# MEMORANDUM DECISION



IN THE

# Court of Appeals of Indiana



Courtney Kincaid,

*Appellant-Petitioner*

v.

State of Indiana,

*Appellee-Respondent*

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June 16, 2025

Court of Appeals Case No.
24A-PC-2545

Appeal from the Whitley Circuit Court

The Honorable Matthew J. Rentschler, Judge

Trial Court Cause No.
92C01-2212-PC-1006

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**Memorandum Decision by Judge Vaidik**
Judges Bailey and DeBoer concur.

**Vaidik, Judge.**

## Case Summary

[1] Courtney Kincaid was convicted of Level 1 felony aggravated battery and Level 1 felony neglect of a dependent resulting in death for battering an eleven-month-old baby at her in-home daycare, and the trial court sentenced her to thirty years. Kincaid petitioned for post-conviction relief, arguing that her trial attorneys were ineffective. The post-conviction court denied relief, and Kincaid now appeals. We affirm.

## Facts and Procedural History

[2] In August 2017, Kincaid started operating an unlicensed daycare in her Columbia City home. *See* Trial Tr. Vol. IV pp. 138, 170. Nick and Sherry Leeman's daughter, E.L., who was born in April 2017, started going there in January 2018. On April 12, Nick dropped off E.L., then eleven months old, at Kincaid's house around 7:00 a.m. At 10:21 a.m., Kincaid took a photo of E.L. and texted it to Sherry. *See* Trial Ex. Vol. VI p. 47; Trial Tr. Vol. IV p. 65. E.L. was "alert and smiling" in the photo. Trial Tr. Vol. IV p. 65. At 12:04 p.m., Kincaid called 911, reporting that E.L. was unresponsive with foam coming out of her mouth but that she was breathing and had a pulse.

[3] A Whitley County Sheriff's Department deputy responded and attempted to enter the home, but the doors were locked. Kincaid eventually exited the front door with E.L. "in her hands." Trial Tr. Vol. III p. 120. She said that she had laid E.L. down, and at some point, the baby coughed. When Kincaid checked

on E.L., she was "foaming at the mouth." *Id.* at 121. Kincaid said E.L. "had been sick recently" but didn't mention a head injury, fall, or accident. *Id.* When the paramedics arrived, E.L. was pale and not breathing on her own, but she had a good pulse. E.L. was transported to the closest hospital, Parkview Whitley Hospital, where she underwent a head CT at 1:20 p.m.

[4] The CT images were sent to radiologist Dr. John Reed, Jr., for his review. Dr. Reed saw on the CT scan a "moderate size" subdural hematoma on the left side of E.L.'s brain, above and behind her left ear. P-C Ex. Vol. III p. 238. Dr. Reed also observed a "large" skull fracture just above and behind her ear, with soft-tissue swelling in the area of the fracture. Trial Tr. Vol. III p. 113. Dr. Reed said there was "significant swelling" in E.L.'s brain, which had shifted from the pressure. *Id.* at 112. He believed "everything pointed to a major blow of some sort, a blunt force impact to that side of the head." *Id.* According to Dr. Reed, the injury to E.L.'s brain "most likely" occurred four to eight hours before the CT scan. *Id.* at 117.

[5] E.L. was transferred to Parkview Regional Medical Center in Fort Wayne for surgery, arriving there around 2:00 p.m. Dr. William Young, a neurosurgeon, performed a craniectomy, where he removed a portion of E.L.'s skull to remove a blood clot and to relieve the pressure inside her skull from the swelling. Dr. Young believed that it would have taken "severe force" to cause such an injury, akin to a baseball bat or car accident. *Id.* at 66. Dr. Young also opined that E.L.'s skull fracture was "large." *Id.* at 68. As for when he believed the injury incurred, Dr. Young deferred to the radiologist. *See id.* at 69.

[6] Meanwhile, detectives started their investigation that day. A detective went to Kincaid's house, and she agreed to talk to him. During the interview, Kincaid explained that when E.L. woke up from her nap, she was gasping for air and had saliva and foam coming from her mouth. Kincaid said she didn't know what happened to E.L. *See id.* at 136.

[7] The craniectomy was ultimately unsuccessful due to "massive bleeding and brain swelling," *id.* at 65, and E.L. was pronounced dead shortly after 10:00 p.m. Her organs were donated, which delayed the autopsy for several days.

[8] The next day, April 13, Kincaid agreed to be interviewed again by detectives. Kincaid recounted the events from the day before, providing the same information. P-C App. Vol. II p. 180. When one of the detectives stated that E.L. may have suffered a head injury, Kincaid responded that E.L. had fallen two days before the incident and bruised her head. *Id.*

[9] On April 16, Dr. Darin Wolfe, a forensic pathologist, conducted E.L.'s autopsy. He issued a preliminary report that day. *See* Trial Ex. Vol. VI p. 78.

[10] Four months later, in August, Kincaid agreed to take a stipulated polygraph examination administered by Indiana State Police Sergeant Matthew Collins. The polygraph was conducted on August 10, and the results showed that Kincaid was being "deceptive" when she (1) denied harming E.L. and (2) denied knowing how E.L. was harmed. Trial Tr. Vol. III p. 190; Trial Ex. Vol. VI p. 65. When Kincaid was told that she had failed the polygraph, she gave a second story: she picked up E.L. from the carpeted floor because she was not

responding and then dropped her back onto the floor. Trial Tr. Vol. III p. 192; Trial Ex. Vol. VI p. 68.

[11] After several hours, Kincaid was told she could leave, but she stayed and told a third story. This time, Kincaid said she dropped E.L. on the concrete patio outside when two children ran into her. Trial Tr. Vol. III p. 195. Then E.L. slept for an hour, and Kincaid heard her coughing. *Id.* at 196. Kincaid said that when she picked up E.L., she was unresponsive, and she dropped her again. *Id.*

[12] The next month, in September, Dr. Wolfe issued the final autopsy report. The report describes the following injuries to E.L.'s head: (1) retinal hemorrhages (right and left eyes); (2) perineural hemorrhages (right and left optic nerves); (3) acute subdural hemorrhage (left skull base dura matter and right dura matter); (4) acute subarachnoid hemorrhage (both cerebral hemispheres and cerebellum); and (5) left temporal-parietal skull fracture. Trial Ex. Vol. VI p. 74. E.L.'s cause of death was determined to be blunt-force traumatic injuries of the head. *Id.* at 71. Like the other doctors, Dr. Wolfe opined that a "significant force" was required to fracture E.L.'s skull, not just a "simple fall." Trial Tr. Vol. IV pp. 44, 46.

[13] In May 2019—thirteen months after E.L.'s death—Kincaid was arrested and charged with Level 1 felony aggravated battery, Level 1 felony neglect of a dependent resulting in death, and Level 2 felony battery on a child resulting in death. After her arrest that day, Kincaid agreed to speak to the detectives again. She was told for the first time that E.L.'s cause of death was blunt-force trauma.

Trial Tr. Vol. III p. 176. Kincaid then told the detectives a fourth story: she had sat E.L. on top of a three- or four-foot-high wall on her patio, and her dog knocked E.L. off the wall. Trial Tr. Vol. IV p. 63. Kincaid followed that up with her fifth and final version: she had become frustrated with the children that day, and E.L. wouldn't stop crying and was inconsolable. Kincaid said that she took E.L. to her shoulder and, "as hard as [she] could," "laid" her on the living-room floor "headfirst." Trial Tr. Vol. III p. 48; Trial Tr. Vol. IV pp. 165, 169; P-C App. Vol. II p. 183 (post-conviction court's order containing transcript of interview). Kincaid said she then thought, "oh God, what did I do." Trial Tr. Vol. III p. 49; P-C App. Vol. II p. 183. Afterward, Kincaid said E.L.'s eyes went gray, she gurgled and foamed at the mouth, and she looked like "there wasn't anything there." Trial Tr. Vol. III p. 49; P-C App. Vol. II p. 184. She told the detectives that "it's not like me to ever, even for a second[,] to ever . . . get mad at any of the kids, they're kids." P-C App. Vol. II p. 185.

[14] Kincaid hired two Columbia City defense attorneys to represent her, the father-son duo of Brad and Zachary Baber, and they entered their appearance on June 3. This was their first case involving "shaken baby syndrome or abusive head trauma." P-C Tr. Vol. II p. 97. The trial attorneys recognized three challenges with the case: (1) the medical evidence; (2) Kincaid's changing stories about what happened to E.L. (in all, she told five different stories, *see* Trial Tr. Vol. III p. 156); and (3) Kincaid's failed polygraph examination.

[15] On June 19, a Department of Child Services (DCS) worker met with Kincaid at her parents' home and showed Kincaid a summary of her May interview with

the detectives. According to the DCS worker, Kincaid acknowledged that what she told the detectives then was the truth. Trial Tr. Vol. IV pp. 21, 26.

[16] In preparation for trial, the trial attorneys hired three experts. First, they hired polygraph examiner Steven Adang to review Kincaid's polygraph. According to Adang, the polygraph examination was properly conducted according to the American Polygraph Association's standards. *See* P-C Ex. Vol. IV p. 92. Based on Adang's opinion, the trial attorneys chose not to challenge the admissibility of Kincaid's polygraph. Second, the trial attorneys hired Professor Alan Hirsch, an expert in interrogations and false confessions. He later testified at trial.

[17] Finally, the trial attorneys contacted the Indiana Public Defender Council to get a recommendation for a medical expert, and the Council sent them "some" names, including forensic pathologist Joseph A. Prahlow from Michigan. P-C Tr. Vol. II p. 100. The trial attorneys specifically wanted a forensic pathologist, which is a doctor that specializes in the cause and manner of death, "to get help to go through" the medical evidence and to "get a second opinion" on Dr. Wolfe's autopsy report. *Id.* at 101. The trial attorneys communicated with Dr. Prahlow on multiple occasions, including by email and in person. Dr. Prahlow reviewed E.L.'s medical records (1,125 pages), the surgical pathology slide, and the autopsy photos, slides, and reports.[1] He also reviewed several police reports,

[1] Kincaid claims, and the post-conviction court found, that Dr. Prahlow didn't review E.L.'s CT imaging. *See* Appellant's Br. p. 13; P-C App. Vol. II p. 186 (Finding 25: "Dr. Prahlow did not review the CT imaging."). In support, Kincaid cites one page of Dr. Prahlow's report. Appellant's Br. p. 13 (citing P-C Ex. Vol. IV p. 95). On that page, Dr. Prahlow lists the materials he reviewed. While he doesn't specifically list E.L.'s CT

the results of Kincaid's polygraph examination, and the police interrogations of Kincaid. Dr. Prahlow submitted his report to the trial attorneys in February 2020. Dr. Prahlow concluded as follows:

> [E.L.] suffered craniocerebral trauma which led to her death. The autopsy findings, in conjunction with the medical findings prior to death, are consistent with the injuries being of an acute nature. Nothing in the photographs or microscopic evaluation of this case suggest a "pre-existing," "old," or "healing" injury. In fact, the marked brain swelling and associated hemorrhage, with diastatic fractures of the skull, are indicative of severe acute injury. The findings, along with the clinical presentation and course, are consistent with this being an acute traumatic event.
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> Although it is possible that [E.L.] sustained the trauma prior to being placed into [Kincaid's] care on the morning of 4/12/2018, it is apparent that [E.L.] was not demonstrating significant symptoms which would lead one to believe this to be the case. . . .
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> Elucidating . . . historical information in this case . . . provides the most convincing evidence regarding the timing of the injuries. Most importantly in this case, despite the initial reports [by Kincaid] of no known trauma, the reality is that [Kincaid] did, in fact, eventually offer several different stories of traumatic events

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imaging, he does list "Medical records (1125 pages)." P-C Ex. Vol. IV p. 95. He also discusses E.L.'s "CT scan":

> **A CT scan of the head revealed** a left-sided frontoparietal acute (possibly acute o[r] chronic) subdural hemorrhage with mass effect, a midline shift, subfalcine, transtentorial uncal, and cerebellar tonsillar herniation, as well as a non-displaced, oblique left-sided temporoparietal fracture. Also evident was diffuse left-sided scalp soft tissue swelling/hemorrhage.

*Id.* (emphasis added). While this doesn't definitively establish that Dr. Prahlow reviewed E.L.'s CT imaging, it does establish that he reviewed the CT report. Moreover, Kincaid didn't call Dr. Prahlow as a witness at the post-conviction hearing.

> to [E.L.] while under her care. This fact, in my opinion and experience, almost certainly confirms that the lethal traumatic head injuries occurred while under her care.

P-C Ex. Vol. IV pp. 96-97. In his report, Dr. Prahlow didn't recommend that the trial attorneys consult a more specialized expert, such as a neuroradiologist. Given Dr. Prahlow's opinion, the trial attorneys decided not to call him as a witness at trial, though they consulted him in formulating questions for the State's witnesses. P-C Tr. Vol. II pp. 102, 112.

[18] About a month before trial, the trial attorneys deposed the State's medical experts, including the radiologist Dr. Reed, the neurosurgeon Dr. Young, the forensic pathologist Dr. Wolfe, and Dr. Ralph Hicks, a child-abuse pediatrician who reviewed E.L.'s medical records. During Dr. Reed's deposition, he noted that some of his partners, who were pediatric radiologists and neuroradiologists, had more knowledge about infant head injuries than he did. *See* P-C Ex. Vol. III pp. 224 (regarding cerebral spinal fluid leaks from skull fractures), 227 (regarding age of subdural hematomas).

[19] A jury trial was held in July 2020. The jury viewed the videos of Kincaid's August 2018 and May 2019 interviews with the detectives. The State's medical experts testified as detailed above—that the injuries to E.L. were likely caused by a substantial amount of force. *See* Trial Tr. Vol. V p. 216 (trial attorney acknowledging that the State's medical experts "agree[d] that this injury required a substantial amount of force"). Dr. Reed testified that the injury to E.L.'s brain "most likely" occurred four to eight hours before the CT scan. Trial

Tr. Vol. III p. 117. Finally, Dr. Wolfe testified that the injuries to E.L. were consistent with the fifth and final version of events that Kincaid told.

[20] Kincaid testified on her own behalf, stating that she lied when she told the five different versions of what happened to E.L. Trial Tr. Vol. IV pp. 158, 168-69. She explained that those versions were not true and came from her recurring dreams. She claimed that she didn't harm E.L. and that she only said she did to help the investigation. Professor Hirsch, the false-confessions expert, testified extensively about the Reid technique, an interrogation approach featuring three phases: isolation, confrontation, and minimization. Trial Tr. Vol. IV pp. 114-26; Trial Ex. Vol. VI p. 12. According to Professor Hirsch, the Reid technique can lead to false confessions. Trial Tr. Vol. IV p. 119. He also explained that in "quite a bit" of false-confession cases, people change their stories because they aren't telling the truth and therefore "can't maintain a consistent narrative." *Id.* at 135. Professor Hirsch was only allowed to testify about false confessions in general—not about the facts here.

[21] During closing arguments, the trial attorneys argued that Kincaid didn't change her story that she didn't know what happened to E.L. until the August 2018 interview, during which the detectives employed the "constant and unrelenting" tactics of confrontation and minimization. *See* Trial Tr. Vol. V p. 213. The trial attorneys also relied on the four-to-eight-hour timeline provided by the State's radiologist Dr. Reed to argue that E.L.'s injury could have occurred **before** she was dropped off that morning at Kincaid's house. *See id.* at 216.

[22] The jury found Kincaid guilty as charged. The trial court entered judgment of conviction on the two Level 1 felonies and sentenced Kincaid to concurrent terms of thirty years.

[23] Kincaid hired appellate counsel, who filed a direct appeal. Kincaid argued that the trial court committed fundamental error in limiting Professor Hirsch's testimony on false confessions and that her 30-year sentence is inappropriate. We affirmed. *See Kincaid v. State*, 171 N.E.3d 1036 (Ind. Ct. App. 2021), *trans. denied*.

[24] Kincaid then hired post-conviction counsel, who filed a petition for post-conviction relief in December 2022. Kincaid claimed that her trial attorneys rendered ineffective assistance of counsel by "fail[ing] to investigate whether there was another explanation for the cause of E.[L.]'s injuries" by "consult[ing] with proper experts." P-C App. Vol. II p. 22.

[25] At the June 2024 post-conviction hearing, Kincaid presented the testimony of Dr. Gregory M. Shoukimas, a neuroradiologist from Massachusetts who has only ever testified as a defense witness, and trial counsel Zachary Baber. Dr. Shoukimas testified that "[a] neuroradiologist is a specialist in radiology who focuses on imaging of the brain and spine." P-C Tr. Vol. II p. 8. Based on E.L.'s CT scans, he believed that she had both old and new subdural hematomas, which were caused by an undiagnosed condition called benign enlargement of the subarachnoid space (BESS), or external hydrocephalus. P-C Tr. Vol. II pp. 28-29, 43, 49; P-C Ex. Vol. III p. 82. Dr. Shoukimas explained:

> **[T]he subdural hematoma was not necessarily the result of trauma. It could [have] easily been a result of the benign hydrocephalus**, which I believe was the cause of it based on the findings of two different distinct subdural hematomas old and new.

P-C Tr. Vol. II p. 50 (emphasis added). According to Dr. Shoukimas, BESS can cause "spontaneous atraumatic subdural hematoma[s]," which can lead to seizures. *Id.* at 49. Dr. Shoukimas theorized that E.L. had a seizure "initiated by subdural blood," which then launched "a cascade of events eventually leading to the death of this child," that is, E.L. "had a seizure and the seizure resulted in . . . loss of oxygenation of the brain, which then resulted in cerebral edema and swelling with herniation and eventual cause of death was herniation and compression of the brain stem." *Id.* at 18, 50; P-C Ex. Vol. III p. 86. Dr. Shoukimas believed that Dr. Reed didn't diagnose E.L. with BESS because he wasn't trained as a neuroradiologist. *See* P-C Tr. Vol. II p. 91.

[26] Dr. Shoukimas conceded that there was "extensive" soft-tissue swelling "all over" E.L.'s skull fracture. *Id.* at 83. He also conceded that the skull fracture was caused by a "traumatic event," such as an accidental fall or "somebody impos[ing] it on the child as intentional trauma." *Id.* at 60, 81-82; *see also id.* at 69 (Dr. Shoukimas opining that "[s]omebody had to shake this baby or hit this baby on [the] head to have abusive head trauma to be a major cause of this problem"). Finally, he conceded that the soft-tissue swelling would also "likely be due to a traumatic event." *Id.* at 60, 83; *see also id.* at 94-95 ("[W]e know that there was a skull fracture, we know that there was soft tissue swelling. We're

talking about massive brain trauma, massive abusive of [sic] trauma."). But he opined that "just because there's a coincidental appearance of soft[-tissue] swelling over the fracture doesn't mean that they occurred simultaneously or they could [have] occurred simultaneously, but they didn't necessarily occur at the time that E.L. was admitted on 04/12/2018." *Id.* at 45-46. Dr. Shoukimas also didn't believe that the skull fracture and the subdural hematoma were the cause of E.L.'s death. *Id.* at 30-31 (Dr. Shoukimas answering "no" to the question of whether "considering only the skull fracture and the subdural hemorrhage together, uh, were they the cause of death?").

[27] Zachary Baber testified about the defense strategy. When asked if they had consulted a neuroradiologist, he responded:

> A. So we did not, we just deposed the State's radiologist [Dr. Reed] and got the timing out of that radiologist.
>
> Q. And was there any reason why you didn't?
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> A. So, uh, I wish I could tell you a good reason, um, but, but no. Uh, once we found out that, I know it was later on, but I guess when we actually did depose[] the, the State's radiologist, we were kind of tunnel visioned a little bit that way because we were getting closer to trial. And we got out what we wanted out of their radiologist about the timing. So once we got that out of through [sic] their radiologist, yeah, that. So that's not a good answer, but.

*Id.* at 102.

[28] The post-conviction court issued a 27-page order denying relief, which contains these conclusions:

> 68. As noted above, trial counsel did seek out medical expertise. In addition to their polygraph and false confession experts, they hired a well-recommended medical expert who reviewed the evidence and ultimately opined that the medical evidence was uncertain but, when presented in light of the admissions and confessions of their client, amounted to convincing proof that Mrs. Kincaid was the instrumentality of [E.L.'s] death. Would reasonable counsel have dug deeper and ultimately located Dr. Shoukimas or another physician like him who could have found this particular alternative explanation for the cause of this child's death?
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> 69. The medical evidence in this case was ambiguous relating to the timing and mechanics of the injury that resulted in the child's death. It was established that the child experienced a significant head injury which occurred with enough force to break the bone in her skull. There was proximate soft tissue swelling. Also clear was that brain swelling was the ultimate cause of the child's death. But it was not possible for the State's witnesses to narrow the time frame of the injury that caused the bleeding in the child's brain so as to place the injury during the time frame that the child was exclusively in Mrs. Kincaid's care. **At trial Dr. Reed testified that the injury was sustained four to eight hours before the CT scan, more or less. The child was in Mrs. Kincaid's care only for roughly five hours before the 911 call. Guilt of the charged offenses in this case might have been difficult to establish from the medical evidence alone.**
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> 70. Nor were the circumstances of the injury knowable from evidence independent of Mrs. Kincaid. There was no weapon found, no additional forensic evidence to examine, and no witnesses to the event. The inconclusive medical evidence led the

State's witnesses to have consensus on the mechanism of death but not the details of the trauma that caused the injury. Trial counsel pointed out to the jury the doubt and confusion about what the medical evidence was able to show.

71. The State's own medical evidence was sometimes inconsistent. The doctors had different opinions about whether the injuries observed could have been sustained from different types of events and what effect the injuries would have had on the child. The State's radiologist was inconsistent with himself. He altered his interpretation of the CT during the case about whether there was an additional older injury in light of new information learned during the case.

72. Ultimately, the confession of May 29, 2019 ("As hard as I could just la[id] her on the ground . . . she hit head first . . . the back of the head . . . oh God, what did I do . . . it's not like me ever, even for a second to get mad at any of the kids . . . .") was the most powerful evidence that the fact-finders employed to establish beyond a reasonable doubt Mrs. Kincaid's guilt.

73. Without Mrs. Kincaid's admissions, the medical evidence and the imprecision therein would have carried far more importance. **Without her admissions, another medical theory of the child's demise might have been persuasive to the jury that reasonable doubt about Mrs. Kincaid's guilt existed. Perhaps the jury could have been convinced of the possibility that the child's injuries were spontaneous or the result of pre-existing injury in the absence of the May 29, 2019 statement.** But with Mrs. Kincaid's admissions, the jury encountered the comforting certainty of the accused's own words to explain the where, when, and how of the injury.

74. Mrs. Kincaid's confession is consistent with the medical evidence. **While Dr. Shoukimas provides another theory of the**

> **mechanics of [E.L.'s] death, he did not disprove the State's theory. Rather, he simply provided another alternative explanation that might have been persuasive in the absence of Mrs. Kincaid's statements acknowledging her assault on the child.**
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> 75. **Dr. Shoukimas' testimony and theory are not without flaw. Dr. Shoukimas cannot point to a causation of the child's skull fracture or the soft tissue swelling.** While some of the potential causes of this child's death explained by Dr. Shoukimas are "benign" and/or "spontaneous," even **he concedes that the skull fracture had to be the result of some traumatic event.** A skull fracture and BESS are separate and distinct maladies which are coincidentally present if BESS is present at all.
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> 76. Trial counsel rightly focused on the admissions made by their client as the State's strongest evidence and did their best to discount them with their false confessions expert. . . .

P-C App. Vol. II pp. 200-03 (emphases added). The court determined that the trial attorneys did not render deficient performance. But the court found that even if the trial attorneys were deficient in "fail[ing] to further evaluate additional medical expertise," there was no prejudice:

> The jury in this case listened to all of the disparate medical experts, heard all of their sometimes-conflicting opinions, and heard Mrs. Kincaid's changing stories and eventual confession. Said jury was satisfied beyond a reasonable doubt that she was guilty of the charged offenses. **It is unlikely that a medical expert with a theory that did not account or explain for the child's fractured skull would have dissuaded them from their verdict.**

*Id.* at 204 (emphasis added).

[29] Kincaid now appeals.

## Discussion and Decision

[30] Kincaid appeals the denial of post-conviction relief. A defendant who petitions for post-conviction relief bears the burden of establishing grounds for relief by a preponderance of the evidence. *Hollowell v. State*, 19 N.E.3d 263, 268-69 (Ind. 2014). If the post-conviction court denies relief, and the petitioner appeals, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 269.

[31] Kincaid contends the post-conviction court erred in finding that her trial attorneys were not ineffective. When evaluating a defendant's ineffective-assistance-of-counsel claim, we apply the well-established, two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Wilkes v. State*, 984 N.E.2d 1236, 1240 (Ind. 2013). The defendant must prove (1) counsel rendered deficient performance, meaning counsel's representation fell below an objective standard of reasonableness as gauged by prevailing professional norms, and (2) counsel's deficient performance prejudiced the defendant, i.e., but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Id.* at 1240-41. "Failure to satisfy either prong will cause the claim to fail." *Conley v. State*, 183 N.E.3d 276, 283 (Ind. 2022), *reh'g denied.*

[32] Kincaid argues the trial attorneys rendered deficient performance because they "failed to hire a pediatric neuroradiologist to review the medical records documenting E.L.'s death." Appellant's Br. p. 45. Had they done so, her argument continues, they would have learned that "E.L. did not die from an injury sustained from abuse"; rather, she died from BESS. *Id.*

[33] Kincaid concedes that "[i]n normal criminal cases involving a death, consulting with a forensic pathologist would be a reasonable step for trial counsel to investigate how the victim died." *Id.* She claims, however, that consulting a forensic pathologist is not enough in abusive-head-trauma cases involving infants. But Kincaid cites no Indiana authority for the proposition that defense attorneys act unreasonably if they consult a forensic pathologist—but not a neuroradiologist—in these types of cases. *See* Appellant's Reply Br. p. 5 ("There is no case from Indiana that is directly on point."). Based on the lack of such authority, it would be difficult for us to say that the trial attorneys acted unreasonably under prevailing professional norms by not also consulting a neuroradiologist. *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom."). This is especially so given that the State's radiologist Dr. Reed gave a timeline that was favorable to Kincaid and the report from Dr. Prahlow—who by all indications was qualified and came recommended by the Indiana Public Defender Council—didn't advise them to consult a more specialized expert, such as a neuroradiologist. *See id.* at 107

(noting that counsel is entitled to "balance limited resources in accord with effective trial tactics and strategies").[2]

[34] In any event, even assuming that the trial attorneys were deficient, we agree with the post-conviction court that Kincaid has failed to prove prejudice. As the post-conviction court explained, Dr. Shoukimas "did not disprove the State's theory"; he merely offered "another theory of the mechanics of [E.L.'s] death." But this theory was "flaw[ed]" because it failed to address E.L.'s skull fracture and soft-tissue swelling near the fracture. Moreover, Dr. Shoukimas acknowledged that the fracture and swelling were the result of a traumatic injury. Yet he opined that they were unrelated to the subdural hematomas and E.L.'s death. As the post-conviction court explained, if this case was based on medical evidence alone, then perhaps the result would be different. But here, there is more: Kincaid told evolving stories and ultimately admitted to harming E.L., she failed her polygraph examination, and the medical evidence corroborates her admission. Kincaid has failed to prove that, but for her trial attorneys' failure to consult an expert who would opine like Dr. Shoukimas,

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[2] Kincaid cites a Utah case, *State v. Hales*, 152 P.3d 321 (Utah 2007), which found that the defendant's trial attorneys were ineffective for "failing to retain a qualified expert to examine CT scans of [the five-month-old victim's] brain injuries." *Id.* at 325. But Kincaid didn't cite this case until her reply brief, so the State hasn't had an opportunity to respond it. Regardless, we find that *Hales* is distinguishable. There, the defendant's trial attorneys did not have their forensic pathologist look at the victim's CT scans until the morning of trial, at which point the trial court ruled that the forensic pathologist could not offer testimony interpreting the scans "because he admitted on voir dire that he did not read CT scans in his work." *Id.* at 340. As discussed above in footnote 1, Dr. Prahlow, at the very least, looked at E.L.'s CT report in arriving at his conclusion. Moreover, in *Hales*, the State's evidence showed that the victim's brain injury occurred when the victim was exclusively in the defendant's care. Here, however, the State's radiologist Dr. Reed gave a timeline that was favorable to Kincaid, and the trial attorneys relied on that timeline in formulating the defense strategy.

there is a reasonable probability the result of the proceeding would have been different.[3] We therefore affirm the post-conviction court's denial of relief.

[35] Affirmed.

Bailey, J., and DeBoer, J., concur.

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[3] Kincaid also argues that her trial attorneys' "failure to discover that E.L. had died from a medical condition also negatively impacted their false confessions defense as well." Appellant's Br. p. 46. She posits that had her trial attorneys done so, "Professor Hirsch could have testified not only about coercive interrogation tactics and how they lead some people to confess falsely, but also about the coercive impact false evidence—particularly false medical evidence—can have on a suspect during an interrogation." *Id.* Although Kincaid cites two law-review articles in her brief, *see id.* at 46-47, she didn't call Professor Hirsch as a witness at the post-conviction hearing. We therefore don't know what he would have testified to in light of Dr. Shoukimas's opinions.