-06,4629-30. And

finally, Dr. Herman testified that he has "not found a case that [this constellation of injuries] has been caused by a three-year-old," R4629,4690. Dr. Herman added that it was "extremely unlikely" that a three-year-old could cause the bilateral arm fractures by simply picking up a baby, R4627,4705.

Dr. Hedlund, the pediatric neuroradiologist, testified similarly. He explained that "the combination of these injuries"—the diastatic skull fracture, the subdural blood, the subarachnoid blood, the increased swelling in the brain, the neck injuries, the blood in the spinal canal, and the fractures in the right and left arm bones—"so strongly points to abusive trauma or inflicted injury." R6235. And he testified that "one traumatic event"—"shaking and shaking impact"—was the "likely mechanism" that explained "all these injuries." R6269 (emphasis added).

Moreover, Dr. Hedlund stated his belief that Lincoln's injuries "were caused by the hands of an adult." R6260. He disagreed that pulling Lincoln's arms could cause the humerus fractures, but "[g]rabbing and shaking" could. R6259. And he disagreed that a three-year-old swinging a door into Lincoln's head could have caused the head injuries, explaining that he "would not expect the scope of intracranial injuries, brain swelling, bleeding in multiple compartments [of the brain], [and] a diastatic fracture to result from a three-year-old swinging a door onto a head." R6260,6264-65. And finally, he

discounted a constrained, or crush, injury where there are two opposite forces on the head, because he did not find a corresponding injury on the other side of Lincoln's head. R6240-42. Instead, like Ingebretsen, Dr. Hedlund concluded that the skull fracture was the result of "impact to a flat surface." R6242-43.

Dr. Ulmer, the medical examiner who performed the autopsy, was not an expert in shaken baby syndrome or abusive head trauma. However, she too agreed that "grabbing [Lincoln], shaking him, slamming him into that changing table" at Defendant's home "potentially could" cause all of the injuries suffered by Lincoln. R5493; *accord* R5467-68 (explaining that shaking could result in some injuries to the neck and spine of an infant). R5467-68. And she testified that a 30-pound three-year-old kicking Lincoln, picking him up by one hand, dropping him, and slamming his head in the door "would not" be sufficient to cause all of Lincoln's injuries. R5497.

The State also called Dr. Mamalis, the ocular pathologist who autopsied Lincoln's eyes. His testimony was confined to Lincoln's eye injuries, but also filled in important details of the evidentiary picture painted by the State. He testified that the retinal hemorrhages and folds in Lincoln's eyes have only been found in cases of violent shaking from abuse, severe automobile accidents where the child was unrestrained and bounced around inside the

vehicle, and falls of more than one story. R4519-20,4522,4533-35,4539,4547. He explained that slamming a child's head into a table would be sufficient, R4548—not rolling off a couch or changing table, R4520. He acknowledged that slamming a door into a child's head could cause the macular folding "[i]f there was sufficient force," but it would need to be "the equivalent of a motor vehicle accident." R4523. He testified that "it would be very doubtful that a three-year-old could generate enough force and enough trauma to cause" the injuries found in Lincoln's eyes. R4517.

In sum, Ingebretsen's testimony that all of Lincoln's injuries could be explained by an adult grabbing Lincoln, shaking him, and striking his head against a firm object was materially the same as Drs. Herman's, Hedlund's, and Ulmer's testimony, corroborated in part by Dr. Mamalis. As a result, even absent Ingebretsen's testimony, the evidentiary picture would be substantially the same.

Defendant hasn't proved otherwise. She points to the lack of Lincoln's DNA on the changing table, the two accounts of children at the daycare, and Lincoln's behavior after lunch. Aplt.Br. 43-49. But prejudice must be assessed on the change in the *entire* evidentiary picture. As shown, successfully excluding the testimony of one of five experts on essentially the same issues

would not have been a change sufficient to make a more favorable outcome reasonably likely.

Defendant also argues that only Ingebretsen "absolutely linked [her] with Child's injuries," and that unlike Ingebretsen, all of the doctors testified that there could be other causes of Lincoln's injuries. Aplt.Br. 45-47,49-50. But this argument mischaracterizes both the doctors' testimony and Ingebretsen's testimony. It is true that the doctors all testified that there could be other causes for the various injuries when viewed in isolation, but as explained, each of the doctors testified that shaking with impact to the head was consistent with all of the injuries—the essence of Ingebretsen's testimony. And while Ingebretsen testified that the constellation of injuries was explained by shaking with impact to the head against a firm surface, he too acknowledged that in isolation, each of the injuries could be caused in other ways. *See* R4945.

In sum, this Court should reject Defendant's ineffectiveness claim because he has not shown prejudice. The Court need go no further.

2. In any event, Defendant has not proved that all competent counsel would have objected to the biomechanical engineer's testimony.

Defendant's ineffective-assistance claim also fails because he has not shown that counsel performed deficiently by not objecting to the challenged testimony.

To prove deficient performance, Defendant must demonstrate that his counsel's performance fell "below an objective standard of reasonableness." *Id.* at 688. This is no easy task. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). This is so, in part, because a defendant must overcome the "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. As explained in *Strickland*, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689. Thus, to prove deficient performance, the defendant must demonstrate that "no competent attorney" would have proceeded as did defendant's counsel. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *accord State v. Coombs*, 2019 UT App 7, ¶20, 882 Utah Adv. Rep. 13 ("Performance is deficient under *Strickland* only when 'no competent attorney' would have so acted.") (quoting *Premo*). Defendant has not overcome this high bar.

In support of his claim that counsel was deficient, Defendant cites two decisions from this Court, several Utah district court cases, Aplt.Br. 35 & n.7, and numerous federal and state cases purportedly supporting the proposition that biomechanical engineers without medical training are not qualified to testify about the cause of a person's injuries, Aplt.Br. 35-39 & n.8. She

contends that these cases demonstrate a national consensus that biomechanical engineers like Ingebretsen should not be allowed to testify and that counsel's decision not to object was thus unreasonable. Aplt.Br. 42. But these cases did not put counsel on notice that Ingebretsen's testimony was inadmissible.

Competent counsel is not required to raise futile objections. *See Codianna v. Morris*, 660 P.2d 1101, 1109 (Utah 1983) ("The failure of counsel to make motions or objections which would be futile if raised does not constitute ineffective assistance."). But neither is counsel required to raise all meritorious objections. *See Ross v. State*, 2012 UT 93, ¶45, 293 P.3d 345 (holding that "appellate counsel's failure to raise an obvious, meritorious claim does not automatically render his assistance ineffective"). The question is whether counsel's actions were objectively reasonable "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

In this case, any challenge to Ingebretsen's testimony would have been futile. Whether expert testimony is admissible, and if so, the permissible scope of that testimony, is governed by evidence rules 701 through 704. Yet, Defendant engages in almost no analysis explaining why the challenged testimony did not meet the requirements of those rules. Instead, he cites two cases from this Court, a smattering of unpublished, state district court cases, and various state and federal cases from outside Utah. *See* Aplt.Br. 34-40.

The two cases Defendant cites from this Court do not help him. In *Balderas v. Starks*, 2006 UT App 218, ¶¶26-30, 138 P.3d 75, this Court upheld the an accident reconstructionist's testimony about "the likelihood of a resultant injury" following a car accident. The Court said nothing about biomechanical engineers.

Defendant cites *Beard v. K-Mart Corp.* for the proposition that "the diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons." 2000 UT App 285, ¶16, 12 P.3d 1015 (cleaned up). But Ingebretsen did not diagnose the injuries suffered by Lincoln. As he explained in his testimony, "the doctors are the diagnosticians. They tell [him] what broke." R4874. Nor did he attempt to explain what happened to Lincoln's body after sustaining the injuries. He limited his testimony to "what pattern of applied and inertial forces are consistent with the injuries [seen] in Lincoln." R4880. That question is "outside the knowledge and experience of the average individual," but within the particular realm of Ingebretsen's expertise. *Balderas*, 2006 UT App 218, ¶27 (cleaned up). Accordingly, the testimony satisfied rule 702's requirement that it "help the trier of fact to understand the evidence or to determine a fact in issue." Utah R. Evid. 702(a).

Nor do the state district court cases help Defendant. Most of those cited purportedly stand for the proposition that a biomechanical engineer may not offer medical testimony. *See* Aplt.Br. 35 n.7. The same holds true for many if not most of the other state and federal cases Defendant cites. *See* 36-39.

But Ingbretsen did not offer medical testimony. He testified about the forces that could result in the injuries that the medical doctors diagnosed.

But even if he could have successfully objected to the challenged testimony, Defendant still has not proved deficient performance. The standard is not whether counsel could have successfully objected, but whether "all reasonably competent attorneys" would have done so. *State v. Bruhn*, 2019 UT App 21, ¶18 n.3, 884 Utah Adv. Rep. 7. Defendant has not shown that to be the case. Where the medical experts provided essentially the same testimony, reasonable counsel could conclude that there was no benefit to objecting, and may reasonably choose instead to attack the expert's conclusions as counsel did here. *See* R4945-4977.

In sum, Defendant has not established that all reasonable counsel would have challenged Ingebretsen's testimony. Nothing in Utah caselaw indicated that the testimony was inadmissible. *See State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993) (finding no deficiency where defendant cited no controlling authority in effect at the time of trial that would have supported his claim).

Nor does the other caselaw cited by Defendant so hold. And given the substantially similar testimony of the medical experts, counsel could reasonably have chosen not to object. Accordingly, Defendant has not shown deficient performance.

B. Defendant has not overcome the substantial burden of proving that trial counsel was ineffective for not objecting to using the photos of the CPR doll on the changing table and the video of Brother trying to lift the weighted CPR doll as demonstrative exhibits.

Defendant argues that trial counsel should have objected to three photographs of the CPR doll on the cracked changing table (State Exhibits 84-86) and the video of Lincoln's brother attempting to lift the weighted CPR doll (State Exhibit 135). Aplt.Br. 51-55. He claims that counsel should have objected to the evidence under evidence rule 403. He argues that the probative value of the photos (arguing that there was none) was substantially outweighed by the danger of misleading the jury because they "purport[ed] to tell the jury what happened in a powerful, visual way" by manipulating the legs of a doll that was shorter than Lincoln. Aplt.Br. 51-53. Similarly, Defendant argues that the "marginal" probative value of the video to show that Brother was likely unable to lift Lincoln in a manner suggested by the defense was substantially outweighed by the danger of misleading the jury "because

the circumstances and personal motivation were not the same." Aplt.Br. 53-55.

Defendant again fails to overcome the difficult burden of proving ineffective assistance of counsel.

1. Defendant has not proven that all competent counsel would have objected to the exhibits.

In the first place, Defendant has not shown that counsel was deficient for not objecting to the evidence. Not only would an objection have been futile, but reasonable counsel also could have elected not to object and used the exhibits against the State, as counsel did here. Certainly, it cannot be said that "no competent counsel" would have followed the course trial counsel did here.

As discussed, Defendant must demonstrate that "no competent attorney" would have proceeded as did defendant's counsel. *Premo*, 562 U.S. at 124. Or, stated another way, Defendant must demonstrate that "all reasonably competent attorneys" would have objected to the exhibits. *See Bruhn*, 2019 UT App 21, ¶18 n.3. Here, there are at least two reasons that competent counsel may not have objected. First, counsel could conclude any objection would have been futile. And second, even if an objection could have succeeded, counsel's decision to use that evidence against the State "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (cleaned up).

Under rule 403, relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by a danger of … unfair prejudice … or misleading the jury." Utah R. Evid. 403. Defendant contends that the photos of the CPR doll had "no probative value" because "the doll was nowhere near the actual height" of Lincoln and officers "had to spread the legs of the doll wide so that it would fit neatly where they wanted it to fit." Aplt.Br. 52. Defendant contends that the picture of the doll on the changing table was thus irrelevant because had the doll been the same length as Lincoln, "the crack in the changing table would have been below the doll's lower back," not "perfectly align[ed] with the crack" as depicted in the photos. Aplt.Br. 52.

Defendant misses the point. Ingebretsen did not suggest that Lincoln was lying on the changing table when he incurred the injuries. The point of the photos was to help him explain that "the physical dimensions and location of *the head* in relationship to the fracture and the length and breadth of the *changing table* are consistent" with Lincoln being grabbed and "forcibly caused to strike some firm object." R4941 (emphasis added). Ingebretsen had explained that the circular crack could only be caused by "a round object that hit right" at the support beam under the table top, 4937-38, which was consistent with Lincoln being "*thrown down* on the table" at that location, R4941-

42 (emphasis added). This did not require that Lincoln fit neatly onto the changing table; whether or not his legs dangled over the changing table when that occurred was irrelevant.

Moreover, there was nothing misleading about the photos. As noted, Ingebretsen explained to the jury the photos' purpose. And the jury was well aware of the differences in size. *See* R4428 (officer testifying that doll "was a few inches shorter" than Lincoln). As a result, the probative value of the photos was not substantially outweighed by the risk of misleading the jury or unfair prejudice. Under these circumstances, reasonable counsel would have reason to believe that a challenge to the photos would not have prevailed. *See, e.g., Faust v. State*, 805 S.E.2d 826, 833 (Ga. 2017) (holding that where exhibits similarities and differences are made known to jury, "an objection to the demonstrative exhibits would have been wholly without merit, and counsel was not ineffective for failing to make a meritless objection to the State's introduction of those exhibits); *State v. Jones*, 984 N.E.2d 948, 966 (Ohio 2012) ("An exhibit is not necessarily incompetent because it fails to show some exact thing in connection with the subject under investigation, provided it shows some matter bearing directly upon the matter under investigation, with an explanation of how it differs from that which is being investigated.") (cleaned up).

The same is true with regard to the video showing Brother trying to lift the weighted CPR doll. The testimony at trial established that Lincoln weighed approximately 17 pounds at the time of the incident. R4800. And the testimony also established that the weighted doll weighed some 4 pounds *less* than Lincoln. R4802. The experiment was thus highly probative of whether Brother was capable of lifting or throwing Lincoln down as theorized by the defense. While this experiment may very well have been "prejudicial in the sense of being damaging to the party against whom it is offered," *State v. Mauer*, 770 P.2d 981, 984 (Utah 1989), it was not unfairly prejudicial. Nor was it misleading. And to the extent that Brother's motivations may have been different in the two circumstances, counsel made the jury aware of that. R6409-10.

In sum, defendant's decision not to object to admission of the exhibits did not constitute deficient performance because any objection would have failed. Certainly, reasonable counsel could conclude that an objection would have been unsuccessful. *See State v. Bond*, 2015 UT 88, ¶2, 361 P.3d 104 (holding that counsel not deficient in not making motion that "would have been futile").

But even assuming arguendo that counsel could have successfully objected to the exhibits under rule 403, that is only half the battle in showing

deficient performance. He must also demonstrate, at the least, that counsel's decision not to object cannot "be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (cleaned up). As explained in *Strickland*, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689. Thus, to prove deficient performance, the defendant must demonstrate that "no competent attorney" would have proceeded as did defendant's counsel. *Premo*, 562 U.S. at 124. Defendant has not even attempted to overcome this high bar.

In this case, it is evident that counsel chose to use the exhibits against the State. In closing, the defense argued that despite Child's report that Brother injured Lincoln, "law enforcement set out to sweep [Child's] statement under the rug." R6401. Counsel argued that rather than trying to corroborate Child's account, law enforcement did "the exact opposite"—"stuck on their … theory that they had from the very first night." R6405-06. And counsel argued that investigators were obsessed with trying to prove that theory through wholly unreliable experiments with the CPR doll:

> They send CSI over to put a doll on the changing table.
>
> And you've seen the photos. I don't know if anyone noticed—I sure hope so. *They put this doll on it to make it line up.* Perfectly, by the way. *To make it line up perfectly with the crack—and you'll see the photos as you deliberate. They had to spread the legs*

> *out entirely. And we asked on cross-examination whether they took any other photos, any other alignments, and they said no.*
>
> … I don't want to pretend as though this test is definitive of anything, by the way. You know, *after [Child] gives her statement, nothing is done about it*. And the only—*the next thing they do is they go over with CSI, still looking at the changing table that [another child] had previously told them she broke*. … And they're still stuck on the theory. *They're not even considering what [Child] says yet*.
>
> … *They line up a baby up perfectly by stretching its legs to make it fit, take some photos, and further confirm what they made up their minds on three weeks before that*.

R6406-07 (emphases added).

Counsel then turned to the experiment with Brother lifting the doll. Counsel emphasized that the day after the photos, the officers went to the Penlands to "conduct—I don't even want to call it a test—that crude experiment." R6408. And counsel proceeded to again emphasize that investigators proceeded to confirm their theory with an unreliable experiment, rather than try to corroborate [Child's] report:

> This is three weeks after his baby brother passed away. Three weeks. Detective Vanderwarf comes to his home with a box, playing toys. *He's probably thinking, this is cool. What's in the box? And he pulls out a baby whose limbs are falling off*. Again, a few -- *a few short weeks from the time his brother passed away, likely grieving in his own – in his own way*. And they tell him to pick it up. Let's see if you can pick up this baby, from his knees, by the way. From his knees.
>
> *After they've shoved weights in the middle compartment -- not in the legs, not in the head, not evenly disputed, but central*. Right here. And the limbs are falling off. *Boston is on his knees. They never ask him one time: Hey, Buddy, stand up for me. Let me see how you can do*

> *that. No.* They take four minutes. That -- that -- there's --again, I hesitate to call it a test. *There's nothing scientific about what they did*. They took four minutes to completely discount and disregard [Child's] statement.
>
> *And from that moment on it didn't matter anymore. … We can still go with what we had made up our mind weeks before.*
>
> …
>
> *… At no point – at no point did law enforcement even go look at the doors at Mrs. Morley's house after they heard from [Child] …. They took that and they disregarded her*.

R6409-10 (emphases added).

Here, counsel chose to use the exhibits against her. It cannot be said that "no competent attorney" would have proceeded as did defendant's counsel. *Premo*, 562 U.S. at 124.

2. Defendant has not proven he was prejudiced by the photos and video.

Moreover, Defendant has not shown prejudice. Like Ingebretsen's testimony, excluding the CPR doll photos and video would not have changed the overall evidentiary picture enough to make a more favorable outcome reasonably likely. As discussed, *supra*, at 19-21, the State's medical experts testified that Lincoln's injuries, in the aggregate, could be explained by shaking and shaking with impact. And three testified that it was highly unlikely that a three-year-old could inflict all of these injuries. *See supra*, at 19-21. The photos and video were used to help show that slamming Lincoln into the

changing table could have caused the crack and his injuries, and that Brother was not likely capable of doing what Child had reported. But this was essentially the testimony of the experts. Accordingly, the exhibits did not substantially add to the evidentiary picture. The Court can thus reject Defendant's ineffective-assistance claim on this ground as well.

* * *

In sum, Defendant has not met the high burden of proving that counsel was deficient for not objecting to the exhibits. Any objection would have been futile and counsel's use of the exhibits to attack the State's case was reasonable. Having failed to prove either deficient performance or prejudice, Defendant's ineffective-assistance claim fails.

CONCLUSION

For the foregoing reasons, the State requests that the Court affirm Defendant's conviction for child abuse homicide.

Respectfully submitted on April 1, 2019.

SEAN D. REYES
Utah Attorney General

/s/ *Jeffrey S. Gray*
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Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7,970 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ *Jeffrey S. Gray*
JEFFREY S. GRAY
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 5, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☑ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf), together with the required number of hard copies:

☐ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☑ was filed with the Court (incl. CD or by email) and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ *Jeffrey S. Gray*

ADDENDA

ADDENDUM A

- **Utah Code Ann. § 76-5-109(2) (Westlaw, 2019)**
  (Child Abuse – Child Abandonment)

- **Utah Code Ann. § 76-5-208 (Westlaw, 2019)**
  (Child Abuse Homicide)

Utah Code Ann. §76-5-109(2) (Westlaw, 2019). Child abuse–Child Abandonment

(2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

* * *

(b) if done recklessly, the offense is a felony of the third degree; or

* * *

Utah Code Ann. § 76-6-301(Westlaw, 2018)

(1) Criminal homicide constitutes child abuse homicide if, under circumstances not amounting to aggravated murder, as described in Section 76-5-202, the actor causes the death of a person under 18 years of age and the death results from child abuse, as defined in Subsection 76-5-109(1):

(a) if the child abuse is done recklessly under Subsection 76-5-109(2)(b);

(b) if the child abuse is done with criminal negligence under Subsection 76-5-109(2)(c); or

(c) if, under circumstances not amounting to the type of child abuse homicide described in Subsection (1)(a), the child abuse is done intentionally, knowingly, recklessly, or with criminal negligence, under Subsection 76-5-109(3)(a), (b), or (c).

(2) Child abuse homicide as described in Subsection (1)(a) is a first degree felony.

(3) Child abuse homicide as described in Subsections (1)(b) and (c) is a second degree felony.

ADDENDUM B

State's Exhibits 84-86

(Photos of CPR doll on changing table)

Exhibit #84

State's Exhibit S94
Case No. 14K000206
Date: 5-1-17
Clerk's Initials DG

Exhibit #85

State's Exhibit S95
Case No. 1419006
Date: 5-4-17
Clerk's Initials DG

Exhibit #86

State's Exhibit S86
Case No. 1419608C6
Date: 5-4-17
Clerk's Initials DG