NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2660**
VERSUS	*	**COURT OF APPEAL**
THOMAS NELLUM	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-483, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE STEVEN R. PLOTKIN, JUDGE MICHAEL E. KIRBY, AND JUDGE MAX N. TOBIAS, JR.)

PLOTKIN, J., DISSENTS

MARY CONSTANCE HANES
LOUISIANA APPELLATE PROJECT
P. O. BOX 4015
NEW ORLEANS, LA 70178-4015
COUNSEL FOR DEFENDANT/APPELLANT

HONORABLE HARRY F. CONNICK
DISTRICT ATTORNEY OF ORLEANS PARISH
ANNE M. DICKERSON

ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

CONVICTION AFFIRMED; SENTENCE AMENDED, AND AFFIRMED AS AMENDED

Defendant, Thomas Nellum ("Nellum"), was charged by grand jury indictment on 28 October 1999 with second degree murder, a violation of La. R.S. 14:30.1. The indictment was amended on 31 January 2000 to allege the specific ground that Nellum committed the offense while engaged in the perpetration of cruelty to juveniles, even though he had no intent to kill or inflict great bodily harm. Nellum pleaded not guilty at his 4 November 1999 arraignment. The trial court found probable cause and denied Nellums's motion to suppress the statements and confession. On 31 January 2000, Nellum waived his right to a jury trial, electing to proceed with a bench trial. Trial was held that date, and the court deferred a ruling until 8 February 2000. On 8 February 2000, the trial court found Nellum guilty of manslaughter. Nellum waived all legal delays and was sentenced to fifteen years at hard labor, with credit for time served, without benefit of parole, probation, or suspension of sentence. On 21 June 2000, the trial court granted Nellum's motion for an out-of-time appeal.

FACTS

The victim in the instant case was Nellum's thirteen-week old daughter, Talia Nellum ("Talia"). Treva Bowie, the mother of the victim, is Nellum's stepsister. Ms. Bowie testified that the victim was born on 26 May 1999. The victim and Ms. Bowie's two older daughters, Tiara and Temia, neither of whom are related to Nellum, lived with the couple. Ms. Bowie was working at two part-time jobs on 1 September 1999—from 9:00 a.m. to 4:00 p.m., and 10:00 p.m. to 6:00 a.m. Nellum too was employed at two jobs. Other family members took care of the children while Nellum and Ms. Bowie worked. Nellum was not working on 1 September 1999, and was at home with Talia, who had been suffering from colic. Talia was asleep every time Nellum telephoned Ms. Bowie at work that day. When she came home from work, Nellum was sitting on the sofa holding the infant, who began to cry when the door closed. Ms. Bowie took her into the adjoining room, gave her some Tylenol, and the child went back to sleep. Talia cried out between 7:00 p.m. and 8:00 p.m., but went back to sleep. Ms. Bowie said Talia often cried, but that she was told it was colic or a bug. Talia awakened about 9:40 p.m., and Nellum was holding her when Ms. Bowie departed for her second job ten minutes later. Ms. Bowie gave Talia more Tylenol before she left.

Ms. Bowie spoke with Nellum on the telephone around midnight for about twenty minutes, and during the conversation she heard Talia wake up.

Nellum said he wanted Ms. Bowie to look at Talia's feces, as the couple had earlier noticed it appeared very dark. Nellum telephoned her at about 4:00 a.m. to say that he did not think Talia was breathing. Ms. Bowie told him to call the baby's name and pluck her fingers. Nellum did so, but Talia did not respond. Nellum said he would call back, and hung up. He called her back and said that Talia was not responding. He told Ms. Bowie he had called "mama," and she was coming over. Ms. Bowie told him to call 911, so the address would show up. Ms. Bowie hung up and telephoned Nellum's mother, who said she was getting dressed and coming to the house. Nellum telephoned Ms. Bowie back to say that an ambulance was taking the infant to Children's Hospital. When Ms. Bowie arrived at the hospital, doctors told her that Talia had a fractured skull, broken ribs, and a fractured leg.

Ms. Bowie testified that she had never seen Nellum do anything that could have harmed Talia. She never saw him shake Talia or hit her. She said he would push on Talia's stomach, sort of massage it, in an attempt to remedy colic gaseousness and get the baby's bowels to move. She said Nellum speculated that the baby had inherited his intestinal problems, and said he was understanding and caring about the maladies.

Ms. Bowie stated on cross-examination that Talia had very bad colic, and confirmed that the baby cried almost all of the time, both day and night.

She said that every time one would put the baby down she would begin to cry, that she responded better to females than males, and often she was able to calm the baby down when Nellum could not. Ms. Bowie said that she and Nellum had planned to get married, and that she did not believe he had intentionally done anything to harm Talia. She said that whatever she needed Nellum provided, and that he was a good stepfather and father. Ms. Bowie said she had never seen any bruises or marks on Talia. She said Nellum's mother, Anita, would often baby-sit Talia, and his mother never mentioned seeing any bruises or marks. The last time Talia was in the hospital before she died (during the last weekend in July 1999), she had a full examination, including x-rays and a spinal tap. No one at the hospital mentioned any injuries, and Talia was sent home with a diagnosis of milk intolerance. Ms. Bowie taught Nellum how to take care of the baby. She said he devised the massage technique by himself, but she answered in the negative when asked if she had ever seen him doing anything she thought was improper while attempting to get rid of gas or stop the baby from crying. She had seen him sort of rock the baby, but never shake it.

Ms. Bowie said that during the three months of the baby's life she worked three days and three nights a week, a total of perhaps forty to forty-five hours a week. Nellum was working two jobs and was away at different

times from thirty-to forty hours a week.

New Orleans Police Officer Sean Lee responded to a medical call at Nellum's residence on 2 September 1999. After he knocked on the door and checked with the dispatcher about the correct address, Nellum answered the door holding the lifeless infant. Nellum, very calmly, told the officer that he did not think his baby was breathing, and laid her down on a couch just inside of the front door. Nellum then picked up the baby, and Officer Lee took her from him. The officer noticed a bruise on the right side of the baby's chest. He subsequently turned the baby over to EMS personnel. Nellum explained that the baby had been sick and crying most of the night. The baby stopped crying and he went to check on it; it appeared to him that the baby had thrown up. Nellum rode with his parents to Children's Hospital. Officer Lee notified his rank, thinking that the Child Abuse Unit might need to be contacted because the child had stopped breathing. He placed Nellum in handcuffs while at Children's Hospital at the direction of a detective.

Paul McGarry, M.D., qualified by stipulation as an expert in the field of forensic pathology, performed an autopsy on the victim. The baby had a swollen head, with the soft spots of the skull bulging. There were markings on the scalp, and bruises and abrasions of the chest and back. The right leg

was swollen and unstable, and the right femur was broken. Internally, Dr. McGarry found evidence of violent injuries to the head, right leg, and chest. He said the child had been shaken violently enough to tear the blood vessels loose inside the head, disconnecting the brain from the blood vessels and thus draining it—causing a subdural subarachnoid hemorrhage. The baby had a total of nine broken ribs on both sides of the chest. Hemorrhaging was present in the chest wall, and bruises and abrasions on the chest, the kind that occur when the chest is grabbed and squeezed hard enough to break the ribs and crush the chest. Dr. McGarry found some rib fractures that had partially healed. In eight different ribs, he found rib fractures in two, three and four places that had completely healed. He estimated that the completely healed rib fractures were from six to eight weeks old.

Dr. McGarry stated that the cause of death was the head injuries, which he said were the result of violent shaking by a person with adult strength. The injuries to the chest were caused by violent squeezing, grasping, and crushing of the chest. The cause of the broken femur was a violent twisting and snapping of the bone so as to break it in two, in a diagonal spiral pattern.

Dr. McGarry stated on cross-examination that it is easier to break the bone or rib of a three-year-old than a six-month-old. He said the chest

injuries could have been caused at the same time as the head injuries, as the violent shaking would have required a firm grasp on the baby. Dr. McGarry said he heard that Nellum had attempted to resuscitate the baby and conceded that a rib could have been broken by pushing down on the chest with one's hands. However, he said he would not expect that the head injuries would have been caused by a resuscitation attempt. Dr. McGarry indicated on redirect examination that it was his impression that Talia's ribs were broken by someone grabbing and squeezing her too hard, but not from an attempt to administer CPR. He identified photographs of bruises and abrasions on the chest and around the left side to the back, which he said were in a pattern that a squeezing hand could make.

New Orleans Police Detective Arnold Williams of the Child Abuse Unit, investigated the death of Talia. He stated that he was contacted by a district officer, and went to Children's Hospital. He was told by the EMS unit personnel that the baby had a pulse. A physician informed him that she suspected physical abuse. Det. Williams informed Nellum of his rights. A stipulation between counsel was made that Nellum waived his rights and made a voluntary statement. In the voluntary statement, Nellum said Talia had gas. He tried squeezing, rubbing, pushing down on and massaging her stomach. Nellum demonstrated on an anatomically correct doll how he held

Talia, with his hands on both sides, with a firm grip. He also demonstrated how he shook Talia. He admitted that he shook her to stop her from crying. Det. Williams said Nellum was cooperative during questioning.

Anita Acker, Nellum's mother, testified that she saw her son's baby four or five days a week. She said the baby was often sick and cried "non-stop." Before she moved to Jefferson Parish Nellum had called her twice in the past to come over in the middle of the night to help him with the baby. She corroborated Ms. Bowie's statement that the baby responded better to females than males. At approximately 11:00 p.m. on the night Talia died, Nellum called her to say that the baby was sick. She heard Talia screaming in the background. She offered to come over, but Nellum said he wanted to handle it himself. Ms. Acker said Nellum loved Talia and never saw him exhibit any abnormal behavior toward her or his two stepdaughters.

Carl Acker, Nellum's stepfather, testified that he saw Talia at least three times a week; he, his daughter, and Ms. Acker baby-sat Talia while Nellum and Ms. Bowie worked. Mr. Acker confirmed that Talia was sick a lot, and in pain from gas. He had personally gone to Children's Hospital with the baby on a couple of occasions when she was sick. Mr. Acker stated he never saw Nellum abuse his daughter, and said Nellum was always loving towards her. The only marks he ever saw on Talia were her birth marks.

Nellum testified that he worked at the Marriott and Windsor Court hotels so that he could take care of his family. He loved his baby. He admitted that it was a challenge for him to take care of a baby, and said he always sought advice from his mother and Ms. Bowie. He said Talia cried a lot, pretty much from the day she was born. He and Ms. Bowie took her to the hospital a number of times because they did not know what was wrong with her. He said that he had never done anything to Talia that would have caused any bruises or breaks prior to 1 September 1999. He said that the last time they took Talia to Children's Hospital they were told she was simply rejecting milk. He said he sometimes put her on his chest so that she could hear his heartbeat, which would calm her down. Nellum said he showed the detective how he shook Talia. However, he denied violently shaking her in the manner described by Dr. McGarry as necessary to cause her death. He admitted that the marks on the baby's stomach were his, but that he in no way had intended to hurt her. When the baby stopped breathing, he tried to resuscitate her by rocking her on his shoulder. He called Ms. Bowie and his mother. He admitted that he was the only person who shook Talia from the time Ms. Bowie left for work until the time the EMS unit arrived. He did not recall twisting the baby's leg. Nellum said he never attempted to evade responsibility for what happened, and said he never would have done

anything to intentionally hurt his baby.

ERRORS PATENT

A review of the record reveals one error patent. The trial court sentenced Nellum on his manslaughter conviction to a term of imprisonment without benefit of parole, probation, or suspension of sentence. La. R.S. 14:31(B) provides that upon conviction of manslaughter where 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. The statute does not authorize the denial of the benefit of parole. Accordingly, Nellums's sentence must be amended to delete the denial of the benefit of parole.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, Nellum complains that the record does not contain a verdict. Subsequent to Nellum filing his appellate brief, the record was supplemented with a full transcript of the adjudication/sentencing hearing, at which the trial court's verdict of manslaughter was pronounced.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, Nellum claims that the evidence was not sufficient to support his conviction.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
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> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary

> guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Nellum was charged with second degree murder by killing Talia while engaged in the perpetration of cruelty to juveniles, even though he had no intent to kill or to inflict great bodily harm, a violation of La. R.S. 14:30.1 (A)(2)(b). He was convicted of the responsive verdict of manslaughter, a violation of La. R.S. 14:31, defined in pertinent part by Subparagraph (A)(2)(a) as a homicide committed without any intent to cause death or great or bodily harm "[w]hen the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person."

Nellum's argument as to this assignment of error is that the evidence supported only a verdict of negligent homicide, which was not charged, and therefore he should have been acquitted. His argument is premised on the supposition that the felony offense of cruelty to juveniles, proscribed by La. R.S. 14:93, can be the basis for a conviction of second degree murder, manslaughter, and negligent homicide. Nellum mistakenly classifies cruelty

to juveniles as a felony "not enumerated" in La. R.S. 14:30.1, the second degree murder statute. Cruelty to juveniles is enumerated in La. R.S. 14:30.1(A)(2)(b), and was the specific ground charged in the bill of information in the instant case. Accordingly, cruelty to juveniles cannot form the basis of a manslaughter conviction directly under La. R.S. 14:31(A)(2)(a).

Under La. R.S. 14:31(A)(2)(a), a person who kills another while perpetrating an intentional misdemeanor directly affecting the person is guilty of manslaughter. Simple battery, an intentional misdemeanor directly affecting the person, is defined as the intentional use of force or violence upon the person of another, without the consent of the victim. La. R.S. 14:33; R.S. 14:35. Simple battery is a general intent crime. State v. Hernandez, 96-0115, p. 3 (La. App. 4 Cir. 12/18/96), 686 So. 2d 92, 94. General criminal intent is present when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed consequences as reasonably certain to result from his act. La. R.S. 14:10(2).

In State v. Bolden, 501 So. 2d 942 (La. App. 2 Cir. 1987), the defendant was convicted of manslaughter in the death of a two-year-old female left in her custody. Medical testimony showed that the death was the

result of brain injuries caused by the victim being violently shaken. The autopsy also revealed evidence of old brain injuries, indicating that the child had been shaken several weeks earlier. The conviction was affirmed on appeal, with the court finding that the evidence supported convictions based upon both intentional cruelty to juveniles and simple battery.

Nellum admitted that he shook Talia to stop her from crying. Thus, by Nellum's own admission, he intentionally used force or violence upon his daughter. It can be presumed that the thirteen-week old did not consent. Therefore, Nellum admittedly committed a simple battery upon the victim. The injuries to the blood vessels in the baby's head were the cause of death. Dr. McGarry testified that those injuries were caused by violent shaking by an adult. Nellum admitted that he knew that his shaking caused the baby's death. Further, Nellum admitted that no one else besides him could have shaken her between the time Ms. Bowie left for work shortly before 10:00 p.m. and the time police arrived to find Talia limp and lifeless. In addition, Dr. McGarry said the fresh broken ribs and bruises to the chest, sides, and back could have been caused by someone grasping the baby and violently shaking her.

Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that

Nellum killed his daughter while engaged in the commission of a simple battery upon her. Accordingly, the evidence was sufficient to convict Nellum of manslaughter. Nellum's admission that he shook his daughter to stop her from crying, an intentional act, negates any "defense" of negligent homicide.

There is no merit to this assignment of error.

ASSIGNMENTS OF ERROR NOS. 3, 4, 5 & 6

In assignments of error numbers three, four, and five, Nellum claims that trial counsel was ineffective in three respects: (1) in failing to request the trial court to charge itself under La. C.Cr.P. art. 781 on the elements of negligent homicide; (2) in failing to investigate and call witnesses at sentencing; and (3) in failing to file a motion to reconsider sentence to preserve his right to appeal his sentence as excessive. In assignment of error number six, Nellum claims that his sentence is excessive.

"As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So. 2d 783, 802. However, where the record is sufficient, the claims may be addressed on

appeal. State v. Wessinger, 98-1234, p. 43 (La. 5/28/99), 736 So. 2d 162, 183; State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). State v. Brooks, 94-2438, p. 6 (La. 10/16/95), 661 So.2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736, 741. Counsel's performance is ineffective when it is shown that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland at 686, 104 S.Ct. at 2064; State v. Ash, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669. Counsel's deficient performance will have prejudiced the defendant if the defendant shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different; “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 693, 104 S.Ct. at 2068; State v.

Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So. 2d 231, 236.

This court has previously recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." State v. Bordes, supra, at p. 8, 738 So. 2d at 147, quoting State v. Bienemy, 483 So.2d 1105, 1107 (La. App. 4 Cir. 1986). Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." Id. quoting State v. Brooks, 505 So.2d 714, 724 (La. 1987).

Nellum first argues that defense counsel was ineffective in failing to request the court to charge itself on the crime of negligent homicide. La. C.Cr.P. art. 781 permits a defendant to request the court to charge itself in accordance with written charges presented to the court. Nellum concedes that negligent homicide is not a responsive verdict to either second degree murder or manslaughter. La. C.C.P. art. 814(A)(3) lists the “only” three responsive verdicts to a charge of second degree murder as guilty, guilty of manslaughter, and not guilty. However, jurisprudence holds that under some circumstances a court presiding over the trial of one charged with second degree murder must give a requested charge on the law of negligent

homicide, albeit not as a possible responsive verdict.

In State v. Marse, 365 So. 2d 1319 (La. 1979), the defendant was convicted of second degree murder. The trial court refused to give a requested jury charge relative to the law of negligent homicide and to the jury's duty to acquit if it found that defendant had committed that crime. On appeal, the Louisiana Supreme Court noted that a trial court has a duty under La. C.C.P. art. 802 to charge the jury as to the law applicable to the case, covering every phase of the case supported by the evidence whether or not accepted by the trial judge as true. The Court found copious evidence from which the jury could have inferred that the defendant was guilty of negligent homicide. The Court found that the requested negligent homicide charge would have otherwise been proper under La. C.Cr.P. art. 807, and held that the trial court had erred in failing to give the charge. However, the Court held that the error was harmless, finding that it could have been prejudicial only if the jury had insufficient information to understand that if the defendant was guilty only of negligent homicide, the defendant should be found not guilty of the charged offense of second degree murder.

Nellum cites State v. Lloyd, 535 So. 2d 885 (La. App. 2 Cir. 1988), involving the manslaughter convictions of parents charged in the death of their ten-week old son. The parents were charged with manslaughter, and

elected a bench trial. Defense counsel requested that the trial court charge itself as to the elements of negligent homicide, and that if the evidence showed that the defendants were guilty only of negligent homicide, the court must enter a finding of not guilty of the charged offense of manslaughter. The trial court refused to so charge itself. On appeal, the court cited Marse, supra, and held that the trial court had erred. However, the court found the error harmless. The appellate court noted that the trier of fact was the court, not a jury, and stated that the trial court's knowledge of criminal law certainly would have encompassed the effect of finding that the facts supported only a finding of negligent homicide, i.e., acquittal on the charged offense of manslaughter. The court also noted that the trial court had the benefit of defense counsel's argument in its consideration of the evidence.

In the instant case, it will be assumed that there was evidence from which the court could have concluded that Nellum committed a negligent homicide, and that the trial court would have been bound to charge itself relative to that offense had it been requested to do so by defense counsel. Defense counsel's closing argument reflects that counsel argued negligent homicide to the court, set out the elements of that offense, i.e., the killing of a human being by criminal negligence, and defined criminal negligence for the court. Thus, it cannot be said that defense counsel's tactical decision to

argue the law to the court instead of submitting a written charge to it and requesting it to charge itself was deficient in any way. Even assuming it was, it must be presumed that the trial court had sufficient knowledge of criminal law to know that if it found Nellum had committed a negligent homicide, it should find him not guilty of the offense charged, especially in light of defense counsel's argument relative to negligent homicide. Thus, Nellum has failed to show that a reasonable probability exists that, but for the alleged deficient performance, the result of the proceeding would have been different.

Nellum next argues that defense counsel's performance was deficient in that counsel failed to investigate (1) alleged reports by persons that the baby's mother stated that she was "glad" the baby had died because she had not wanted her, or (2) reports that neighbors had heard the baby screaming when the mother was home alone with the child, and that these neighbors had "suspicions" about the mother. Nellum claims that defense counsel was advised prior to trial of the existence of these persons, and should have investigated and called these persons as witnesses at the sentencing hearing. Nellum concedes that any such evidence would not have had bearing on his culpability in the death of his baby. However, he suggests that such evidence might have served to ameliorate his sentence, as he claims the trial

court sentenced him believing he had inflicted prior injuries on the baby that might have been inflicted by the baby's mother. The record does not reflect that defense counsel was advised of the existence of any such persons. Further, the evidence showed that the baby routinely cried and screamed, so it would not be anything out of the ordinary that the baby might have screamed when the mother was with her alone. Even assuming the mother made the statement attributed to her about being glad that the baby had died, that in no way implicates her in causing any injury to the baby. Nellum fails to demonstrate that a reasonable probability exists that if such evidence had been presented at the sentencing hearing he would have received a less onerous sentence.

Nellum's last claim of ineffectiveness is that defense counsel was ineffective in failing to file a motion to reconsider sentence in order to preserve his right to raise a claim of excessive sentence on appeal. The failure to make or file an oral or written motion to reconsider sentence, or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude a defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. La. C.Cr.P. art. 881.1(D).

La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v.

Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v. Webster, 98-0807, p. 3 (La. App. 4 Cir. 11/10/99), 746 So. 2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So. 2d 339. 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. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. art. 894.1 is found, a reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraporu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear [s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

Nellum was convicted of manslaughter, a violation of La. R.S. 14:31. The evidence shows that the infant, Talia, died as a result of a battery, and thus the sentence provided for was not less than ten nor more than forty years imprisonment at hard labor, without benefit of probation or suspension of sentence. La. R.S. 14:31(B). Nellum was a first time felony offender, who had been gainfully employed, and who supported his daughter and his fiancée. No indication of a history of violence was shown, except to the

extent that he may have inflicted prior injuries on his infant daughter. Nellum was twenty-seven years old at the time of sentencing. The trial court stated that it could not understand why anyone would shake a thirteen-week old child so hard that it would cause death.

Nellum claims his sentence is excessive when compared to sentences imposed in other manslaughter cases involving child victims. He cites State v. Lloyd, supra, where parents were charged with and convicted of manslaughter in the death of their two-month old daughter, who died from congestive heart failure. The infant had such severe diaper burns that they were comparable to third-degree burns. The continual exposure of the open wounds to fecal matter led to sepsis or infection of the blood stream, which eventually caused a respiratory infection, respiratory failure, congestive heart failure, and death. The child was brought to the hospital wearing a diaper with old and new fecal matter in it, as well as blood and skin that peeled off when the diaper was removed. The infant also had marked filth in most of his body creases. The couple's living conditions were deplorable, with garbage and decaying food strewn throughout the home. On appeal, the parents' manslaughter convictions were affirmed on evidence supporting the conclusion that they were guilty of gross and prolonged criminal negligence toward their infant son, rising to a level of cruelty to a juvenile.

The parents were each sentenced to sixteen years at hard labor at a time when the sentencing range was from zero to twenty-one years, with the court finding that any lesser sentence would deprecate the seriousness of the offense.

In State v. Bolden, supra, the defendant was charged with and convicted of manslaughter in the death of a two-year old female left in her custody. The child's fatal head injuries were caused by intentional shaking, and there was also evidence of older brain injuries. In addition, the child had numerous scars, burns, and bruises. The defendant was sentenced to twenty-one years at hard labor, at a time when the sentencing range was from zero to twenty-one years. The court noted that the defendant had apparently engaged in the systematic and repeated physical abuse of the child. The court also noted that the two-year old weighed only eighteen pounds.

In the instant case, Nellum was sentenced to fifteen years, five years more than the minimum, and twenty-five years less than the maximum. Nellum does not argue that the statutorily mandated minimum sentence of ten years is excessive in and of itself. Considering the facts and circumstances of this case, it cannot be said that the sentence of five years more than the minimum is nothing less than the purposeless imposition of

pain and suffering.

Accordingly, as the sentence imposed on Nellum is not excessive, even had defense counsel filed a motion to reconsider sentence and preserved Nellum's right to appeal the sentence as excessive, the outcome would not have been different.

There is no merit to these assignments of error.

CONCLUSION

For the foregoing reasons, Nellum's conviction is affirmed. His sentence is amended to delete the stipulation that it is served without the benefit of parole, and the sentence is affirmed, as amended, and in all other respects.

CONVICTION AFFIRMED; SENTENCE AMENDED; AFFIRMED AS AMENDED