NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1616

STATE OF LOUISIANA

VERSUS

TYSON JAMES FARKAS

Judgment Rendered: MAY 02 2014

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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. 573,674
The Honorable Randall L. Bethancourt, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

The defendant, Tyson James Farkas, was charged by bill of information with possession of a schedule II controlled dangerous substance (cocaine), a violation of Louisiana Revised Statute 40:967C. He pled not guilty and, following a jury trial, was found guilty as charged. The State subsequently filed a habitual offender bill of information and, after being adjudicated a fourth-felony habitual offender, the defendant was sentenced to twenty years at hard labor without the benefit of probation or suspension of sentence. We affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On June 17, 2010, while patrolling the Grand Caillou area in Houma, Louisiana, Sergeant Kyle Bergeron with the Terrebonne Parish Sheriff's Office observed two individuals inside a vehicle parked at the end of Bobtown Circle. The defendant was sitting in the driver's seat, and Leroy Harris, Jr. was in the passenger's seat. As his headlights illuminated the vehicle, Sergeant Bergeron could see the two individuals quickly moving in their seats, adjusting themselves. As Sergeant Bergeron drove up, Harris quickly exited the vehicle. The defendant then reached out of the vehicle and dropped a shiny object. Sergeant Bergeron ordered the defendant out of the vehicle and patted down both him and Harris. He asked the defendant what he dropped, to which the defendant replied that he did not know what Sergeant Bergeron was talking about. Assisted by a back-up officer, Sergeant Bergeron then searched outside of the vehicle in the driver's door area. While shining a flashlight underneath the vehicle, Sergeant Bergeron saw a crack pipe approximately midway underneath the vehicle that contained what appeared to be crack cocaine. Both the defendant and Harris were placed under

arrest, and each of them claimed that the pipe and crack cocaine belonged to the other.[1]

COUNSELED ASSIGNMENT OF ERROR NUMBER 1

In his first counseled assignment of error, the defendant argues that the evidence was insufficient to support his conviction for possession of cocaine.[2] 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. Pro. 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, Louisiana Revised Statute 15:438 provides that 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.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis

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[1] Harris was charged by the same bill of information as the defendant. He pled guilty and was sentenced to one year at hard labor.

[2] The defendant argues on appeal that the district court erred in allowing Harris to testify and that Harris's testimony should have been excluded because Harris was not competent to testify. However, the defendant did not object to the challenged testimony at trial and therefore failed to preserve the issue for review. *See* La. Code Evid. art. 103A(1); La. Code Crim. Pro. art. 841A. The grounds for an objection must be brought to the court's attention to allow it the opportunity to make the proper ruling and prevent or cure any error. *See State v. Trahan*, 93-1116 (La. App. 1 Cir. 5/20/94), 637 So. 2d 694, 704.

that raises a reasonable doubt. *State v. Captville,* 448 So. 2d 676, 680 (La. 1984). A reviewing court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the fact finder. *See State v. Calloway,* 07–2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*).

It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II La. R.S. 40:967C. Cocaine is a controlled dangerous substance as classified in Schedule II. *See* La. R.S. 40:964, Schedule IIA(4). To support a conviction for possession of cocaine, the State must present evidence establishing beyond a reasonable doubt that the defendant was in possession of the drug and that he knowingly or intentionally possessed it. La. R.S. 40:967C; *State v. Sylvia*, 01-1406 (La. 4/9/03), 845 So. 2d 358, 361. Constructive possession is sufficient to support a conviction. *State v. Toups*, 01-1875 (La. 10/15/02), 833 So. 2d 910, 913. A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, and the drug need not be in his actual physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. *State v. Trahan*, 425 So. 2d 1222, 1226 (La. 1983). But, the mere presence in the area where narcotics are discovered or mere association with the person who controls the drug or the area where it is located is insufficient to support a finding of constructive possession. *Toups*, 833 So. 2d at 913.

A determination of whether there is "possession" sufficient to convict depends on the peculiar facts of each case. *Id.* Factors to be considered in determining whether a defendant exercised dominion and control sufficient to

constitute possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. *Id.*

Harris testified that the defendant picked him up and the two parked on Bobtown Circle near Harris's driveway. When Harris saw a sheriff's deputy driving up, he exited the vehicle. Harris testified that the deputy, while looking underneath the vehicle, found nothing on the driver's side, but found a pipe under the car in the middle while looking underneath the vehicle from the passenger's side. Harris initially testified that the pipe belonged to the defendant, then stated, "It was our pipe. Yes, it was my pipe." He claimed that he did not throw the pipe out of the vehicle, and that he pled guilty in order to get out of jail earlier.

Harris was being treated for schizophrenia but was not on his medication at the trial and had not been on his medication for approximately six months. He testified that he was committed to a mental hospital a few times "for being crazy." He remembered signing a *Boykin*[3] form in connection with his guilty plea, but denied that the *Boykin* form presented to him, which bore his signature, was the form he signed. Asked if the form had been written with disappearing ink, Harris answered that the form he signed probably was.

Sergeant Bergeron testified that he observed the defendant and Harris quickly moving in their seats, adjusting themselves before Harris exited the vehicle. He saw the defendant reach out of the vehicle and drop a shiny object. Sergeant Bergeron retrieved a crack pipe from underneath the vehicle, and subsequent tests revealed that it contained cocaine.

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3 *See Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

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 that the defendant was guilty of possession of cocaine. The jury rejected the defendant's theory that the cocaine found underneath the vehicle belonged to someone else, and apparently accepted the testimony of Sergeant Bergeron and of Harris. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *State v. Lofton*, 96-1429 (La. App. 1 Cir. 3/27/97), 691 So. 2d 1365, 1368, *writ denied*, 97-1124 (La. 10/17/97), 701 So. 2d 1331. Additionally, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. *See State v. Ordodi*, 06-0207 (La. 11/29/06), 946 So. 2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. *Calloway*, 1 So. 3d at 418.

This assignment of error is without merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER 2

In his second counseled assignment of error, the defendant contends the district court erred in imposing an unconstitutionally excessive sentence. Louisiana Constitution Article I, Section 20 prohibits the imposition of excessive punishment. A sentence may violate a defendant's constitutional right against excessive punishment even though it is within statutory limits, and the sentence is subject to appellate review. *State v. Sepulvado,* 367 So.2d 762, 767 (La. 1979). 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. *State v. Reed,* 409 So. 2d 266, 267 (La. 1982). 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. Lanclos,* 419 So. 2d 475, 478 (La. 1982); *State v. Hurst,* 99–2868 (La. App. 1 Cir. 10/3/00), 797 So. 2d 75, 83, *writ denied,* 00–3053 (La. 10/5/01), 798 So. 2d 962.

The defendant was convicted of possession of cocaine and adjudicated a fourth-felony habitual offender. Louisiana Revised Statute 40:967C(2) provides, in pertinent part, "Any person who violates this Subsection as to any other controlled dangerous substance shall be imprisoned with or without hard labor for not more than five years and, in addition, may be sentenced to pay a fine of not more than five thousand dollars." Pursuant to Louisiana Revised Statute 15:529.1A(1)(c)(i) (prior to the 2010 amendments), if the fourth felony is such that upon a first conviction the offender would be punishable for any term less than his natural life, then the person shall be sentenced to imprisonment for the fourth felony for a determinate term not less than the longest term prescribed for a first conviction and up to the remainder of his natural life, but in no event less than twenty years. Thus, as a fourth felony offender the defendant was exposed to a minimum sentence of twenty years and a maximum sentence of life imprisonment. Having been sentenced to the minimum term of twenty years, the defendant now argues that this court should reduce his sentence below the mandatory minimum.

The defendant cites *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672, wherein the Louisiana Supreme Court examined the issue of when a downward

departure from the mandatory minimum sentence in a habitual offender case is permitted. In *Johnson*, the court held that in order to rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that his circumstance is exceptional. This requires the defendant to prove that because of unusual circumstances, he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. *Johnson*, 709 So. 2d at 676; *see also State v. Lindsey*, 99-3302 (La. 10/17/00), 770 So. 2d 339, 343.

The defendant argues that his sentence was not "meaningfully tailored" to his culpability, the gravity of the offense, or the circumstances of the case. The district court reasoned that the defendant's incarceration would discourage a potential career criminal from future crime and protect society as a whole by taking a multiple offender off the street. The district court also pointed out that although the defendant was only thirty years old, he had many "brushes with the law" and had "yet to learn from them." The record does not demonstrate that the defendant's sentence was not meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of his case. Therefore, a downward departure from the minimum sentence provided in Section 15:529.1A(1)(c)(i) (prior to the 2010 amendments) is not justified. This assignment of error is without merit.

***PRO SE* ASSIGNMENTS OF ERROR NUMBERS 1 AND 2**

In related *pro se* assignments of error, the defendant argues that the evidence introduced to prove two of his prior convictions at the habitual offender hearing was insufficient.[4] In a habitual offender proceeding, the State has the burden of

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[4] The defendant's predicate offenses were (1) March 8, 2004 convictions for driving while intoxicated, third offense, under Terrebonne Parish docket number 422,898, and illegal use of a weapon under Terrebonne Parish docket number 422,383; (2) a July 11, 2006 conviction for aggravated flight from an officer under Terrebonne Parish docket number 465,018; and (3) a

proving that the defendant was convicted of a prior felony. Any competent evidence may be used to establish such proof. *State v. Payton*, 00-2899 (La. 3/15/02), 810 So. 2d 1127, 1130; *State v. Moten*, 510 So. 2d 55, 63 (La. App. 1 Cir.), *writ denied*, 514 So. 2d 126 (La. 1987). Such evidence may include (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. *Payton*, 810 So. 2d at 1130.

The predicate convictions that the defendant complains of are the March 8, 2004 guilty pleas to driving while intoxicated, third offense ("2004 DWI conviction"), and illegal use of a weapon ("illegal use of a weapon conviction"). The defendant complains that the fingerprints in connection with the 2004 DWI conviction were on a fingerprint card rather than on the bill of information, and that the state failed to establish a connection between the fingerprint card and the bill of information. He also complains that there were no fingerprints in connection with his illegal use of a weapon conviction.

We first note that because the state relied upon two additional felony convictions, that have not been challenged, one on July 11, 2006 and one on June 20, 2002, it was only necessary that the state prove one of the two March 8, 2004 convictions in order to establish that the defendant was a fourth felony offender. At the habitual offender hearing, Terrebonne Parish Sheriff's Deputy Ivy Dupre, Jr. was accepted as an expert in the field of fingerprint identification and comparison. Prior to the hearing, Deputy Dupre had obtained the defendant's fingerprints and placed them on the standard card used in Terrebonne Parish. Those fingerprints were then compared to the fingerprints from the 2004 DWI

June 20, 2002 conviction for attempted possession of a schedule IV controlled dangerous substance (diazepam) under Terrebonne Parish docket number 385,699.

conviction. Deputy Dupre testified that a fingerprint card was attached to the back of the bill of information for the 2004 DWI conviction.[5] The minute entry introduced for the 2004 DWI conviction also indicated that the defendant's fingerprints were affixed to the bill of information. Deputy Dupre testified that if the fingerprints are not actually on the bill of information itself, they will be on an attached fingerprint card. He testified that the prints on the fingerprint card from the current case and those from the 2004 DWI conviction were made by the same person. In addition to the fingerprint evidence, the state introduced copies of the bill of information, waiver of rights form, and transcript of the *Boykin* plea for the 2004 DWI conviction. The evidence as a whole was sufficient to establish that on March 8, 2004, the defendant pled guilty to driving while intoxicated, third offense. Because that conviction was sufficiently proven as a predicate offense, we pretermit any analysis with respect to the illegal use of a weapon conviction.

The district court correctly found that the State met its burden of proving that the defendant was a fourth-felony habitual offender. The fingerprint and documentary evidence established the prior felony convictions and that the defendant was the person convicted of those felonies. The fact that the defendant's fingerprints for the 2004 DWI conviction were on a card attached to the bill of information, and not actually on the bill of information itself, did not raise a reasonable doubt about the defendant's identity. This assignment of error is without merit.

CONVICTION, HABITUATAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

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[5] The attached fingerprint card includes the defendant's name, date of birth, and social security number. "GUILTY PLEA" is written in the "Reason Fingerprinted" section of the card, and the docket number written on the card is #422,898. The card is stamped with a filing date of March 8, 2004, the same day the defendant entered his guilty plea to that predicate offense.