NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1962

STATE OF LOUISIANA

VERSUS

PAUL ANTOINE DION, JR.

Judgment Rendered: JUN 13 2013

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On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Trial Court No. 571,510

The Honorable George J. Larke, Jr., Judge Presiding

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* * * * *

BEFORE: PARRO, WELCH, AND DRAKE, JJ.

DRAKE, J.

The defendant, Paul Antoine Dion, Jr., was charged by grand jury indictment with second degree cruelty to juveniles, a violation of La. R.S. 14:93.2.3. He pled not guilty. He waived his right to a jury trial and, following a bench trial, was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The trial court sentenced the defendant to thirty years' imprisonment at hard labor.[1] The defendant now appeals, designating five counseled assignments of error and one pro se assignment of error. We affirm the conviction and sentence.

FACTS

Melissa Thibodeaux lived in Thibodaux and worked as a sitter for elderly people. Melissa and Doris Dion, defendant's mother, cared for the same lady, and it was through Doris that Melissa met the defendant. After briefly dating, in 2008, the defendant moved in with Melissa in her house in Lafourche Parish. At this time, the defendant was unemployed. Later, the defendant began driving trucks for a living. Problems developed in the relationship, and the defendant moved out sometime in mid-2008. Melissa testified at trial that she made the defendant leave because he had gotten physically abusive with her. They still saw each other, however, "off and on." In December of 2008, Melissa became pregnant. The defendant was the father of the child. At forty-one years old, Melissa was happy to be pregnant. She had been married several times and had had several miscarriages.

The defendant was not pleased with the pregnancy and wanted Melissa to have an abortion, which she refused. The defendant made several phone calls to Melissa at home while she was pregnant. Whether Melissa answered and spoke to the defendant or let the defendant leave a message, the defendant's

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[1] The defendant was also sentenced to six months for direct contempt of court, a charge that arose out of the defendant's absconding from court on the last day of trial and going into hiding. The six-month sentence was ordered to run first and in addition to the thirty-year sentence.

statements/conversations were recorded, and those recordings were introduced into evidence and played for the trial court. On one occasion, the defendant left a message that Melissa was not going to carry that "f---ing baby" and that something was going to happen to Melissa. In another message, the defendant stated, "go get an abortion if not I'm gonna get you shot." In another message, the defendant stated:

> As far as you and that kid I ain't I ain't paying nothing. I don't wanna have no part of you or that child. I ain't giving you child support I ain't giving you nothing so I hope you gonna have an abortion I I hope something happens to you before you carry that baby too far. Okay bye.

Two weeks prior to S.D.'s birth, the defendant moved back in with Melissa. Melissa explained at trial that there was no reconciliation between her and the defendant, but she wanted the defendant to learn how to take care of his baby. Melissa gave birth to a boy, S.D., on September 9, 2009. S.D. was born healthy with no medical problems and the first three months of his development were normal.

Melissa testified that on Saturday, October 31, 2009, when S.D. was seven weeks old, he was in the defendant's bedroom crying. Melissa took S.D. and brought him to her bedroom. With S.D. still crying, the defendant took the baby, put him in his Jeep Cherokee and drove to his mother's house in Bourg in Terrebonne Parish. Melissa stated it was freezing outside, and the defendant left with S.D. without a blanket, formula, or child seat. Melissa called the police, but they could not help her because the defendant was equally entitled to the custody of his child. Melissa and the defendant had never secured a court-ordered custody agreement. While the defendant kept S.D. at his mother's house over the Halloween weekend, Melissa repeatedly called the defendant to check on S.D. On Monday, the defendant let Melissa come pick up S.D. in Bourg. With the defendant following in his Jeep under the pretense that Melissa would allow the

defendant to come back to live with her, Melissa brought S.D. to the house of her parents who lived nearby. When Melissa and the defendant went to Melissa's house, Melissa told the defendant to take his belongings and leave. The next day, Melissa went to speak to an attorney about custody of S.D.

Still with no formal court order, Melissa, the defendant, and their attorneys worked out a temporary visitation arrangement. The defendant was allowed custody of S.D. one day a week and on every other weekend. On Friday, December 11, 2009, the defendant picked up three-month-old S.D. from Melissa's mother's house for the first agreed-upon overnight visit. Melissa testified there was nothing wrong with S.D. when the defendant took custody of him that Friday morning at about 10:00 a.m. and took him to his mother's house, where the defendant was also living. Then on Saturday evening at about 7:30 p.m., the defendant called Melissa on the phone and told her that S.D. had vomited when being fed a bottle. Melissa told the defendant to bring S.D. to her, and the defendant said he was considering that, but it was raining heavily. Several minutes later, Melissa called the defendant again to check on S.D. The defendant told her that S.D.'s leg was shaking. Melissa told the defendant to bring S.D. to her, or she would come to his mother's house with the police. With the rain slackening, the defendant agreed to meet Melissa at Nocko's, a truck stop with a convenience store in Raceland on La. Hwy. 182.

Between 9:30 p.m. and 10:00 p.m., the defendant met Melissa at Nocko's, where the defendant gave S.D. to her. S.D. was crying. Melissa testified the defendant told her that he probably would not be seeing S.D. for a long time. The defendant then said he was going to buy a beer, which he did at the convenience store. According to Melissa, the defendant had not drunk since the 1990s and she had never seen him drink a beer. Melissa, who was with her mother, drove back to her mother's house and removed S.D. from his car seat. S.D.'s leg and arm were

shaking, his eyes were twitching, and his lips were turning blue. Melissa called her doctor, who told Melissa to bring S.D. to the hospital. Melissa brought S.D. to Thibodaux Regional Medical Center, where S.D. was treated by emergency room physician, Dr. Charles Speights. Dr. Speights testified at trial that S.D. had a low temperature of 95.7 degrees, and he was twitching all over and arching his back. The doctor ordered blood work, a chest x-ray, and a CT scan of the head. The CT scan revealed subdural hematoma, or bleeding on the brain. Upon ruling out several possibilities that might have caused S.D.'s symptoms, Dr. Speights felt it was clear S.D. was suffering from shaken baby syndrome (SBS).

S.D. was transported to Children's Hospital, which had a pediatric ICU. While S.D. was intubated in intensive care, Dr. Jamie Jackson, a child abuse pediatrician, conducted a comprehensive physical examination on the infant. She also consulted with a neurologist and ophthalmologist. Dr. Jackson testified at trial that S.D.'s eyes were sluggish and minimally reactive and that these symptoms, coupled with his low body temperature, indicated neurological problems. S.D. did not have palmer (hand) or plantar (feet) reflexes. The ophthalmologic findings were diffuse retinal hemorrhages consistent with centripetal force injury. The doctor explained that centripetal force, which involves rotation and forward and backward motion, is the typical force related with SBS. Dr. Jackson further testified that S.D. had some rib fractures of the right seventh and possibly the fifth and sixth. The doctor stated that in infants, rib fractures alone are indicative of physical abuse since it is really difficult for an infant to get a rib fracture. Thus, it would have taken a significant amount of force to cause this injury. Dr. Jackson testified that S.D. had significant, permanent injuries as a result of being shaken and that developmental delays may become worse.

Dr. Kenneth Cruse, S.D.'s pediatrician, testified at trial that S.D. was born a normal baby with no neurological problems. After seeing S.D. in January of 2010,

Dr. Cruse stated that he agreed with Children's Hospital's diagnosis of SBS. According to Dr. Cruse, S.D. will always have significant neurological impairments, but as he gets older may have some form of ambulation with the assistance of a walker. Dr. Cruse did not expect S.D. ever to be able to ambulate normally.

Michele Bower, a pediatric physical therapist, testified at trial that she was S.D.'s physical therapist and has worked with him one hour a week for two years. At trial, Bower removed S.D. from his $7,000 custom wheelchair and showed the trial court some of the physical therapy S.D. undergoes, which includes a lot of stretching. Bower stated that at twenty-six months old, S.D. can say some words, like "good" or "out." She explained that S.D. always looks to the right because he uses the muscles on one side of his body better than the other side. She further explained that at this age, S.D. should be walking around, kicking a ball, climbing steps, and playing with toys, but instead S.D. was working on sitting. Bower stated that on a good day, S.D. could sit up for about thirty seconds. She added that S.D. could not stand or crawl, and he could not reposition himself when lying down. She also stated that S.D. wore leg braces and used a gait trainer, which enables him to stand up straight. Bower expected S.D.'s substantial impairments in speech and mobility were permanent.

Dr. Mark Holder, an internist, testified for the defense. Dr. Holder stated that he had reviewed S.D.'s medical records. His first time testifying as an expert, Dr. Holder stated that he had in the past treated children for SBS and that he agreed with S.D.'s diagnosis of SBS. S.D.'s CT scan of his head was taken on Sunday, December 13, 2009, at 7:42 a.m. The radiology report on this scan stated: "Impression changes consistent with subacute massive cerebral anoxia, small subdural hemorrhages." Dr. Holder explained that "subacute" meant there was a period of 72 hours to several weeks from when the injury occurred (the shaking) to

when the CT scan was taken. Thus, according to Dr. Holder, S.D.'s symptoms did not necessarily have to show up within hours of the injury. On cross-examination, Dr. Holder was asked if he agreed with Dr. Jackson's assessment that S.D.'s injury had to have occurred within close proximity to when the defendant noticed S.D.'s leg shaking. Dr. Holder responded that he agreed with the testimony "in general." The prosecutor played for Dr. Holder the defendant's recorded statement to the police, which Dr. Holder had not heard. After viewing the transcript of the recorded statement, Dr. Holder agreed that it contained important history and further, that the history was not consistent with a baby who suffered the amount of trauma S.D. suffered thirty-five hours before the twitching. The following exchange between the prosecutor and Dr. Holder then took place:

> Q. Okay. So the history that we just saw, which you didn't have the benefit of when you made your opinion?
> A. Correct.
> Q. So the report that you wrote you said: In my opinion this trauma happened before 9:00 a.m. on Friday morning. Correct?
> A. Correct.
> Q. After having seen this history, that is no longer your opinion, is it?
> A. It's not compatible with the medical findings, correct.
> Q. I know. And I know this is tough. That's not your opinion any more after you saw this history, is it?
> A. It -- It's not typical.
> Q. Okay. Third time's got to be the charm. Look, this is serious. All right? I know that this history is thorough, complete, and it's in-depth and it is not consistent with a baby that suffered the type of trauma that caused this permanent damage, correct?
> A. Correct.
> Q. So the trauma had to occur after 9:00 a.m. on Friday.
> A. Based on the history, correct.

On the redirect examination of Dr. Holder, by defense counsel, the following rehabilitative exchange took place:

> Q. I'm still missing, Doctor, what you saw that had you change your opinion from the CT scan said the injury as shown on that CT scan was subacute and therefore had probably occurred 72 hours prior to that CT scan. Are you changing that opinion?
> A. Based on the CT scan alone, I'm not changing my interpretation of the CT scan.
> Q. Okay.
> A. The CT scan clearly states subacute.

Q. Which means 72 hours prior?
A. Yes, sir.

Sergeant Shane Fletcher, with the Terrebonne Parish Sheriff's Office, testified at trial that he was the lead investigator on this case and that he had interviewed the defendant. The interview was recorded, and the DVD of the recording was introduced into evidence and played for the trial court. Upon being **Mirandized** and signing an advice of rights form, the defendant informed Sergeant Fletcher that S.D. was happy when he picked him up Friday morning, everything was fine for the rest of the day Friday, and S.D. looked good when he (S.D.) woke up Saturday morning. Saturday evening S.D. drank two ounces of his formula and threw it up. According to the defendant, after several minutes, he fed S.D. the other two ounces in his bottle, and S.D. kept that down. S.D. then began crying "hard" and his leg started shaking. He called Melissa and told her something was wrong with S.D. A short time later, S.D.'s arm began shaking and his eyes were twitching. When the heavy rain abated, he met Melissa at Nocko's to give S.D. to her. The defendant denied that he shook S.D. or hurt him in any way. The defendant informed Sergeant Fletcher that he was the only person who handled S.D. at his mother's house. The defendant's mother testified at trial that the people living at her house when S.D. was over there were her sister, her husband, and the defendant. She confirmed that no one in her house, including herself, handled S.D. except for the defendant. When asked during the interview about the beer he purchased, the defendant denied it. After being told there was video footage, the defendant admitted he purchased a beer and could not explain to Sergeant Fletcher why he had lied.

The defendant did not testify.

COUNSELED AND PRO SE ASSIGNMENT OF ERROR NO. 1

In his first counseled assignment of error, the defendant argues the evidence

was insufficient to support the conviction. Specifically, the defendant contends the State failed to prove that he was the person who injured S.D.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see La. Code Crim. P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 01-3033 (La. App. 1 Cir. 6/21/02), 822 So.2d 161, 163-64.

La. R.S. 14:93.2.3 provides, in pertinent part:

> A. (1) Second degree cruelty to juveniles is the intentional or criminally negligent mistreatment or neglect by anyone over the age of seventeen to any child under the age of seventeen which causes serious bodily injury or neurological impairment to that child.

> (2) For purposes of this Section, "serious bodily injury" means bodily injury involving protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or substantial risk of death.

The defendant does not deny that shaken baby syndrome caused S.D.'s injuries. He asserts instead, in his brief, that reasonable doubt existed over whether S.D. was injured while in his (defendant's) care and custody. Specifically, in his sole argument, the defendant suggests that S.D. may have been injured between the time Melissa picked up S.D. from Nocko's and the drive back home. According to the defendant, child abuse pediatrician Dr. Jackson "testified that the symptoms of shaken baby syndrome occur immediately."

At trial, Dr. Jackson explained in a hypothetical context that immediate bleeding on the brain can result from being shaken. Also, the hemorrhaging in the eyes would be immediate. However, with regard to S.D.'s specific symptoms of vomiting and a twitching arm and leg, as described by the defendant as occurring around 7:30 p.m. on Saturday, Dr. Jackson suggested that the incident - when S.D. was shaken - occurred some time between Saturday morning and Saturday evening. S.D. underwent a CT scan of his head at Children's Hospital on December 13, 2009 (Sunday) at 7:42 a.m. An attending neurologist at the hospital, Dr. McGuire (who did not testify at trial) included in her written notes: "not clear time of injury 24-48 hours? Impression: progressing edema of the brain, coma, signs of impending herniation, continue supportive care." Her prognosis was "Grave." Dr. Jackson testified this meant the injury likely occurred 24 to 48 hours from the time the CT scan was taken. Thus, according to Dr. Jackson, the injury, or shaking, occurred at least 24 hours prior to the CT scan, or at 7:42 a.m. Saturday when S.D. was with the defendant.

S.D. was taken by Melissa to Thibodaux Regional Medical Center at about 10:45 p.m. on Saturday. Dr. Speights, the emergency room physician who cared

for S.D., testified at trial that S.D. had been injured probably within the last twelve hours, and that if S.D. had been injured longer than twelve hours before, he probably would not have survived. Dr. Kenneth Cruse, a pediatrician, testified that the symptoms of vomiting and twitching of the limbs occurred within hours of the traumatic event (the shaking).

The evidence clearly established S.D. began suffering symptoms when he was with the defendant. Melissa's testimony, corroborated by the defendant's own recorded statement to the police, indicates that at about 7:30 p.m. on Saturday, the defendant called Melissa and told her that S.D. had vomited and that his leg was shaking. Thus, the earliest indication of symptoms of SBS was at 7:30 p.m. (and could have been earlier and the defendant simply waited to call Melissa) before S.D. was even back in Melissa's care. In his interview, the defendant stated that S.D. looked good Saturday morning and afternoon, but later that evening, S.D. had vomited, his arm and leg were shaking, and his eyes were twitching. Doctors confirmed that vomiting and the seizure-like symptoms of twitching limbs are compatible with a baby having been violently shaken. Also, S.D. had fractured ribs. Accordingly, there was nothing in the evidence to suggest that Melissa injured S.D. by shaking him some time during the thirty to forty-minute drive back home from Nocko's.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The defendant suggests that he was not the person who shook S.D., injuring him. However, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness, including an expert. **State v. Ducksworth**, 496 So.2d 624, 634 (La. App. 1st Cir. 1986).

Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record may contain evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. See **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 03-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

The trial court heard all of the testimony and viewed the documentary evidence presented to it at trial and, notwithstanding any conflicting testimony, found the defendant guilty. The trial court's judgment of guilt reflected the reasonable conclusion that, based on the physical evidence and expert testimony, the defendant, at some point during his approximately 35-hour period of custody of S.D., violently shook S.D., breaking his ribs and causing irreparable neurological injuries. In finding the defendant guilty, the trial court clearly rejected the defense's theory of innocence. See **Moten**, 510 So.2d at 61.

After a thorough review of the record, we are convinced that, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of any hypothesis of

innocence, that the defendant was guilty of second degree cruelty to juveniles. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). This assignment of error is without merit.

In his pro se assignment of error attacking the sufficiency of the evidence, the defendant argues that other information should have been elicited at trial to show that he was not responsible for S.D.'s injuries. For example, the defendant suggests that possibly S.D. was injured by Melissa by giving S.D. Tylenol; or S.D. was injured prior to birth by prenatal medication, the same medication that caused Melissa to miscarry twins.

The counseled assignment of error regarding sufficiency, fully discussed above, clearly established the defendant was the person who violently shook S.D., causing his injuries. On appeal, the reviewing court does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events. **Mitchell**, 772 So.2d at 83. See **State v. Juluke**, 98-0341 (La. 1/8/99), 725 So.2d 1291, 1293 (per curiam). Accordingly, the pro se assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that he did not knowingly and voluntarily waive his right to a jury trial.

The punishment for second degree cruelty to juveniles is confinement at hard labor. La. R.S. 14:93.2.3(C). Accordingly, the defendant was entitled to a jury trial. La. Const. art. I, § 17(A); La. Code Crim. P. art. 782(A). Louisiana Code of Criminal Procedure article 780 provides, in pertinent part:

> A. A defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury.

Thus, if a defendant is tried and convicted by a judge when he is entitled to a trial by jury, the record must show that a jury trial was knowingly and intelligently waived. See **State v. Cappel**, 525 So.2d 335, 336-37 (La. App. 1st Cir.), writ denied, 531 So.2d 468 (La. 1988). While the Louisiana Supreme Court has rejected an absolute rule requiring the trial judge to personally inform defendant of his right to a jury trial, the preferred method of ensuring the right is for the trial judge to advise defendant personally on the record of his right to a jury and to require that defendant waive the right personally either in writing or by oral statement in open court on the record. **State v. Brooks**, 01-1138 (La. App. 1 Cir. 3/28/02), 814 So.2d 72, 78, writ denied, 02-1215 (La. 11/22/02), 829 So.2d 1037.

The trial court in the instant matter conducted a hearing on the defendant's motion to waive jury trial. In his brief, the defendant notes that after the trial court obtained his educational level and that he had never been treated for mental illness, the trial court asked, "Are you presently suffering from any mental or emotional disability?" The defendant responded, "Uh-uh." According to the defendant, since he did not answer "yes" or "no," the trial court did not establish whether or not he was experiencing emotional difficulties. Thus, defendant contends that "a question exists" as to whether he knowingly and voluntarily waived his right to a jury trial.

The defendant's assertion is baseless. We note initially that "uh uh" generally means "no" (and "uh huh" means "yes"). Our understanding of the meaning of "uh uh" notwithstanding, the defendant, inexplicably, has failed to include the entire exchange between him and the trial court and a prosecutor, which clearly indicates a knowing and voluntary waiver of the right to a jury trial. Thus, following the defendant's response in the negative to suffering from mental or emotional disability, the following exchange took place:

> The Court: Okay. Mr. Dion, I have you here because you're being tried on the charge of second degree cruelty to a juvenile and you have a trial set for the month of November. It's my understanding that you

> and your attorney have filed a motion or, whether it's either a written motion or an oral motion, to waive the jury. Do you understand that?
> [Defendant]: Yes, sir.
> The Court: You understand under the charges that you have, because it's a sentence at hard labor, you're entitled to be tried by a jury of your peers of 12 people, ten of whom would have to vote to convict you. Do you understand that?
> [Defendant]: Yes, sir.
> The Court: And you -- You feel that it's in your best interest at this time to waive that right to a jury trial?
> [Defendant]: Yes, sir.
> The Court: And you make this decision knowingly and intelligently?
> [Defendant]: Yes, sir.
> The Court: Okay. Mr. Barnes, do you have any questions first?
> Examination by Mr. Barnes [Prosecution]: Mr. Dion, you know that you can't go back once you waive the jury?
> [Defendant]: No, I ain't going to go back. I'm sticking with it.
> Mr. Barnes: Okay.
> The Court: Mr. Whipple?
> Mr. Whipple [defense counsel]: I have no -- None, Judge.
> The Court: Okay. And you wish to be tried by a judge; is that correct?
> [Defendant]: Yes, sir.
> The Court: Thank you, Mr. Dion.
> [Defendant]: That's it?
> The Court: The Court, having gone over the, the testimony of the witness here will find that he knowingly and intelligently waives his rights to a jury trial and Mr. Dion will be tried by a bench trial.

Furthermore, two months later on the first day of the bench trial, the trial court again went over with the defendant his decision to waive a jury trial:

> The Court: All right. The way I understand, previously Mr. Dion had waived his rights to a jury trial and asked for a bench trial; is that correct?
> Mr. Whipple [defense counsel]: Yes, Your Honor.
> The Court: And you stand with that, Mr. Dion?
> [Defendant]: Yes, sir.
> The Court: You previously were brought into the [C]ourt and I questioned you about that and the Court will accept that.
> Mr. Whipple: Right.

The foregoing clearly establishes the defendant was made aware of his right to a jury trial and made a knowing and intelligent waiver of that right. Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues he was provided ineffective assistance of counsel. Specifically, the defendant contends defense counsel failed to file a motion to suppress the evidence or statements and failed to call the appropriate physician to testify regarding S.D.'s injuries.

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1 Cir. 11/8/96), 684 So.2d 432, 438.

The defendant asserts it was deficient performance by defense counsel in failing to file a motion to suppress the evidence or statements, and in calling as defense's medical expert an internist, instead of a neurologist, to interpret S.D.'s medical reports. These allegations of ineffectiveness relate to pretrial and trial preparation and strategy. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[2] Accordingly, these allegations of ineffectiveness are not subject to appellate review. See **State v. Albert**, 96-1991 (La. App. 1 Cir. 6/20/97), 697 So.2d 1355, 1363-64; See **State v. Allen**, 94-1941 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433; **State v. Martin**, 607 So.2d 775, 788 (La. App. 1st Cir. 1992). This assignment of error is not subject to appellate review.

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[2] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues the trial court erred in allowing the physical therapist to demonstrate on S.D. the therapy he underwent. Specifically, the defendant contends the prejudicial effect of allowing S.D. to be brought into the court outweighed the probative value.

Michele Bower, a pediatric physical therapist, was called by the State to testify. Bower testified she was S.D.'s physical therapist and that she worked with him one hour per week. Instead of having Bower testify about the specifics of the one-hour sessions of physical therapy, the State sought to bring S.D. into the courtroom and have Bower do some exercises with S.D., so the trial court could have a better understanding of S.D.'s impairments. Defense counsel objected on the grounds that neurological damage was more properly shown through the testimony of doctors, rather than a physical therapist. Defense counsel further argued the demonstration was being used to invoke the trial court's sympathy and that it had no relevance in proving any facts or elements of the crime. The prosecutor countered that the State had the burden of proving neurological damages sustained by S.D., and that the best evidence of this was for the trial court to "see visually what those impairments are."

In overruling the defendant's objection, the trial court stated:

> I think it will go on to show neurological impairment just as if he was being brought in if this was a homicide and the pictures of the body were shown to show the wounds or whatever. I think the same thing can be shown, used here, to show the neurological impairment.

S.D. was brought into the courtroom, and Bower conducted several exercises with the child to demonstrate what he could and could not do, and to compare his impaired progress with a typical two-year old. Bower and S.D. were videotaped and the DVD was submitted into evidence.

Preliminary questions concerning the competency or qualification of a

person to be a witness or the admissibility of evidence shall be determined by the court. La. Code Evid. art. 104. 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. La. Code Evid. art. 401. All relevant evidence is admissible, except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. Code Evid. 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. La. Code Evid. art. 403. Ultimately, questions of relevancy and admissibility of evidence are discretion calls for the trial court. Such determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. See **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992); **State v. Olivieri**, 03-563 (La. App. 5 Cir. 10/28/03), 860 So.2d 207, 218.

We see no reason to disturb the trial court's ruling. We agree with the trial court's analogy of the use of photographs at trial, and note as well that videos of potentially very disturbing crime scenes have long been held to be admissible evidence at trial. See **State v. Huls**, 95-0541 (La. App. 1 Cir. 5/29/96), 676 So.2d 160, 176, writ denied, 96-1734 (La. 1/6/97), 685 So.2d 126. See also **State v. Perry**, 502 So.2d 543, 559 (La. 1986), cert. denied, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987) (where the supreme court noted the defendant cannot deprive the State of the moral force of its case by offering to stipulate to what is shown in photographs).

The evidence here introduced, along with testimony, by a live demonstration of S.D.'s limits and capabilities, was highly relevant in facilitating the trial court's assessment of the extent of S.D.'s injuries. Accordingly, the trial court did not

abuse its discretion in allowing such evidence to be introduced.

Moreover, even had the trial court erred in allowing this evidence at trial, such admission would have constituted harmless error. Louisiana Code of Criminal Procedure article 921 states that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." The test for determining whether an error is harmless is whether the judgment of guilt 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).

In the instant matter, the medical and testimonial evidence clearly established the defendant's guilt, as well as the extent of S.D.'s injuries. As such, the demonstration of S.D.'s physical therapy was merely cumulative. Thus, the judgment of guilt rendered was surely unattributable to any demonstrative evidence of S.D.'s neurological damage, and any error in allowing such evidence was harmless beyond a reasonable doubt. See **Sullivan,** 508 U.S. at 279, 113 S.Ct. at 2081. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 5

In his fifth assignment of error, the defendant argues his sentence is unconstitutionally excessive.

A thorough review of the record indicates the defendant did not make or file a motion to reconsider sentence following the trial court's imposition of the sentence. Under La. Code Crim. P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness.[3]

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[3] Following sentencing of the defendant, defense counsel stated, "We'll just note our objection for the record." Defense counsel's objection did not constitute an oral motion to reconsider sentence. Moreover, a general objection to a sentence without stating specific grounds, including excessiveness, preserves nothing for appellate review. See **State v. Bickham**, 98-1839 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 891.

See **State v. Mims**, 619 So.2d 1059 (La. 1993) (per curiam). The defendant, therefore, is procedurally barred from having this assignment of error reviewed because of his failure to file a motion to reconsider sentence after being sentenced. See **State v. Duncan**, 94-1563 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.