NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 1011

STATE OF LOUISIANA

VERSUS

CHAD M. THIBODEAUX

Judgment Rendered: October 31, 2008

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Appealed from the
18th Judicial District Court
In and for the Parish of West Baton Rouge, Louisiana
Case No. 064299

The Honorable J. Robin Free, Judge Presiding

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Richard J. Ward District Attorney Elizabeth A. Engolio Assistant District Attorney Plaquemine, Louisiana	Counsel for Appellee State of Louisiana
W. Robert Gill Andre Belanger Baton Rouge, Louisiana	Counsel for Defendant/Appellant Chad M. Thibodeaux

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Gaidry, J. concurs in result

GAIDRY, J.

The defendant, Chad M. Thibodeaux, was charged by grand jury indictment with one count of manslaughter, a violation of La. R.S. 14:31, in connection with the death of his infant son, and initially pleaded not guilty. He subsequently withdrew his original plea and pleaded guilty as charged. He was sentenced to twenty-five years at hard labor.

The defendant now appeals, contending that (1) the trial court erred by failing to apply the rule of lenity and by failing to impose a sentence within the least severe penalty range available for the homicide of a child under ten years of age that is caused by a battery; and (2) the trial court abused its discretion and excessively sentenced the defendant, an army officer diagnosed with a high impulsivity rate, to twenty-five years after finding that he did not intend to kill the victim and noting that he lacked a criminal record. We affirm the conviction and sentence.

FACTS

Due to the defendant's guilty plea, there was no trial, and thus, no trial testimony concerning the facts of the offense. At the *Boykin*[1] hearing, however, the following exchange occurred between the court and the defendant:

> [Court]: I'm going to ask you, if you would, sir, tell me what you did.
>
> [Defendant]: I was with the baby early morning hours –
>
> [Court]: What was this child's name?

[1] In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court reversed five robbery convictions founded upon guilty pleas because the court accepting the pleas had not ascertained that the defendant voluntarily and intelligently waived his right against compulsory self-incrimination, right to trial by jury, and right to confront his accusers. *Boykin* only requires a defendant be informed of these three rights. "Its scope has not been expanded to include advising the defendant of any other rights which he may have, nor of the possible consequences of his actions." *State v. Smith*, 97-2849, p. 3 (La. App. 1st Cir. 11/6/98), 722 So.2d 1048-49.

[Defendant]: Caleb Michael Thibodeaux.

[Court]: Okay.

[Defendant]: And he kept crying, and I hadn't slept, you know, I had a lot on my mind. I mean I was in school, working two jobs, and I was also an officer in the Guard, so I had a lot on my plate, and probably shouldn't have had the baby to begin with. I probably should have had my wife watching him. And I slapped him with my left hand, open hand, and he ended up dying in the hospital afterwards. I mean we brought him that morning but I mean –

[Court]: How old was this child?

[Defendant]: He was three weeks old, Your Honor.

[Court]: I know you think I am being cruel but I have to ask those questions because it's –

[Defendant]: I mean I didn't mean for that.

[Court]: I understand that. Did you hear the part of this –so in other words, you are telling me that you committed a battery upon him; is that correct?

[Defendant]: Yes, Your Honor.

[Court]: And that he died as a result of that battery; is that what you're telling me?

[Defendant]: Yes, Your Honor.

[Court]: And that he was under the age of 10 years old; is that correct?

[Defendant]: Yes, he was, Your Honor.

An autopsy performed on the child revealed that he died as a result of blunt trauma to the head with skull fracture, subdural hematoma, and subarachnoid hemorrhage, and suffered retinal and optic nerve hemorrhage, consistent with "shaken baby syndrome."

IMPROPER PENALTY

In his first assignment of error, the defendant argues conflicting penalties exist for the "offense" of committing a battery upon a victim under the age of ten resulting in the victim's death, and thus, under the rule of

lenity, the trial court erred in failing to impose the lesser penalty, that applicable to negligent homicide under La. R.S. 14:32(C).

Legislative intent is the fundamental question in all cases of statutory interpretation, and rules of statutory construction are designed to ascertain and enforce the intent of the statute. *State v. Peters*, 05-2069, pp. 4-5 (La. App. 1st Cir. 5/5/06), 935 So.2d 201, 203. It is presumed that the legislature enacts each statute with deliberation and with full knowledge of all existing laws on the same subject. Thus, legislative language is interpreted by the courts on the assumption that the legislature was aware of existing statutes, rules of construction, and judicial decisions interpreting those statutes. It is further presumed that the legislative branch intends to achieve a consistent body of law. *Peters*, 05-2069 at p. 5, 935 So.2d at 203-04.

A criminal statute must be given a genuine construction consistent with the plain meaning of the language in light of its context and with reference to the purpose of the provision. La. R.S. 14:3. Moreover, it is a well-established tenet of statutory construction that criminal statutes are subject to strict construction under the rule of lenity. The rule of lenity applies not only to interpretations of the substantive ambit of criminal laws, but also to the penalties imposed by those laws. When a criminal statute provides inconsistent penalties, the rule of lenity directs the court to impose the least severe penalty. *Peters*, 05-2069 at p. 5, 935 So.2d at 204.

The defendant relies upon comparison of the following *penalty* provisions for his argument:

> Whoever commits manslaughter shall be imprisoned at hard labor for not more than forty years. However, if the victim was killed as a result of receiving a battery and was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than ten years nor more than forty years.

La. R.S. 14:31(B) (prior to amendment by Acts 2008, No. 10, § 1).

> Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both. However, if the victim was killed as a result of receiving a battery and was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than two nor more than five years.

La. R.S. 14:32(C) (prior to amendment by Acts 2008, No. 10, § 1, and No. 451, § 2).

There was no error in sentencing the defendant under La. R.S. 14:31(B). The defendant was indicted and pleaded guilty to the offense of manslaughter, not that of negligent homicide.[2] Manslaughter and negligent homicide are different and distinct offenses, with separate penalty provisions. *See* La. R.S. 14:31 and 14:32. Manslaughter includes "[a] homicide committed, without any intent to cause death or great bodily harm . . . [w]hen the offender is engaged in the perpetration . . . of any *intentional* misdemeanor directly affecting the person." La. R.S. 14:31(A)(2)(a). (Emphasis supplied.) Simple battery, a misdemeanor, involves the *intentional* use of force or violence upon the person of another. *See* La. R.S. 14:33 and 14:35. Unlike general or specific criminal intent, criminal negligence is essentially negative. *See* La. R.S. 14:12. Rather than requiring the accused intend some consequence of his actions, criminal negligence is found from the accused's gross disregard for the consequences of his actions. *State v. Martin*, 539 So.2d 1235, 1238 (La. 1989).

This assignment of error is without merit.

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[2] Determining whom, when, and how to prosecute are matters within the discretion of the district attorney. *See* La. Const. art. V, § 26(B) and La. C.Cr.P. art. 61.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant concedes that the trial court adequately considered the sentencing guidelines of La. C.Cr.P. art. 894.1, but emphasizes that the defendant in *State v. Pugh*, 40,287 (La. App. 2d Cir. 11/2/05), 914 So.2d 1183, received less jail time than he did for more egregious conduct. He also argues that his actions would have subjected him to a maximum sentence of five years under the negligent homicide statute.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may nevertheless violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Hurst*, 99-2868, pp. 10-11 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, *writ denied*, 00-3053 (La. 10/5/01), 798 So.2d 962.

The defendant's sentencing exposure was from ten to forty years at hard labor, without benefit of probation or suspension of sentence. La. R.S. 14:31(B) (prior to amendment by 2008 La. Acts No. 10, § 1). He was sentenced to twenty-five years at hard labor, the midpoint of the sentencing range.

After careful consideration of the record and the trial court's reasons, we must conclude that the sentence imposed was not grossly disproportionate to the severity of the offense, and thus was not unconstitutionally excessive. Following an extensive sentencing hearing, the court noted that it did not believe that the defendant intended to kill the victim, but did intend to hit him, and had to live with the consequences of that action; the defendant was under unusual stress as a result of his fighting in Iraq; the defendant was also under stress due to financial difficulties and due to trying to complete his studies while maintaining multiple jobs; the victim was the defendant's own child; the victim was only twenty-two days old; and the defendant did not immediately seek help for the victim after injuring him.

We also must reject the defendant's argument that the trial court erred in failing to sentence him to less jail time than the defendant in *Pugh*, 40,287, 914 So.2d 1183. There is little value in making sentencing comparisons. It is well settled that sentences must be individualized to the particular offender and to the particular offense committed. *State v. Batiste*, 594 So.2d 1, 3 (La. App. 1st Cir. 1991). The record demonstrates that the trial court took full account of the defendant's personal circumstances, including his prior diagnosis of attention deficit disorder and the psychological factors discussed by his treating psychiatrist. Lastly, for the reasons set forth in our treatment of the first assignment of error, the defendant's reliance on the penalty under the negligent homicide statute is misplaced.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable

by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920(2).

Following the defendant's guilty plea, but prior to the sentencing hearing, upon request of the defendant, the trial court appointed a sanity commission. Although there is some indication in the record that the commission was appointed to examine the defendant's mental condition at the time of the offense pursuant to La. C.Cr.P. art. 650, the order appointing the sanity commission confirms that the commission was appointed to examine the defendant's mental capacity to proceed pursuant to La. C.Cr.P. art. 642. At the beginning of the sentencing hearing, the following exchange occurred:

> [Defense]: Judge, just for clarification on the record, last time we were here – actually my client had pled guilty – I've got a copy of that minute entry – he pled guilty it looks like on February 5, 2007. Shortly thereafter, Judge, out of an abundance of caution – he pled to manslaughter – you ordered three doctors to see him. I think it was Dr. Vosburg, there was another doctor, and a third doctor. After I got the two reports back, I saw no need – I spoke to my client about having a third doctor do any other evaluations – I thought from Day One that he also - he always knew the difference, I believe, in right and wrong, and I just wanted to make sure the record was clear.
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> [Court]: I've got you.

The record does not reflect that the trial court made a formal ruling, following a contradictory hearing, that the defendant had the capacity to proceed prior to sentencing. *See* La. C.Cr.P. arts. 642 and 647; *State ex rel. Seals v. State*, 00-2738, p. 5 (La. 10/25/02), 831 So.2d 828, 832-33. Although the failure to rule on the defendant's capacity is error under La. C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant in this case. The defendant only moved for appointment of a sanity commission after pleading guilty, indicating there was no serious issue of capacity in this case. The court then appointed the sanity commission "out

of an abundance of caution." Further, the record has been supplemented with the reports of the doctors on the sanity commission, and all of the doctors found the defendant to be competent to proceed. Additionally, the defense abandoned the issue, if any, of the defendant's competency by failing to seek an examination from "a third doctor." Because the trial court's failure to rule on the defendant's capacity was not raised by either the defense or the state in either the trial court or on appeal and because the error is not inherently prejudicial, we are not required to take any action. As such, we decline to remand for a *nunc pro tunc* hearing on the issue of competency to correct this error in accordance with *State ex rel. Seals*, 00-2738 at pp. 6-7, 831 So.2d at 833. *See State v. Price*, 05-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.