STATE OF LOUISIANA	*	**NO. 2017-KA-0598**
VERSUS	*	
		COURT OF APPEAL
CARLOS ZEPEDA	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 530-048, SECTION "L"
Honorable Franz Zibilich, Judge
* * * * * *
Judge Joy Cossich Lobrano
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

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AFFIRMED;
REMANDED WITH INSTRUCTIONS

DECEMBER 13, 2017

Defendant, Carlos Zepeda ("Defendant"), appeals his November 30, 2016 convictions for aggravated battery, a violation of La. R.S. 14:34, and simple battery, a violation of La. R.S. 14:35. Defendant also appeals his sentence for aggravated battery. Finding no error, we affirm the judgment of the district court.

On the morning of June 18, 2016, three male friends (together, "victims,") met at a hardware store where they frequently gathered in search of work. After waiting for a period of time at the hardware store without success, the victims relocated to a restaurant where they ordered food and a six-pack of beer to share amongst themselves.[1] While the victims were eating and drinking, Defendant came over to their table and asked for a beer, at which time the first victim[2] gave him one.[3] The group socialized for about half an hour before the victims paid their bill.

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[1] Two of the victims testified that each of the three victims consumed two beers each, but second victim testified that he drank a single beer.

[2] The victims are numbered in accordance with the count on the bill of information listing that individual as the victim.

[3] The victims testified that they had met Defendant approximately six to eight months prior to the date of the incident, when Defendant began hanging out in front of the hardware store. However, the victims also testified that they were not friends with Defendant.

Rather than paying his own bill, Defendant asked the victims to lend him fifty dollars. None of the victims complied.

At that time, all four men left the restaurant together and transported Defendant to his house. The first victim testified that Defendant went inside of the house to obtain money to pay his bill at the restaurant, but he never returned to the vehicle. The victims left Defendant at his house and drove back to the hardware store.

About twenty-five to thirty minutes later, Defendant arrived at the hardware store. A group of people were outside the store gambling and playing a game of cards. Defendant did not say a word to anyone, but went to the trunk of his car, closed it, and walked away. The third victim observed Defendant crossing the street towards them, carrying a machete in his pants. The first victim was distracted by the game of cards and did not see Defendant approach him from behind. Defendant struck the first victim with the machete several times in the back, near the neck, in the torso and ribs, and in the back of the head. The blows caused the first victim to collapse near a tree at the front entrance of the hardware store.

After attacking the first victim, Defendant ran after the second victim with the machete. The second victim took off his belt to defend himself. However, the belt tore and the second victim ran away from Defendant. Defendant then fled towards the entrance of the hardware store and into the street. A group of about six or seven people, including the second and third victim, immediately chased after Defendant with sticks, bats, and other objects to prevent him from leaving the

scene. Defendant fled towards a white truck, but before he could drive away, several people pulled him out of the truck and detained him until the police arrived. At one point during the chase, the third victim caught up with Defendant in order to detain him, but Defendant fractured his hand with a paint roller/stick.

Two Louisiana State Troopers and a New Orleans Police Department ("NOPD") detective were the first law enforcement officers on the scene. A little while later, Officer Colin Eskine ("Officer Eskine"), of the NOPD, arrived. The NOPD detective gave Officer Eskine a brief summary of what occurred prior to his arrival. A Louisiana State Trooper provided interpretation between the second and third victims and Officer Eskine.

Both the first victim and Defendant were transported to the hospital, where the first victim received multiple stitches in the back of his head, his left ear, and torso. Defendant was also treated for a minor injury to his hand. Defendant and the first victim were released from the hospital shortly thereafter.

On July 25, 2016, the State of Louisiana charged Defendant by bill of information with one count of attempted second degree murder of the first victim, in violation of La. R.S. 14: (27)30.1, one count of aggravated assault with a dangerous weapon of the second victim, in violation of La. R.S. 14:37, and one count of simple battery on the third victim, in violation of La. R.S. 14:35. On July 27, 2016, Defendant appeared in court for arraignment and entered a plea of not guilty. On August 19, 2016, Defendant filed numerous pre-trial motions. A hearing

on Defendant's motions was held on August 22, 2016, and the district court found probable cause for the charges filed against Defendant.

A three-day jury trial was held from November 28, 2016 through November 30, 2016. On the first day of trial, the State provided defense counsel with medical records indicating that the first victim had an ethanol level of 148.66 on the date of the incident. Counsel for the State indicated that although the medical records were dated July 20, 2016, the State obtained them on November 28, 2016.

On the second day of trial, defense counsel filed a motion for sanctions, alleging a violation of *Brady* and statutory discovery laws. A hearing outside the presence of the jury was held, during which defense counsel requested three remedies. First, defense counsel requested a mistrial. Next, defense counsel requested that the district court take judicial notice that a 148.66 ethanol level is equivalent to a .14866 blood alcohol level. Lastly, defense counsel requested that the district court instruct the jury that defense counsel was unable to incorporate information concerning the victims' intoxication into opening statements because the State's failed to disclose it timely. At the conclusion of the hearing, the district court agreed to take judicial notice of the .14866 blood alcohol level and to give the jury instruction. Defense counsel agreed to withdraw the motion and proceed with trial.

At the conclusion of the trial on November 30, 2016, as to count 1, the jury found Defendant guilty of a lesser offense, aggravated battery, a violation of La. R.S. 14:34; as to count 2, the district court found Defendant not guilty; and as to

count 3, the district court found Defendant guilty. On December 8, 2016, Defendant was sentenced. As to count 1, Defendant received ninety-eight months imprisonment at hard labor, the first year to be served without benefit of probation, parole, or suspension of sentence and as to count 3, Defendant received ninety-eight days at Orleans Parish prison, to be served concurrently with the sentence for count 1. Defense counsel filed a motion for appeal and designation of the record on December 12, 2016, which the district court granted on the same date. This appeal timely follows.

ERRORS PATENT

Louisiana Code of Criminal Procedure article 920 directs appellate courts to consider errors discoverable by an inspection of the pleadings and proceedings. *State v. Sims*, 2017-0101, p. 3 (La. App. 4 Cir. 11/15/17), ---So.3d---. A review of the record reveals that at the December 8, 2016 sentencing hearing, the district court informed Defendant that his sentence would be ninety-eight months imprisonment at the Department of Corrections for the State of Louisiana at hard labor, with the first year of the sentence being served "without the benefit of probation, parole, or suspension of sentence." Pursuant to La. R.S. 14:34(B), at least one year of the sentence shall be served without benefit of parole, probation, or suspension only if the offender knew or should have known that the victim was

an active member of the Armed Forces or is a disabled veteran.[4] Both Defendant and the State agree that the record is void of any evidence that the first victim is an active member of the Armed Forces or is a disabled veteran. Accordingly, the case is remanded to the district court to amend the sentence to remove this restriction.

Assignments of Error

In his first assignment of error, Defendant argues that the district court erred by failing to impose sanctions on the State for failure to produce *Brady* material. It is well settled that the State has an affirmative duty to disclose exculpatory evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). In order to prove a *Brady* violation, the defendant must establish, *inter alia*, that the evidence in question was in fact exculpatory or impeaching. *State v. Garrick*, 2003-0137, p. 5 (La. 4/14/04), 870 So.2d 990, 993 (per curiam). Disclosure of exculpatory evidence should be made in time to allow a defendant to make effective use of such information in the presentation of his case. *State v. Crawford*, 2002-2048, p. 13 (La. App. 4 Cir. 2/12/03), 848 So.2d 615, 625. However, even where a disclosure is made during trial, it will be considered timely if the defendant is not prejudiced. *See State v. Prudholm*, 446 So.2d 729, 738 (La. 1984).

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[4] La. R.S. 14:34(B) provides:

> Whoever commits an aggravated battery shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than ten years, or both. At least one year of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence if the offender knew or should have known that the victim is an active member of the United States Armed Forces or is a disabled veteran and the aggravated battery was committed because of that status.

In the instant case, defense counsel filed a written motion for sanctions for *Brady* violations. On six different occasions during the hearing on the motion, the district court asked defense counsel exactly what remedies she was seeking; specifically asking whether she wanted the district court to declare a mistrial.[5]

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[5] Excerpts from the hearing on the motion for sanctions read (emphasis added):

> Day 2
> (A brief recess was taken)
> Out of presence of the jury
>
> The Court:
> What do you want me to do?
>
> [Defense Counsel]:
> It's *Brady*, first of all. So I am asking one that there be sanctions. But two that I be able to ask this witness information that is in the medical records even though he did not write them. Because at this point I cannot go get an expert. Ethanol level is not something that we use in common everyday language. We think of blood alcohol level. It is factually the same, but I can't call an expert now –
>
> ***
>
> The Court:
> So you are getting them in. Now what?
>
> [Defense Counsel]:
> I am asking that I allow the Court to take judicial notice that ethanol level is the same thing as blood alcohol level. You go over three decimal points and that is what the number is. A 148.66 is the same thing as .14866.
>
> ***
>
> The Court:
> I knew we were going to get here. You want me to recess this case or do you want a mistrial?
>
> [Defense Counsel]:
> I can introduce *Brady* and not put it into evidence. I can confront someone with *Brady* without introducing it into evidence.
>
> ***
>
> The Court:
> You want a continuance? You want a mistrial? What do you want?
>
> [Defense Counsel]:
> I'm fine going forward if we are allowed to take judicial notice that a 148.66 is the same thing as a .14866.
>
> ***
>
> The Court:
> I am going to take judicial notice of it and I am going to make that announcement to the jury over the State's objection.

Rather than maintaining her objection and seeking sanctions and/or a mistrial, defense counsel withdrew her motion, instead asking that the district court take judicial notice that a 148.66 ethanol level is the equivalent of a .148 blood alcohol level and that the district court instruct the jury that defense counsel was unable to incorporate information concerning the victims' intoxication into opening statements because the State's failed to disclose it timely. The record makes clear that defense counsel explicitly agreed to withdraw the motion in its entirety and proceed with the trial.

La. C.Cr.P. art. 841(A), known as the contemporaneous objection rule, states that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence…." *See also State v. Hickman,* 2015-0817, p. 12 (La. App. 4 Cir. 5/16/16), 194 So.3d 1160, 1168 (finding that where an alleged error was not objected to, review of that error was waived on appeal). The contemporaneous objection rule has two purposes: (1) to require counsel to call

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The Court:
I mean that's the Court's ruling. You can ask for a mistrial. I am going to grant it. You can take all the writs. You can start all over. You all can do whatever you want.

[Defense Counsel]:
I am okay with it as it stands right now. But depending on how your Honor allows me to question the witness –

The Court:
As a wise judge once told me, he said, Mr. Zibilich you can ask me for all the advisory opinions in the world. I ain't giving you none. I can't answer that question until I hear their objection.

[Defense Counsel]:
We can go for it as it is now.

an error to the trial court's attention at a time when it may correct the error; and (2) to prevent defense counsel from "sitting on" an error and gambling on a favorable verdict, only to later resort to appeal after conviction on an error that might have been corrected at trial. *State v. Knott*, 2005-2252, p. 2 (La. 5/5/06), 928 So.2d 534, 535; *see also State v. Coleman*, 2012-1408, p. 20 (La. App. 4 Cir. 1/8/14), 133 So.3d 9, 13. Because defense counsel withdrew its objection, Defendant has not preserved the issue for appellate review.

Furthermore, even if Defendant had preserved the issue for appellate review, Defendant has not demonstrated that he was prejudiced by the State's disclosure of the victim's medical records on the first day of trial. In his appellant brief, Defendant argues that if the evidence had been disclosed, his self-defense case "would have been strengthened by showing [the victims] to be drunken marauders out to avenge Defendant's interferences at the restaurant and with their work." However, a review of the record reveals that defense counsel was provided with evidence of the first victim's medical records prior to the three victims' testimonies and defense counsel did in fact cross-examine those witnesses, questioning them about their alcohol consumption on the date of the incident. *Compare State v. Roussel,* 381 So.2d 796, 801 (La. 1980) (finding that where a defendant's late discovery of the alleged exculpatory information did not deprive defendant of an opportunity to effectively present the alleged Brady material to the trier of fact, the defendant was not prejudiced by the late discovery). For these reasons, even if Defendant had preserved this assignment of error for appellate review, he has not

demonstrated that he was prejudiced by the disclosure of the medical records on the first day of trial. This assignment of error lacks merit.

In his second assignment of error, Defendant argues that the sentence is constitutionally excessive. The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be constitutionally excessive. *State v. Hamdalla*, 2012-1413, p. 15 (La. App. 4 Cir. 10/2/13), 126 So.3d 619, 627. A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Moss*, 2008-1079, p. 17 (La. App. 4 Cir. 7/22/09), 17 So.3d 441, 451. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *Id.* at 2008-1079, p. 18, 17 So.3d at 452.

In the case *sub judice*, Defendant argues that the district court failed to adequately consider the mitigating factors present in his case, and thus imposed an excessive sentence. First, this Court must determine whether the issue raised by Defendant was preserved for appeal. While Defendant argues that he objected to the sentence at the December 8, 2016 hearing, the record is void of any such objection. Defendant also concedes that he failed to file a motion to reconsider the sentence as required by La. C.Cr.P. art. 881.1.

La. C.Cr.P. art. 881.1(E) sets limits on appellate review of sentences where, as in the case *sub judice*, a defendant fails to file a motion to reconsider sentence at the district court. La. C.Cr.P. art. 881.1 provides in pertinent part:

> A. (1) In felony cases, within thirty days following the imposition of sentence … the state or the defendant may make or file a motion to reconsider sentence.
>
> (2) The motion … shall set forth the specific grounds on which the motion is based…
>
> ***
>
> E. Failure to make or file a motion to reconsider sentence … shall preclude … the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

In the absence of such an objection or filing of a written motion for reconsideration of sentence, a defendant is precluded from urging any ground of objection to the sentence. *See State v. Hulbert*, 2003-1149, p. 3 (La. App. 4 Cir. 8/20/03), 852 So.2d 1245, 1246-47.[6] Defendant's failure to object to the sentence at sentencing and his failure to file a motion to reconsider sentence bars him from arguing that the sentence is excessive on appeal.

For the reasons stated above, Defendant's convictions and sentences are affirmed. This case is remanded with the instruction that the district court amend Defendant's sentence for aggravated battery as required by this opinion.

AFFIRMED;
REMANDED WITH INSTRUCTIONS

[6] *See also State v. Martin,* 97-0319, p. 1 (La. App. 4 Cir. 10/1/97), 700 So.2d 1322, 1323; *State v. Green,* 93-1432, pp. 5-6 (La. App. 4 Cir. 4/17/96), 673 So.2d 262, 265; *State v. Salone,* 93-1635, p. 4 (La. App. 4 Cir. 12/28/94), 648 So.2d 494, 495-96.