

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY PARKER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

APPENDICES

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APPENDIX A A-1

Opinion of the Louisiana Court of Appeal, *State v. Parker*, No. 2016-KA-1016 (La. Ct. App. 1 Cir. 2017) (affirming conviction and sentence).

APPENDIX B B-16

Order of the Supreme Court of Louisiana, *State v. Parker*, No. 2017-K-0509 (La. 2017) (denying petition for supervisory writ).

Document: State v. Parker, 2017 La. App. Unpub. LEXIS 62

State v. Parker, 2017 La. App. Unpub. LEXIS 62

Copy Citation

Court of Appeal of Louisiana, First Circuit

February 17, 2017, JUDGMENT RENDERED

2016 KA 1016

Reporter

2017 La. App. Unpub. LEXIS 62 * | 2016 1016 (La.App. 1 Cir. 02/17/17); | 2017 WL 658256

STATE OF LOUISIANA VERSUS RANDY DEMOND PARKER

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE LOUISIANA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Writ denied by [State v. Parker, 2017 La. LEXIS 2910 \(La., Dec. 15, 2017\)](#)

Prior History: [*1] APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA. DOCKET NUMBER 05-12-1147, SEC. VIII. HONORABLE [TRUDY M. WHITE](#) ▼, JUDGE.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

Core Terms

sentence, rights, district court, interview, hit, disability, assigned error, responded, injuries, waive, second degree murder, toilet, inflicted, punched, knowingly, bruises, diagram, noticed, intelligent waiver,

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suppression motion, defense counsel, circumstances, intelligent, confession, autopsy, convict, jury trial, extremities, juvenile, whipped

Counsel: Hiliar C. Moore, III, District Attorney and [Ronald Gathe](#) ▼, April Leon, Stacy L. Wright, Assistant District Attorneys, Baton Rouge, Louisiana, Attorneys for Appellee State of Louisiana.

Christine Lehmann, [Abigail Crick](#) ▼, New Orleans, Louisiana, Attorneys for Defendant/Appellant Randy Demond Parker.

Judges: BEFORE: [PETTIGREW](#) ▼, [McDONALD](#) ▼, and [CALLOWAY](#) ▼,  JJ.

Opinion by: [McDONALD](#) ▼

Opinion

[Pg 2] McDONALD, J.

The defendant, Randy Demond Parker, was charged by grand jury indictment with first degree murder.  He pled not guilty. After a bench trial, he was found guilty of the responsive offense of second degree murder. He filed a motion in arrest of judgment, as well as motions for new trial and post verdict judgment of acquittal, all of which the district court denied. He now appeals, alleging eight assignments of error. We affirm the defendant's conviction and sentence.

FACTS

On October 23, 2011, Baton Rouge City Police detectives responded to a 911 call at 2627 Erie Street in response to an unresponsive child, the [*2] 23-month-old victim, Demarcus Stokes. Their investigations led to the defendant, the boyfriend of the victim's mother, Kimayia Stokes,  as a suspect. In a video recorded statement, the defendant admitted that he punched the victim multiple times and whipped him with a belt two to three times. After noticing that the victim was unresponsive, the defendant called 911. However, by the time emergency medical services arrived, the victim had died. An autopsy revealed that the cause of the victim's death was blunt force trauma to his head, trunk, and extremities.

SUFFICIENCY OF EVIDENCE

When a defendant raises issues of sufficiency of evidence and other trial errors, the reviewing court should first determine the sufficiency of the evidence. [State v. Hearold](#), 603 So.2d 731, 734 (La. 1992). In his third assignment of error, the defendant argues that the district court erred in finding him guilty of second degree murder. Specifically, the defendant contends that the district court convicted him of second degree murder under the theory that he unintentionally killed the victim while engaged in cruelty to juveniles. According to the defendant, the "'should have known' standard utilized by the court is the equivalent of the negligence standard [*3] in tort law." The defendant argues that this standard is distinct from intent and criminal negligence.

[Pg 3] The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. See [Jackson v. Virginia](#), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also [LSA-Cr.P. art. 821\(B\)](#); [State v. Mussall](#), 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, [LSA-R.S. 15:438](#) provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the Jackson constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under Jackson to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. [State v. Shanks, 97-1885 \(La. App. 1 Cir. 6/29/98\), 715 So.2d 157, 159.](#)

The Jackson standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence [*4] is thus viewed, the facts established by the direct evidence, and inferred from the circumstantial evidence, must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. [State v. Sutton, 436 So.2d 471, 474 \(La. 1983\); State v. Lott, 535 So.2d 963, 966 \(La. App. 2 Cir. 1988\).](#)

[Louisiana Revised Statute 14:30.1](#) defines second degree murder, in pertinent part, as:

A. Second degree murder is the killing of a human being:

- (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
- (2) When the offender is engaged in the perpetration or attempted perpetration of . . . cruelty to juveniles . . . even though he has no intent to kill or to inflict great bodily harm.

Cruelty to juveniles is defined in [LSA-R.S. 14:93\(A\)\(1\)](#) as the "intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child [Pg 4] under the age of seventeen whereby unjustifiable pain or suffering is caused to said child." The term "intentional" as used in [LSA-R.S. 14:93](#) refers to general criminal intent to mistreat or neglect and does not require a specific intent to cause the child unjustifiable pain and suffering. See [LSA-R.S. 14:10; State v. Morrison, 582 So.2d 295, 302 \(La. App. 1 Cir. 1991\)](#). "Mistreatment" as used in this statute is equated with "abuse." [State v. Comeaux, 319 So.2d 897, 899 \(La. 1975\)](#). Criminally negligent mistreatment [*5] or neglect of the juvenile exists when, although neither specific nor general intent is present, there is such disregard of the interest of the juvenile that the defendant's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful person under like circumstances. See [LSA-R.S. 14:12; Morrison, 582 So.2d at 302.](#)

Thus, to convict a defendant of second degree murder where the killing occurred during the perpetration of cruelty to a juvenile, the State was required to prove either that: (1) the defendant intentionally abused or neglected the victim, resulting in the infliction of unjustifiable pain or suffering, and ultimately, death; or (2) the defendant's abuse or neglect of the victim was criminal negligence that caused the infliction of unjustifiable pain or suffering, and finally, death. See [LSA-R.S. 14:30.1\(A\)\(2\); State v. Booker, 02-1269 \(La. App. 1 Cir. 2/14/03\), 839 So. 2d 455, 459, writ denied, 03-1145 \(La. 10/31/03\) 857 So. 2d 476.](#)

Baton Rouge City Police Detective Charles Dotson testified that, on Sunday morning, October 23, 2011, he received a call to report to 2627 Erie Street. He spoke with the defendant at the house and brought him in for a formal interview. Before he was brought in, the defendant's hands were photographed and showed what appeared to be abrasions on the knuckles of his [*6] right hand.

During his first interview with Detectives Dotson and Evelyn Dunn, the defendant stated that he lived in the Erie Street house with the owner, Kierra Golman; her boyfriend, Brandon Tate; and three of their children. The defendant stated that Ms. Stokes was his "baby momma," meaning she was pregnant with his child. According to the defendant, he, Ms. Stokes, and the victim walked to the Erie Street house on Thursday night. On Saturday, he cut the victim's hair around 2:00 or 3:00 p.m. He claimed that the victim fell asleep, and he later woke him up and told him to use the bathroom. The defendant stated that the victim used the bathroom, and then he bathed the victim. He noticed that the victim was [Pg 5] "dozing off" in the bathtub. The defendant then laid the victim in the bed, and he and Ms. Stokes were watching TV. When Ms. Stokes got up to go to the bathroom, he checked on the victim and noticed "snot" and blood coming from his nose. He tried to give him mouth-to-mouth and put his finger inside of the victim's mouth. He claimed that he checked the victim's pulse and put his ear to the victim's heart but noticed that there was no heartbeat. He stated that he thought the [*7] victim was dead because he was not breathing. The defendant told the detectives that he called 911 around 3:00 or 4:00 a.m. The detectives asked the defendant whether something happened while the defendant was cutting the victim's hair. The defendant responded that he "whooped" the victim on his leg because he did not want to get his hair cut. He again stated that the victim fell asleep, and he woke him to use the restroom and bathe him. He noted that the victim, while sitting on the toilet, was eating a sandwich Ms. Golman gave him around 2:00 a.m. He explained that the knot on the victim's forehead was from a fall. According to the defendant, the victim fell down and hit his head on a trash can. The defendant claimed that while he was cutting the victim's hair, the victim started crying. The defendant asked him if he wanted something to cry about and then whipped his legs with a belt. The victim tried to run to his mother but fell down

and hit his head. The defendant concluded that was the only thing that happened that could have caused an injury to the victim's head.

The defendant asked to speak with Detective Dotson a second time, and after he gave the statement, the defendant was [*8] booked into East Baton Rouge Parish prison. During the second interview, the defendant told Detective Dotson that what he told him during the first interview was the truth. He then explained that while he was cutting the victim's hair, he turned the victim over and spanked him with a belt. The victim slipped on clothes that were on the floor and hit his head on a trash can. The victim then fell asleep. The defendant woke the victim up, made him sit on the toilet, and bathed him. The defendant again noted that while the victim was sitting on the toilet, Ms. GoIrrian gave him a sandwich and chips. He claimed that he fed the victim the food. While bathing the victim, he noticed that the victim was dozing off in the bathtub, so he put a diaper on him and laid him in the bed. Later, when Ms. Stokes got out of bed to use the restroom, the defendant noticed the victim's state and told Ms. Stokes that the victim was dead. Ms. Stokes responded that the [Pg 6] victim was just in a deep sleep. The defendant checked the victim's pulse and heart and then called 911.

During his third interview, for the first time, the defendant claimed that he and the victim were "playing fight." He stated that he [*9] had been drinking gin on the date of the incident and also that he was mad because the victim had "peed everywhere," meaning on the floor and in the bed. In explaining how he and victim "play fight," the defendant demonstrated a repetitive punching motion and said, "I did punch that boy." He stated that when he stopped hitting the victim, who was lying on his back, he "made a mistake" and hit the victim in his face on his top lip. He explained that he stopped hitting the victim because his mouth started bleeding. He noted, "I was full of gin." The detective asked the defendant how the victim came to be unconscious, and the defendant stated that he did not know, but guessed the victim was tired. The defendant said that they "played fight" in the bathroom, kitchen, and bedroom. He also stated that Ms. Stokes "was hitting on him too."

The detective asked how many times the defendant knocked the victim down, and the defendant stated that when the baby fell down, he hit him. The detective asked, "Hitting that boy like that was not play fighting; you were hitting him like that because you were angry, weren't you?" The defendant responded, "Yes, sir." The defendant reiterated that he was drinking. [*10]

According to the defendant, when he finished "play fighting" with the victim, he bathed him. When he got the victim out of the bathtub, the victim appeared to pass out. He dried the victim off and put him in the bed. The defendant noted that Ms. Stokes was "right there" watching him and told him to "whip that boy." The defendant stated that Ms. Stokes "could have stopped him" and could have called the police. The defendant stated that he knew the victim was "gone" and told Ms. Stokes to call the police. He claimed that Ms. Stokes did not know what to tell the police, so he called. The detective asked the defendant how many times he used the belt on the victim, and the defendant responded that he used it two or three times. When asked whether it made him nervous that the victim was screaming while he was fighting him, the defendant responded, "I was full of alcohol, I was full of gin." He stated that he asked the victim, "Why you peed?" and then punched him "boom, boom, boom." He claimed that the punches were "not that hard." He [Pg 7] later claimed that he asked the victim, "Did you pee?" And, when the victim responded, "no," the defendant started hitting him. He stated that he picked [*11] the victim up and sat him on the toilet. The defendant agreed with the detective that he did it because he was angry that the victim peed on the floor and bed.

During Detective Dotson's testimony at trial, he noted that the defendant admitted that he punched the victim multiple times, demonstrated how he did so, and gave a reason for doing so - that he was mad at the victim. Detective Dotson also noted that the defendant noticed the victim was in distress around 3:00 or 4:00 a.m., but did not call 911 until 5:53 a.m.

Dr. Bruce Wainer conducted the victim's autopsy. He testified that there was a considerable amount of bruising on victim's body head, trunk, and extremities. Additionally, there were a minimum of three abrasions on the victim's head, four on his trunk, and three or four on his extremities. The doctor testified that one of the abrasions on the back of the victim's right leg was on an unusual surface to be attributed to an accident. The abrasion was in a pattern formation, which the doctor testified was consistent with the use of a belt or hand. There were a minimum of three bruises on the surface of the victim's head. On the inside surface of the victim's scalp, there were [*12] areas of hemorrhage, which were internal manifestations of the bruises on the skin's surface. When asked, Dr. Wainer agreed that it would take "some force" for the bruising to come through to the inside. An examination of the victim's brain revealed a subarachnoid hemorrhage in one of the nneningeal membranes, which indicated that the victim's head injuries were caused by rapid movements taking place in his head and brain. There were also small hemorrhages in his brainstenn area where vital functions are controlled. According to Dr. Wainer, brainstem injuries are much more likely to be lethal by themselves. He concluded that the cause of the victim's death was blunt force trauma to his head, trunk, and extremities. He testified that the injuries he pointed out were very recent and at the most, 48 hours old. The doctor testified that the injuries could have been caused by someone punching the victim in his face, and the impact injuries on the surface of the victim's head indicated impact consistent with being punched in the head and most likely resulted in rapid abnormal head movements that produced an axonal injury. A toxicology report

was also prepared as part of the autopsy, and [*13] the results indicated that [Pg 8] there was a positive level of an antipsychotic drug found in the victim's blood sample. According to Dr. Wainer, the identified drug was prescribed for adult mental illnesses such as schizophrenia and bipolar disorder and was not normally prescribed to children.

Ms. Golman testified that she had known the defendant for six years and lived in the same house as the defendant at the time of the incident. The last time Ms. Golman saw the victim, he was sitting naked on a toilet around 1:00 or 2:00 a.m. Ms. Golman testified that she did not see any bruises on the victim, but she was approximately six feet from him when she saw him on the toilet. She gave a sandwich to the defendant and told him to feed it to the victim, and then she went into the living room where she slept. Ms. Golman testified that she woke up around 4:00 or 6:00 a.m. and saw the defendant and Ms. Stokes. The defendant was holding the victim, and Ms. Stokes was on his side. According to Ms. Golman, the defendant yelled at her to get up and lock the door. When she did, she noticed an ambulance outside.

Stacy Knighten testified that the defendant is her nephew and had lived with her and her [*14] mother his whole life. She stated that the defendant was enrolled in special education classes while growing up and took medicine to "keep him calm." Ms. Knighten stated that on October 23, 2011, her brother, Brandon, picked her up and brought her to the Erie Street house around 7:00 or 8:00 p.m. to visit. According to Ms. Knighten, the defendant and Ms. Stokes were sitting on the bed with the victim, and they were watching cartoons. She stated that she left around 8:00 or 9:00 p.m.

The defendant's sister, McKenzie Parker, testified that she did not think that he would harm a child. When asked if the defendant was able to express himself pretty well, Ms. Parker answered, "Yes, he can. I mean, I would hope he can. He's a grown man."

The defendant testified on his own behalf at trial. According to the defendant, on Friday, October 21, 2011, around 9:00 p.m., he and Ms. Stokes, who was his girlfriend at the time, walked from her house to the Erie Street house while he carried the victim. The three watched television before falling asleep. The next day, Saturday, during the afternoon, he cut the victim's hair. The victim "didn't want to stay still," so the defendant whipped him. The victim [*15] jumped off of the bed, slipped on clothes that were on the floor, and hit his head on a popcorn can that was being used as a trash can. The defendant testified that once he [Pg 9] finished cutting the victim's hair, the victim fell asleep. The victim slept until approximately 7:00 or 8:00 p.m., when the defendant woke him. In the early morning hours of Sunday, around midnight or 1:00 a.m., the victim sat on the toilet and ate a sandwich. The defendant claimed that he was attempting to potty train the victim. According to the defendant, the victim got off of the toilet, urinated on the floor, and the defendant put him back on the toilet before exiting the bathroom and continuing to watch television with Ms. Stokes. The defendant testified that the victim then fell face forward off of the toilet and hit his head. The defendant picked the victim up and put him back on the toilet. The victim then fell a second time, this time falling backward into the toilet bowl. At this point, the defendant bathed the victim. During his bath, the victim appeared tired. The defendant placed the victim in the bed, and they watched television. When Ms. Stokes got up to use the restroom, the defendant checked [*16] on the victim. The defendant noticed something coming out of the victim's nose that appeared to be "snot." He tried to wake the victim, but could not. The defendant put his ear to the victim's chest but could not hear a heartbeat. When Ms. Stokes returned from the restroom, the defendant told her that he thought something was wrong with the victim. According to the defendant, Ms. Stokes responded that the victim "sleep heavy like that." The defendant claimed that he told Ms. Stokes to call the police, but she told him that there was nothing wrong with the victim. The defendant called 911. The defendant and Ms. Stokes then dressed the victim and carried him outside, where he handed the victim to emergency medical services personnel. The defendant admitted that throughout the course of the day Saturday, he whipped the victim two or three times on his legs and buttocks. He claimed that he did not strike the victim hard enough to make bruises or lacerations. He explained that he usually tickles and "play fights" with the victim, but that he accidentally struck the victim in the mouth because the victim squirmed around. Regarding his statement that he "punched" the victim, the defendant [*17] said that he made a mistake and hit him on his lip, but the two were just "playing fight." He explained, "[M]y fists [weren't] balled up like I wanted to ... get into it with somebody"

On cross examination, the defendant testified that he had previously been charged with attempted second degree murder, but that charge was reduced to simple battery. He also testified that he had been convicted of simple assault. The defendant explained that [Pg 10] when he used the belt to whip the victim, he was spanking the child, not beating him, and he wasn't trying to hurt him. He admitted, however, that he believed that the marks on the victim's legs were caused by that whipping. He clarified that he began drinking on Saturday night, around 9:00 or 10:00 p.m. and drank an entire bottle of gin. The defendant claimed that he has a "bad memory," and acknowledged that his videoed statement from 2011, that he punched the victim because he was angry about the victim urinating on the floor, was more accurate than his related comments at trial.

When viewing the evidence presented at trial in the light most favorable to the prosecution, we are convinced that any rational trier of fact could have concluded [*18] beyond a reasonable doubt that the State sufficiently proved all elements of the crime of second degree murder. The district court's statement that the defendant "should have known" the trauma to the victim would result in traumatic

injury or death was not a finding that the defendant's behavior was not criminally negligent but, rather, the court's conclusion that the defendant was not acting with specific intent. The evidence clearly established that the victim was severely abused. By the defendant's own admission, he whipped the victim with a belt multiple times on the date of his death and punched him until he "accidentally" hit the victim in his mouth. Medical testimony at trial clearly established that the victim's death was caused by the trauma to his head, trunk, and extremities. The medical testimony also indicated that there had been rapid movements taking place in the victim's head and brain. After realizing that the victim was unconscious, the defendant waited to call 911. The defendant originally withheld information from detectives, and there were inconsistencies among his three statements, as well as his trial testimony. All of this evidence establishes that the defendant's [*19] conduct "amount[ed] to a gross deviation below the standard of care expected to be maintained by a reasonably careful person under like circumstances." See [LSA-R.S. 14:12](#). Viewing this evidence, together with the defendant's statements to the investigating detectives and his trial testimony, any rational trier of fact could have concluded beyond a reasonable doubt that the defendant killed the victim while engaged in cruelty to a juvenile. See [LSA-R.S. 14:30.1\(A\)\(2\)](#). Moreover, based upon the defendant's initial untruthfulness during the investigation of the offense, the district court, as the trier of fact, reasonably could have determined that he was not credible. From the defendant's [Pg 11] dishonesty and withholding of information during his initial interviews, an inference of a "guilty mind" can be drawn. [State v. Mitchell, 99-3342 \(La. 10/17/00\), 772 So.2d 78, 85.](#)

Considering the above, we find that the evidence presented at the trial of this matter clearly supports a finding that the defendant committed cruelty to the victim, a juvenile, which ultimately resulted in his death. This assignment of error lacks merit.

MOTION TO SUPPRESS STATEMENTS

In his first assignment of error, the defendant contends the district court erred in denying his motion to suppress his custodial statements. [*20] Specifically, the defendant argues that, because of his intellectual disability, the waiver of his rights was not knowing and intelligent.

The [Fourth Amendment to the United States Constitution](#) and [Louisiana Constitution Article I, §5](#) protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. [LSA-C.Cr.P. art. 703\(A\)](#). The State bears the burden of proving the admissibility of a purported confession or statement made by the defendant. [LSA-C.Cr.P. art. 703\(D\)](#). [Louisiana Revised Statute 15:451](#) provides that, "[b]efore what purports to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises." The State must establish that an accused who makes a statement or confession during custodial interrogation was first advised of his Miranda rights. [State v. Plain, 99-1112 \(La. App. 1 Cir. 2/18/00\), 752 So.2d 337, 342.](#) The State must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. [State v. Thomas, 461 So.2d 1253, 1256 \(La. App. 1 Cir. 1984\), writ denied, 464 So. 2d 1375 \(La. 1985\).](#)

The district court must consider the totality of the circumstances in deciding whether a confession is admissible. It must consider the facts and circumstances on a case by case [*21] basis to analyze whether a showing of voluntariness has been made. [State v. Benoit, 440 So.2d 129, 131 \(La. 1983\); State v. Hernandez, 432 So.2d 350, 352 \(La. App. 1 Cir. 1983\).](#) The interviewing police officer's testimony alone may be sufficient to prove a defendant's [Pg 12] statements were freely and voluntarily given. [State v. Maten, 04-1718 \(La. App. 1 Cir. 3/24/05\), 899 So. 2d 711, 721, writ denied, 05-1570 \(La. 1/27/06\), 922 So. 2d 544.](#)

A district court's ruling on a motion to suppress evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. [State v. Jones, 01-0908 \(La. App. 1 Cir. 11/8/02\), 835 So. 2d 703, 706, writ denied, 02-2989 \(La. 4/21/03\), 841 So. 2d 791.](#) So, when a district court denies a motion to suppress, its factual and credibility determinations should not be reversed unless there is a clear abuse of its discretion, i.e., unless such ruling is not supported by the evidence. See [State v. Green, 94-0887 \(La. 5/22/95\), 655 So.2d 272, 281.](#) On the other hand, a district court's legal findings are subject to a de novo standard of review. See [State v. Hunt, 09-1589 \(La. 12/1/09\), 25 So.3d 746, 751.](#)

The Louisiana Supreme Court has noted that a person's diminished mental or intellectual capacity does not itself vitiate his ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession. [Benoit, 440 So.2d at 131;](#) see also [State v. Young, 576 So.2d 1048, 1053 \(La. App. 1 Cir.\), writ denied, 584 So. 2d 679 \(La. 1991\).](#) The State has the burden of proving that the defendant's mental defect did not preclude him from giving a voluntary and free confession with a knowledgeable [*22] and intelligent waiver of his rights. The critical factors are whether the defendant

was able to understand the rights explained to him and whether he voluntarily gave a statement. [State v. Stewart, 93-0708 \(La. App. 1 Cir. 3/11/94\), 633 So.2d 925, 931-32](#), writ denied, [94-0860 \(La. 9/16/94\), 642 So.2d 189, 189-90](#); [Young, 576 So.2d at 1053](#).

The State points out that the defendant offered no expert evidence of his diminished intellectual capacity that would have vitiated his ability to knowingly and intelligently waive his rights. See [State v. Tart, 93-0772 \(La. 2/9/96\), 672 So.2d 116, 127](#), cert. denied, [519 U.S. 934, 117 S. Ct. 310, 136 L. Ed. 2d 227 \(1996\)](#). According to the State, the only evidence in the record of any intellectual disability is the defendant's testimony at the motion to suppress hearing that he was enrolled in special education classes from third through eighth grade, that he "couldn't read too good," and his aunt's testimony that he had special needs.

The State acknowledges that, in addition to the testimony presented at the motion to suppress hearing, the record contains the transcript of a hearing held on July 22, 2013, at [Pg 13] which the State told the district court that the defense had given it medical information and that it had reports from prosecution experts. Based on that information, the State stated that it would not be seeking the death penalty because it believed "that if the defendant [were] tested, [*23] that there [was] a strong possibility that he could come back with a mentally retarded . . . diagnosis." [3](#)

The defendant filed his motion to suppress in January 2014. Later, on May 1, 2014, the defendant filed a motion asking for the appointment of an expert witness to assess his intellectual disability so the defense could present testimony as to whether the defendant had the mental state, cognitive ability, or specific intent to commit the charged offense. The district court granted the motion in June 2014. The record does not indicate whether the assessment was conducted. According to the minutes, after the June 2014 date, the parties did not reappear in court until October 7, 2014, the date of the motion to suppress hearing. The State argues that it is not required to negate a mental abnormality that the defendant alleged but failed to prove and contends that, even if the defendant did suffer from an intellectual disability, that alone would not vitiate his ability to make a knowing and intelligent waiver.

In the defendant's motion to suppress, he argues that he gave two voluntary statements to law enforcement officials that contained inculpatory information. The motion claims that [*24] "because of his intellectual disabilities and cognitive capabilities, the defendant did not and cannot understand his rights." At the motion to suppress hearing, the State established that the defendant gave two statements on October 23, 2011, and a third statement on October 24, 2011. All three statements were videotaped. The two October 23, 2011 statements were introduced into evidence and played at the hearing. [4](#) Written rights forms signed by the defendant on October 23 and October 24 were also introduced into evidence.

Baton Rouge City Police Detective Charles Dotson testified at the motion to suppress hearing. He assisted in the defendant's arrest on October 23, 2011, and participated in his [Pg 14] three interviews. During the defendant's first interview, his Miranda rights were given to him orally and in written form. Another detective in the interview, Detective Evelyn Dunn, read the defendant's rights to him, and the defendant indicated that he understood each one. After the defendant signed the waiver form stating that he understood his rights, was willing to waive them, and had not been threatened, coerced, pressured, or promised anything in exchange for answering questions, [*25] Detective Dotson asked him his highest level of education. The defendant answered that he was in the tenth grade while in GED school, but did not "get a chance" to complete his GED. He stated that he "don't read good." Detective Dotson asked the defendant to read a few lines on the rights form. The defendant read "you have the right to remain silent" and "anything you say can be used against you in court" as well as "you have the right to talk to a ..." but was interrupted when the detective left the room to answer a phone call. While the defendant was reading the form to the detective, the detective reviewed and explained the rights to the defendant. The defendant's first interview lasted about an hour and ended around 1:19 p.m. During this interview, he admitted that he whipped the victim. He explained that the knot on the victim's forehead was a result of him falling and hitting his head on a trash can.

Before his second interview, which began around 6:43 p.m., the defendant said that he wanted to speak with Detective Dotson. The detective returned to the interview room and asked the defendant if he was still aware of his rights. Detective Dotson testified that he told the defendant [*26] his rights, and the defendant responded, "Yeah." Detective Dotson told the defendant that Ms. Stokes was "saying something different" from the defendant's story. The defendant's version of the events remained similar to that given in his first interview, but he added that he was not sure why Kinnayia Stokes was angry with him, because he "didn't do nothing."

Detective Dotson testified that during both the first and second interviews on October 23, 2011, the defendant appeared to understand his rights and did not ask for an attorney. The detective denied making any promises, threats, or inducements to compel the defendant to make a statement. He also denied forcing the defendant to make a statement.

On October 24, 2011, the defendant gave a third statement. Detective Dotson conducted the interview and read the defendant his rights. He also gave the defendant a [Pg 15] written rights form, which he

signed. Detective Dotson testified that the defendant appeared to understand his rights and did not ask for an attorney. He further stated that he made no offers, promises, or threats to the defendant. During this interview, for the first time, the defendant stated that he and the victim were [*27] "playing fight" and that he "did punch that boy," but that he was "full of gin." The defendant also claimed that, in addition to falling and hitting his head on the trash can, the victim fell off of the toilet two times.

On cross examination, Detective Dotson testified that he felt that the defendant fully understood his rights and pointed out that the defendant had been arrested before.

The defendant also testified at the motion to suppress hearing. He stated that he then knew the charges that he was facing, but when the police took him in for questioning in October 2011, he did "not necessarily" understand why he was being questioned. He claimed that he thought he was taken to the police station so law enforcement could "figure out" what happened, and he thought he did something wrong when he was placed in the police car. He claimed that he had been drinking gin and smoking marijuana that day and had "kind of like a little buzz." According to the defendant's testimony, he was enrolled in special education courses from third grade through eighth grade and he could not read "too good." He explained that he can understand and communicate when someone is talking to him, but that he did [*28] not really understand the rights form, did not know he was waiving his rights when he signed the form, and did not know that he would be charged with murder. He noted that although he had been arrested before, he did not "know too much about the law." When asked if he thought that Detective Dotson "tricked" him into giving information that he otherwise would not have provided had he known he was a suspect, he answered "yes." On cross examination, the defendant admitted that his past arrests were in July 2008 for attempted second degree murder and in May 2009 for simple assault but did not remember if he was given his rights on those occasions. He admitted that he asked that Detective Dotson return for the second interview. He said that he guessed he understood the questions asked in his interviews, answered all of the questions in his first and second interviews truthfully, and he did not want to change anything in his statements.

Before the court's ruling, defense counsel argued that the defendant was held the whole day on October 23, 2011, and questioned without any probable cause. Counsel [Pg 16] further argued that the defendant's intoxicated state interfered with his limited intellectual [*29] capabilities. The State responded that the defendant signed both rights waivers and noted that the video showed Detective Dotson reading the rights form line-by-line during the first October 23 interview while the defendant followed along. The State argued that Detective Dotson followed procedure, and the issue came down to credibility between the defendant and the detective.

The court noted that it listened to the defendant's statements and viewed his demeanor on the videos as well as in court. The court restated that the defendant had a limited education. The court opined that the defendant was very verbal in the videos and expressive in his mannerisms, including the use of his hands. It noted that the detective read the rights waiver form to the defendant, and he began to read it himself and signed the form. In denying the motion to suppress, the court concluded that the defendant knowingly and voluntarily waived his rights.

As noted, the defendant was fully advised of his rights and executed more than one waiver of rights form. As to the voluntariness of the defendant's statements, we note Detective Dotson's testimony showed that there were no promises or abuse to induce the defendant's [*30] agreement to make a statement, and the defendant noted such on the rights waiver forms. A confession is not rendered inadmissible because law enforcement officers instruct or encourage an accused to tell the truth, provided the instruction is not accompanied by an inducement in the nature of a threat or one which implies a promise of reward. [State v. Robertson](#), 97-0177 (La. 3/4/98), 712 So.2d 8, 31, cert. denied, 525 U.S. 882, 119 S. Ct. 190, 142 L. Ed. 2d 155 (1998).

We note also the defendant's past experience with the criminal justice system. The defendant testified that he had previously been arrested for attempted second degree murder and simple assault. A person's past experiences with the criminal justice system are relevant to the waiver of rights inquiry, because they may show the person has, in the past, and, perhaps, on numerous occasions, been informed of his constitutional rights against self-incrimination both by law enforcement and judicial officers. See [Robertson](#), 712 So.2d at 30; [Green](#), 655 So.2d at 284. Further, regarding any tactics used by the police during questioning, the issue is whether such tactics were sufficient inducement to render an [Pg 17] otherwise voluntary confession or statement inadmissible. See [State v. Lockhart](#), 629 So.2d 1195, 1204 (La. App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

In [State v. Holmes](#), 06-2988 (La. 12/2/08), 5 So.3d 42, 72-73, cert. denied, 558 U.S. 932, 130 S. Ct. 70, 175 L. Ed. 2d 233 (2009), our supreme court stated:

Furthermore, despite the defendant's appellate claim [*31] that her low intelligence rendered her waiver of rights and subsequent statements involuntary, well established jurisprudence from this state shows otherwise. See e.g., [State v. Green](#), 94-0887 (La. 5/22/95), 655 So.2d 272, 278-84 (La. 1995) (mildly retarded defendant's waiver of rights was knowing and intelligent, even though psychologist testified defendant was unable to comprehend his rights; psychologist also testified defendant was educable and could be

made to understand rights, police officers testified defendant understood his rights in part because of his prior criminal history); [State v. Istre, 407 So.2d 1183, 1186-87 \(La. 1981\)](#) (19-year-old who had IQ of 68 and who did not know his own age intelligently waived rights, which were explained in simplistic terms that he apparently understood); see also [State v. Brown, 414 So.2d 689, 696 \(La. 1982\)](#) ("[M]oderate mental retardation and low intelligence or illiteracy do not of themselves vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession.")

After carefully reviewing the testimony adduced at the motion to suppress hearing and the defendant's videotaped statements, in light of the entire record, we find that the State met its burden of proving the defendant gave voluntary and free statements. The testimony established that any mental defect [*32] the defendant may have suffered from did not preclude him from giving voluntary and free statements with a knowledgeable and intelligent waiver of his rights. The rights form consisted of simplistic phrasing of the rights. The rights were read to the defendant, one by one, and the defendant indicated that he read them again on his own. During the interviews, the defendant seemed calm and his account of events seemed plainly willing. He gave responsive, intelligent answers to questions and gave a comprehensible account of the facts of the offenses. There was no indication that the defendant ever asked for an attorney despite being repeatedly advised of his rights. Further, the totality of the interviews clearly convey that the statements were not being made because of any promises, coercion, or threats. We find the district court did not abuse its discretion in denying the motion to suppress. Thus, this assignment of error is without merit.

OTHER CRIMES EVIDENCE

In his second assignment of error, the defendant argues that the district court erred in admitting evidence of 59 of the victim's "other injuries" because the State failed to give notice that it intended to introduce this other [*33] crimes evidence. Specifically, the defendant [Pg 18] alleges that during trial, the State was allowed to introduce into evidence a diagram of injuries to the victim's body that was part of the autopsy report.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [LSA-C.E. art. 401](#). All relevant evidence is admissible, except as otherwise provided by positive law. Evidence that is not relevant is not admissible. [LSA-C.E. art. 402](#). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. [LSA-C.E. art. 403](#).

Courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. See [LSA-C.E. art. 404\(B\)\(1\)](#). Evidence of the defendant's other crimes, wrongs, or acts is generally inadmissible because of the substantial risk of grave prejudice to the defendant. [State v. Rose, 06-0402 \(La. 2/22/07\), 949 So. 2d 1236, 1243](#). However, the State may introduce evidence of other crimes, wrongs, or acts if it establishes an independent [*34] and relevant reason, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [LSA-C.E. art. 404\(B\)\(1\)](#). Upon the accused's request, the State must provide him with notice and a hearing before trial if it intends to offer such evidence. Even when the other crimes evidence is offered for a purpose allowed under [LSA-C.E. art. 404\(B\)\(1\)](#), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. [Rose, 949 So.2d at 1243](#).

Dr. Wainer testified at trial as to the victim's autopsy results. He noted a considerable amount of bruising and abrasions on the victim's head, trunk, and extremities. He noted that the small hemorrhages in the victim's brainstem area were likely to be lethal on their own but concluded that the cause of death was blunt force trauma to the victim's head, trunk, and extremities. Dr. Wainer testified that, during an autopsy, he normally documents any bruising he sees and includes it in his report. The State showed the doctor a diagram and asked if he recognized it as part of his report. He answered "yes" and explained, "[T]hese are notes that are put on diagrams that I prepared when I was performing the autopsy, so [Pg 19] that, [*35] when I go back and dictate it, I can, you know, accurately describe the injuries." The State then asked, "[T]hat's so you can put in your report and have an understanding, when you come two years later, three years later, after doing the autopsy; correct?" Dr. Wainer responded, "Correct." The State then offered the diagram into evidence and the defense did not object.

After the exhibit was received into evidence, however, the attorneys approached the bench, and defense counsel stated that he "must have let that slip by" and he "intended to present an objection to that exhibit 42 on the basis that [Dr. Wainer] cannot identify when and how these bruises was [sic] inflicted on this child." The State responded that "wasn't the purpose of [its] introducing it" and that the purpose

of its introduction was "just so he can show the documentation that he took in order to strengthen his testimony." The court noted that the doctor could not testify as to when the injuries occurred because they were inflicted before the instant offense. The court overruled the defendant's objection and admitted the diagram.

On cross examination, defense counsel asked (referring to the injuries listed on the diagram), [*36] "[Y]ou have no way of being able to determine when those bruises, scars, or lacerations were inflicted; do you?" The doctor responded that he did not agree with that statement and that he has ways of determining age, although it may not be as precise as what defense counsel requested. He noted that the type of hemorrhage beneath the surface of the skin that is seen in a bruise will begin to change color between the second and third day and progress from there, which gives an estimate of its age.

A coroner is required to make a written report of his investigation to the district attorney in any case involving a homicide, and his report shall certify the cause of death. [LSA-C.Cr.P. art. 105](#). Under [LSA-C.Cr.P. art. 105](#), the coroner's report is competent and admissible evidence as the proof and cause of the victim's death, but not of any other fact. [State v. Stewart, 45,333 \(La. App. 2 Cir. 8/11/10\), 46 So.3d 714, 724, writ denied, 10-2145 \(La. 9/30/11\), 71 So.3d 273](#). Further, in a criminal case, every expert witness must state the facts upon which his opinion is based, provided, however, that with respect to evidence that would otherwise be inadmissible, such basis shall only be elicited on cross examination. [LSA-C.E. art. 705\(B\)](#). A physician testifying as an expert may properly give an opinion as to the [Pg 20] probable manner in which a wound or other [*37] traumatic injury was inflicted where such testimony is based on facts within the expert's knowledge. [State v. White, 298 So.2d 733, 734 \(La. 1974\)](#).

In this case, Dr. Wainer testified that the victim's cause of death was blunt force trauma to his head, trunk, and extremities. So, to the extent the challenged diagram shows evidence of such trauma, it is admissible under [LSA-C.Cr.P. art. 105](#) and under [LSA-C.E. art. 705\(B\)](#) to show the cause of death and the basis of Dr. Wainer's opinion. To the extent the diagram shows past injuries not associated with the cause of death, we note that Dr. Wainer documented this scarring merely as part of a thorough autopsy report. See [LSA-R.S. 13:5713\(K\)\(1\)\(e\)](#) (requiring the coroner to include "a listing of the physical findings of the autopsy"). During his testimony, Dr. Wainer did not opine how or when those other injuries were inflicted, other than stating that the scars stemmed from previous trauma. Notably, there was no testimony that any of the "other injuries" listed on the diagram were inflicted by the defendant, nor was there testimony that the defendant had abused the victim before this offense. Thus, the diagram does not constitute other crimes evidence.

Moreover, to the extent this evidence could remotely be viewed as other crimes evidence, the erroneous [*38] admission of other crimes evidence is a trial error subject to harmless error analysis on appeal. [State v. Johnson, 94-1379 \(La. 11/27/95\), 664 So.2d 94, 101](#). The test for determining whether an error is harmless is whether the verdict actually rendered in this case was surely unattributable to the error. [Sullivan V. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 \(1993\)](#). And, in this bench trial, unlike a jury trial, the trial judge is well versed in the rules of evidence, and is, therefore, trained to give the proper weight to evidence. See [State v. Herrin, 562 So.2d 1, 7 \(La. App 1 Cir.\), writ denied, 565 So. 2d 942 \(La. 1990\)](#). Any possibility that the district court was prejudiced against the defendant by the other injuries shown on the coroner's diagram is so remote as to render the verdict surely unattributable to the evidence. See [La. C.Cr.P. art. 921; State v. Morris, 99-3075 \(La. App. 1 Cir. 11/3/00\), 770 So.2d 908, 915, writ denied, 00-3293 \(La. 10/12/01\), 799 So. 2d 496, cert. denied, 535 U.S., 934, 122 S. Ct. 1311, 152 L. Ed. 2d 220 \(2002\)](#). This assignment of error is without merit.

[Pg 21] SENTENCING

In four related assignments of error, the defendant challenges the sentence imposed by the district court. In his fourth assignment of error, the defendant argues the district court erred in determining that it had no discretion to depart from the mandatory sentence set forth in [LSA-R.S. 14:30.1](#). He contends in his fifth assignment of error that the sentence imposed was excessive. In his sixth assignment of error, the defendant argues that the sentence violated the [*39] United States Constitution because "an automatic sentence of life without parole for an intellectually disabled defendant made culpable by his negligence is a cruel and unusual punishment in violation of the [Eighth Amendment](#)." Finally, in his seventh assignment of error, the defendant argues that his defense counsel was ineffective for failing to present mitigating evidence, request a lesser sentence, or file a motion to reconsider sentence.

The record does not contain an oral or written motion to reconsider sentence. [Louisiana Code of Criminal Procedure article 881.1\(E\)](#) provides that the failure to make or file a motion to reconsider sentence precludes a defendant from raising an excessive sentence argument on appeal. Ordinarily, under this article and the decision of [State v. Duncan, 94-1563 \(La. App. 1 Cir. 12/15/95\), 667 So.2d 1141, 1143](#) (en banc per curiam), we would not consider an excessive sentence argument. In the interest of judicial

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economy, however, we will consider the defendant's excessive sentence argument, even without a motion to reconsider sentence, to address his claim of ineffective assistance of counsel. See [State v. Wilkinson](#), 99-0803 (La. App. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 00-2336 (La. 4/20/01), 790 So. 2d 631. Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. Nevertheless, if the defendant can show a reasonable probability that, [*40] but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. See [State v. Felder](#), 00-2887 (La. App. 1 Cir. 9/28/01), 809 So. 2d 360, 370, writ denied, 01-3027 (La. 10/25/02), 827 So. 2d 1173.

[Louisiana Constitution Article I, §20](#) prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review.[Pg 22] [State v. Sepulvado](#), 367 So.2d 762, 767 (La. 1979). Generally, a sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than the needless infliction of pain and suffering. See [State v. Hurst](#), 99-2868 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So. 2d 962. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. [State v. Hogan](#), 480 So.2d 288, 291 (La. 1985). A district court has wide discretion in the imposition of sentences within statutory limits, and its sentence should not be set aside as excessive, unless the court has manifestly abused that discretion. [State v. Lobato](#), 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items the district court must consider before imposing sentence. See [LSA-C.Cr.P. art. 894.1](#). The district court need not recite the entire checklist of [LSA-C.Cr.P. art. 894.1](#), but the record must reflect that it adequately considered the guidelines. [*41] [Herrin](#), 562 So.2d at 11. In light of the criteria in [LSA-C.Cr.P. art. 894.1](#), a review for individual excessiveness should consider the circumstances of the crime and the district court's stated reasons and factual basis for its sentencing decision. *Id.*

The defendant argues that his sentence of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence, is excessive. He argues that the district court's finding that he was a 23-year-old, intellectually challenged individual who had been drinking heavily on the night in question, and who acted with ordinary negligence, rather than intent, renders him an offender less culpable, and the offense itself less grave, than if he had intended the outcome. He also argues that because of his intellectual disability, a sentence of life imprisonment violates the [Eighth Amendment to the United States Constitution](#). He further contends that the district court erred in stating that it had no discretion in the imposition of sentence. Specifically, he notes that after the district court found him guilty of second degree murder, defense counsel stated, "I don't know if the court is inclined to order a pre-sentence report as sentencing is mandatory, so I'm not — ." The court responded, "I don't believe that [*42] I need a pre-sentence report for a sentence that the court has no discretion. So, we can set a sentencing date."

[Pg 23] The defendant also argues that his counsel was ineffective for failing to request a lesser sentence or file a motion to reconsider sentence and in failing to present mitigating evidence. He claims that at a resentencing hearing, defense counsel would present additional evidence that the defendant was born with drugs in his system; his father was a drug user and spent considerable time in prison; his grandmother cared for him until her death in 2008; he was intellectually disabled; he read at a third-grade level; and he suffered from symptoms of mood and thought disorders and was treated with antipsychotic drugs and mood stabilizers. The potential "mitigating factors" all tend to bolster the defendant's arguments that he was intellectually disabled and his actions were not intentional - both arguments that the district court was fully aware of, and specifically pointed out in its reasons for finding the defendant guilty of second degree murder. 

The district court sentenced the defendant to the mandatory sentence for the offense of second [*43] degree murder provided for in [LSA-R.S. 14:30.1\(B\)](#). Even though a sentence is the mandatory minimum sentence, it may still be excessive if it makes no measurable contribution to acceptable goals of punishment, or amounts to nothing more than the purposeful imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. [State v. Dorthey](#), 623 So.2d 1276, 1280-81 (La. 1993). To rebut the presumption that a mandatory minimum sentence is constitutional, a defendant must clearly and convincingly show that he is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the [Pg 24] offense, and the circumstances of the case. [State v. Johnson](#), 97-1906 (La. 3/4/98), 709 So.2d 672, 676. Departures downward from the minimum sentence should only occur in rare situations. *Id.* at 677.

Based on our review of the record, we find that the district court did not err or abuse its discretion in imposing the defendant's sentence in accordance with the mandatory penalty provided for in [LSA-R.S. 14:30.1\(B\)](#). At his sentencing hearing, the defendant did not attempt to make any clear and convincing showing to the district court that he is exceptional and a [*44] victim of the legislature's failure to assign a sentence that was meaningfully tailored to his culpability, to the gravity of the offense, and to the circumstances of the case. About 15 members of the victim's family were present and the victim's

paternal grandmother addressed the court on their behalf. She stated that the loss of the victim was very hard on her as well as her son, the victim's father, and noted that instead of planning a birthday party for the victim, she was planning a vigil. She concluded that the defendant was going to "have to pay for what he did" and that she hoped that this "taught him a lesson and others out there to not harm little children."

The defendant also addressed the court at the sentencing hearing, and stated:

First, I want to say, really, I'm not going to sit here and say, you know, that I [intended] to do this, you know. It was an accident. I wouldn't do nothing like that. You know, God see everything. I know how they feel right now. I know. All I can say is I'm sorry, but I'm not going to say I'm sorry from saying sorry like I killed him because I didn't kill nobody. I know how they feel right now and, really, that's it.

Even if the defendant was [*45] intellectually disabled, the Louisiana Supreme Court has upheld a sentence of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence where the defendant was deemed intellectually disabled. See [State v. Williams, 05-1556 \(La. 2/17/06\), 921 So.2d 105](#) (per curiam). Although the district court found that the defendant did not intend to kill or inflict great bodily harm upon the victim, it did opine that the defendant's actions in attempting "to discipline [the] 23-month-old [victim] for not being potty trained" was the cause of the victim's death, and the defendant "should have known that the rapid blunt force trauma and other trauma to the head, torso, and/or extremities would result in traumatic injury or death."

[Pg 25] On these facts, the district court had no reason to deviate downward from the mandatory sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. We also note that a remand for full compliance with [LSA-C.Cr.P. art. 894.1](#) is unnecessary when a sufficient factual basis for the sentence is shown. See [State v. Harper, 07-0299 \(La. App. 1 Cir. 9/5/07\), 970 So.2d 592, 602](#), writ denied, [07-1921 \(La. 2/15/08\), 976 So.2d 173](#). The defendant has shown no reasonable probability that his sentence would have been different had his trial counsel filed a motion to reconsider [*46] sentence, requested a lesser sentence, or presented mitigating circumstances. Accordingly, these assignments of error are without merit.

JURY WAIVER

In his last assignment of error, the defendant contends the district court erred in granting his motion waiving his right to a jury trial. According to the defendant, "as a result of his intellectual disability, [he] did not execute a knowing, voluntary and intelligent waiver of his right to a jury trial."

The United States Constitution and the Louisiana Constitution expressly guarantee a criminally accused the right to a jury trial in felony and certain misdemeanor cases. See [U.S. Const. amend. VI](#); [LSA-Const. art. I, §§16, 17\(A\)](#). Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury, but no later than 45 days before the trial date, and the waiver shall be irrevocable. [LSA-Const. art. I, §17\(A\)](#); [LSA-C.Cr.P. art. 780](#). A waiver of trial by jury is valid only if the defendant acted voluntarily and knowingly. See [State v. Kahey, 436 So.2d 475, 486 \(La. 1983\)](#). A waiver of this right is never presumed. [State v. Brooks, 01-1138 \(La. App. 1 Cir. 3/28/02\), 814 So. 2d 72, 76](#), writ denied, [02-1215 \(La. 11/22/02\), 829 So. 2d 1037](#). Before accepting a waiver, the district court is not obligated to conduct a personal colloquy inquiring into the defendant's educational background, literacy, and work history. [State v. Allen, 05-1622 \(La. App. 1 Cir. 3/29/06\) 934 So. 2d 146, 154](#). The Louisiana Supreme Court has specifically [*47] refused to adopt an absolute rule that a jury waiver cannot be made by the defendant's attorney when the defendant is considered to have understood his right and consented to such a waiver. [State v. Phillips, 365 So.2d 1304, 1308-09 \(La. 1978\)](#), cert. denied, [442 U.S. 919, 99 S. Ct. 2843, 61 L. Ed. 2d 287 \(1979\)](#).

[Pg 26] In this case, the defendant's trial counsel filed a motion to waive trial by jury on February 26, 2015. The motion stated that "[t]he defendant and his attorney, upon consideration and consultation together, hereby [waive] the defendant's right to a trial by jury in this case." The motion also includes the statement, "[t]he defendant, RANDY D. PARKER, further states to the Court that he fully understands his right to a trial by jury and he does hereby waive that right knowingly, intelligently and voluntarily." Both defense counsel and the defendant signed the motion.

The district court granted the motion in open court on April 13, 2015, finding that the defendant knowingly and intelligently waived his right to a jury trial. Before granting the motion, the district court engaged in a colloquy with the defendant. The defendant stated that he was 26 years old, could read and write "a little bit," understood the English language, and had completed the eighth grade. The district court then [*48] explained to the defendant that he had the right to a trial by jury. The district court asked the defendant whether he understood, and he said "yes." The following colloquy then occurred:

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[The court]: Do you still wish to waive your right to be tried by a jury?

[The defendant]: Do I want to have a jury trial?

[The court]: Do you want to have a jury trial?

[The defendant]: No, ma'am.

[The court]: Your attorney suggested that you did not want to have a jury trial but you wanted to have what is referred to as a bench trial.

[The defendant]: A judge trial?

[The court]: A judge trial. Correct.

[The defendant]: Yes, ma'am.

[The court]: Okay. You are saying, yes, ma'am, to what?

[The defendant]: The judge trial.

[The court]: Okay. So I'm letting you know that you have the right to have a jury trial and twelve out of twelve would have to vote to convict you, okay? Notwithstanding all of that, you still want a judge trial; is that correct?

[The defendant]: Yes, ma'am.

Based on the above colloquy, it is apparent that the defendant understood his right to a trial by jury and waived it knowingly and intelligently. Moreover, on the first day of trial, [Pg 27] the district court confirmed that the matter would [*49] proceed as a bench trial by asking defense counsel, "Randy Parker did waive his right to have a jury trial; is that correct?" Defense counsel answered, "That's correct."

The defendant further argues that his waiver was invalidated by a "clear error of law regarding the rights [he] was relinquishing." Specifically, the defendant contends that he was incorrectly informed of the number of jurors required to convict him of first degree murder. The transcript indicates that the district court explained that in a jury trial, "the members of the jury determine whether to convict or acquit you; that means to find you not guilty. In your particular case, twelve members of the community must serve on the jury and ten of them would have to concur or agree[.]" The State interrupted the court and stated, incorrectly, that "[b]ecause it is first degree, it would have to come back twelve out of twelve." The court then stated, "In your particular case, twelve members of the community would serve on the jury. Twelve out of twelve of them would have to concur to convict or acquit you. If you chose to waive your right to a jury trial, I alone will decide your guilt or innocence. Do you understand?" As the defendant [*50] correctly points out, because the State was not pursuing the death penalty, ten out of twelve concurring votes were required to render a verdict. See [LSA-R.S. 14:30\(C\)\(2\)](#), [LSA-C.Cr.P. art. 782\(A\)](#). The defendant contends that because he was "wrongly informed as to the basic structure of the jury trial he was giving up, the waiver is not valid." He cites [United States v. Manigan, 592 F.3d 621 \(4th Cir. 2010\)](#), in support of his contention. Manigan, however, did not involve the district court incorrectly informing the defendant of the number of jurors required to convict. Rather, in Manigan, the court refused to enforce the defendant's appellate waiver because the district court advised the defendant, contrary to his plea agreement, that he was entitled to appeal his sentence. [592 F.3d at 627-28](#).

While obtaining a defendant's jury trial waiver, the district court is not required to inform a defendant of the number of jurors and the votes necessary for a conviction. [State v. Campbell, 42,099 \(La. App. 2 Cir. 6/20/07\), 960 So.2d 363, 368](#); see also [State v. Davis, 440 So.2d 818, 819 \(La. App. 1 Cir. 1983\)](#) (finding that the defendant's waiver of his right to a trial by jury was knowing and intelligent even if the district court did not specify the number of jurors the defendant was entitled to or the number of jurors necessary to find him [Pg 28] guilty). Further, we do not find that the district court's incorrect statement prejudiced [*51] the defendant. The district court told the defendant that a unanimous verdict, which would be more difficult to achieve than a ten out of twelve verdict, was required to convict him. Even after being incorrectly informed of this stricter concurrence requirement, the defendant still chose to proceed with a bench trial.

Based on the foregoing, there is adequate evidence to demonstrate the defendant's valid jury trial waiver. The defendant's trial counsel filed a written motion waiving this right, and the defendant signed the motion acknowledging that he fully understood his right to trial by jury and knowingly, intelligently, and voluntarily waived that right. The district court ascertained the defendant's age and educational background and clearly explained his rights to him. The defendant's responses showed that he understood his rights and knowingly and intelligently waived them. The district court then granted the motion without any objection by the defendant. (R. 645-46). Under these circumstances, we disagree with the defendant's claim that he did not validly waive his right to a trial by jury. Accordingly, this assignment of error is without merit.

Footnotes



Judge [Curtis A. Calloway](#) ▼, retired, is serving as judge pro tempore by special appointment of the Louisiana Supreme Court.



After it received evidence that the defendant was possibly intellectually disabled, the State informed the court that it would not seek the death penalty.



Kimayia Stokes was charged separately with obstruction of justice and cruelty to juveniles.



The State claims that it "was simply taking the death penalty off the table as a matter of expediency and strategy."



The State did not introduce the video from the October 24, 2011 statement but did introduce the rights form signed by the defendant in connection with that statement.



On appeal, the defendant filed a citation of supplemental authorities citing [State v. Boyd](#), 14-0408 (La. App. 4 Cir. 2/11/15), 164 So.3d 259 and [State v. Farry](#), 16-211 (La. App. 3 Cir. 11/16/16), 207 So. 3d 436, 2016 La. App. LEXIS 2108, 2016 WL 6780442, as authority for this Court to remand the issue of ineffective assistance of counsel at sentencing for further factual development. In both Boyd and Farry, the appellate courts found that the records were insufficient for consideration of the claims of ineffective assistance of counsel at habitual offender sentencing and remanded for a full evidentiary hearing. [Boyd](#), 164 So.3d at 264-65; [Farry](#), 16-211, 2016 La. App. LEXIS 2108 at *6. Specifically, the Boyd court noted that it did not have any testimony or evidence in the record to explain the absence of any documentation or expert testimony that might have supported or corroborated what the defendant and his aunt told the district court judge at sentencing about the defendant's mental health and also pointed out that the district court did not mention or comment about the defendant's mental health. [Boyd](#), 164 So.3d at 264. The Farry court noted that the district court did not give any reasons for imposing the sentence since the conviction carried a mandatory sentence, and the record did not reflect that there was a pre-sentence investigation report that was considered by the district court. [16-211](#), 2016 La. App. LEXIS 2108 at *24. We find both cases to be distinguishable from this case. Both Boyd and Farry were jury trials, whereas the present case was a bench trial, where there was sufficient evidence in the record to establish the defendant's intellectual disability. The district court heard testimony that the defendant was enrolled in special education classes and took medication to "keep him calm." The district court was also aware that the State did not

pursue the death penalty because it believed, if tested, the defendant would be diagnosed as having an intellectual disability. Moreover, in its ruling, the district court found that the defendant had an intellectual disability and acted without specific intent.

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Supreme Court of Louisiana

December 15, 2017, Decided

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2017 La. LEXIS 2910 * | 231 So. 3d 637 | 2017-0509 (La. 12/15/17);

STATE OF LOUISIANA VS. RANDY DEMOND PARKER

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] IN RE: Randy Demond Parker; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of E. Baton Rouge, 19th Judicial District Court Div. J, No. 05-12-1147; to the Court of Appeal, First Circuit, No, 2016 KA 1016.

[State v. Parker, 2017 La. App. Unpub. LEXIS 62 \(La.App. 1 Cir, Feb. 17, 2017\)](#)

Judges: [Scott J. Crichton ▼](#), [Bernette J. Johnson ▼](#), [John L. Weimer ▼](#), [Greg G. Guidry ▼](#),
[Marcus R. Clark ▼](#), [Jefferson D. Hughes, III ▼](#), [James T. Genovese ▼](#).

Opinion

Denied.

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