NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0138

STATE OF LOUISIANA

VERSUS

RUBEN DARIO CISNERO

Judgment Rendered: September 10, 2010

* * * * * * * *

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 01-07-0653

The Honorable Anthony J. Marabella, Judge Presiding

* * * * * * * *

Hillar C. Moore, III **District Attorney** **Jeanne Rougeau** **Assistant District Attorney** **Baton Rouge, Louisiana**	**Counsel for Appellee** **State of Louisiana**
Frederick Kroenke **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellant** **Ruben Dario Cisneros**
Ruben Dario Cisneros **Cottonport, Louisiana**	**Defendant/Appellant** **In Proper Person**

* * * * * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The defendant, Ruben Dario Cisneros[1], was charged by bill of information with possession of 400 grams or more of cocaine, a violation of La. R.S. 40:967(F)(1)(c). Defendant pleaded not guilty and, following a jury trial, was found guilty as charged. Defendant was sentenced to 30 years at hard labor with the first 15 years of his sentence to be served without benefit of probation, parole, or suspension of sentence. The trial court also imposed a $250,000 fine. Defendant now appeals, designating one counseled assignment of error and four *pro se* assignments of error. For the following reasons, we affirm the conviction and sentence.

FACTS

On November 20, 2006, just after midnight, Officer Wally Cowart and Corporal Brett Hart of the Baton Rouge City Police were patrolling Interstate Highway 12 in a marked unit. While heading eastbound near the highway's intersection with Drusilla Lane, Officer Cowart observed a tractor-trailer unit or eighteen-wheeler truck intrude into the right lane of travel several times without signaling. Based on the observed improper lane usage, Officer Cowart initiated a stop of the truck. Defendant was the driver and sole occupant. A video camera mounted on Officer Cowart's unit recorded the stop. A wireless microphone on Officer Cowart's person also recorded the verbal conversations between the officers and defendant.

After defendant exited the truck, Officer Cowart learned defendant was traveling from Brownsville, Texas to North Carolina with a documented shipment of fire extinguisher powder. At trial, Officer Cowart testified that defendant was nervous and that, during the course of the stop, his

[1] Throughout the appellate record, including the bill of information, defendant's surname is spelled "Cisnero." However, in his *pro se* brief, defendant signed his name as "Ruben D. Cisneros." Also, a copy of defendant's driver's license in the record lists his surname as "Cisneros." Accordingly, we refer to defendant as "Cisneros."

nervousness increased. Officer Cowart testified that, based upon his training and 16 years experience patrolling the interstate highway, he knew the drug routes originated in Mexico and funneled up to the interstate highway systems in Texas. According to Officer Cowart, south Texas, including the Kingsville, Brownsville, and McAllen areas along the border, is the primary source of drug trafficking in the United States. Typically, the drugs traveled eastbound, and the sales profits traveled back westbound.

Officer Cowart asked defendant for permission to search the truck. Defendant consented to the search. Officer Cowart climbed into the cab and sat on the sleeper behind the front seats. He opened the closet next to the sleeper and observed a backpack, beneath which were 22 packages (kilos) of cocaine wrapped in black tape.[2] Two more kilos of cocaine were found inside a cell phone box inside the backpack. Defendant was arrested and the truck was transported to the Drug Enforcement Administration (DEA) office on Acadian Throughway to do a more thorough search. At the DEA office, officers found a torque wrench head in the glove compartment of the cab. The officers discovered that the cushions of the sleeper were attached to the walls with torque screws. After removing those torque screws, officers found another 28 kilos of packaged cocaine, very similar to the cocaine found in the cab closet, behind the rear, passenger-side, and driver-side walls of the cab. In summary, a total of 52 kilos was found in the cab of the truck. According to Officer Cowart, the street value of the cocaine was over $1,000,000.00. The actual total weight of all of the cocaine was 59.94 kilograms.

[2] Each package of cocaine was in a brick form commonly referred to as a kilo. One kilogram equals 2.2 pounds. Each brick of cocaine seized actually weighed between 1,000 grams (one kilogram) and 1,300 grams (1.3 kilograms).

At trial, the state and defendant entered a joint stipulation that if the fingerprint expert were to be called, she would testify that latent fingerprints and palm prints were taken from several of the wrapped bundles of cocaine and that the prints did not match defendant's prints. Defendant did not testify at trial.

COUNSELED ASSIGNMENT OF ERROR

In his sole counseled assignment of error, defendant argues the trial court erred in allowing the introduction of other crimes evidence at trial. Specifically, defendant contends that defense counsel did not "open the door" during his cross-examination of Officer Cowart to allow the prosecutor to question Officer Cowart about defendant's prior drug conviction on redirect examination.

Following the prosecutor's direct examination of Officer Cowart, defense counsel asked Officer Cowart, among other questions, if defendant had been truthful with him about his point of origin and destination on his truck route, as well as about the cargo being transported. Officer Cowart responded that defendant's responses regarding those subjects was true, as far as he knew, since that information was confirmed by the paperwork defendant gave him at the scene.

Subsequent to Officer Cowart's cross-examination, the following relevant exchange between the prosecutor and Officer Cowart took place:

> Q. Now, Mr. Leblanc [defense counsel] asked you several questions about the defendant being truthful and that, based on the log book and your conversation, he was traveling to a location -- uh -- was it Nu -- Nubain? [*sic*]
>
> A. North Carolina? Yes, sir.
>
> Q. North Carolina. And I believe Mr. Leblanc's words were he was truthful when he made that statement, correct?
>
> A. Correct.

Q. All right. And, in fact, there were several questions by Leblanc in that -- regarding Cisneros's truthfulness as he was conversing with you?

A. Yes, sir.

Q. All right. Based on your contact with Cisneros, do you believe that he was completely truthful with you or the other officers during that conversation?

A. No, sir. I do not.

Q. Why not?

A. Well, for instance, some of the questions he was asking me, I couldn't actually prove whether the -- uh -- Mr. Cisneros was telling me the truth; but, on one of the questions I asked him, I know he lied to me.

Q. Which question was that?

A. If he had been ever -- ever been arrested for a -- a narcotics --

At that point, defense counsel objected on the ground that evidence of arrests was not admissible. In overruling the objection, the trial court stated:

> Well, but it might -- it might -- it's not admissible for some purposes, but it's admissible for other purposes. And you asked him if he was telling you the truth and you attenuated [*sic*] that everything he told you is true and he has found something he didn't tell him was true, so I'm going to let it in.

The dialogue between the prosecutor and Officer Cowart thereupon continued:

Q. So, officer, let's go back. Mr. Leblanc indicated that he, the defendant, was being truthful with you. You didn't believe he [*sic*] to be completely truthful, did you?

A. No, sir.

Q. In fact, I think you indicated he lied to you, --

A. Yes, sir.

Q. -- Cisneros?

A. Yes, sir.

Q. What was the question?

A. I had asked him if he had ever been arrested for a narcotics charge.

Q. And do you recall his response?

A. He said no.

Q. And ultimately you found that to be a lie?

A. Yes, sir.

Q. Why?

A. Well, during the traffic stop, when I was back at my computer running a criminal history, traffic check, the -- run his driver's license number, a criminal history check showed he had been arrested for a felony drug charge before.

Q. In fact, he had been convicted of a felony drug charge based on your criminal history search, correct?

A. Correct.

Defense counsel again objected at that point. The objection was overruled.

Louisiana Code of Evidence article 404 provides, in pertinent part:

> (A) **Character evidence generally.** Evidence of a person's character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) **Character of accused.** Evidence of a pertinent trait of his character, such as a moral quality, offered by an accused, or by the prosecution to rebut the character evidence; provided that such evidence shall be restricted to showing those moral qualities pertinent to the crime with which he is charged, and that character evidence cannot destroy conclusive evidence of guilt.
>
> . . .
>
> (B) **Other crimes, wrongs, or acts.** (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by

> the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Louisiana Code of Evidence article 609.1, entitled "Attacking credibility by evidence of conviction of crime in criminal cases," provides, in pertinent part:

> A. **General criminal rule.** In a criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions, subject to limitations set forth below.
>
> B. **Convictions.** Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.

In his counseled brief, defendant suggests that the trial court permitted the testimony regarding his prior arrest and conviction because defense counsel, during his cross-examination of Officer Cowart, had broached the subject of defendant's honesty. Defendant argues, however, that the trial court's ruling was in error because defense counsel was not attempting to establish a defense or attack the credibility of Officer Cowart, either of which could be seen as "opening the door." Instead, according to defendant, defense counsel was attempting to demonstrate to the jury that defendant did not have the usual attitude of a person carrying drugs.

In its brief, the state suggests the testimony of defendant's arrest and conviction was properly allowed under La. C.E. art. 404(A)(1). According to the state, it was entitled to introduce evidence of defendant's bad character in rebuttal because defendant himself placed his character at issue by introducing evidence purporting to show his good character. The state contends that the testimony makes clear that it was not attempting to

introduce evidence of defendant's criminal history to prove bad character or that he acted in conformity therewith. Instead, the state contends that the prosecution was attempting to rebut the suggestion that defendant was honest with Officer Cowart, an issue defendant brought before the jury during cross-examination.

Initially, we observe that that it is unclear why the state sought to develop testimony regarding defendant's prior drug arrest and conviction, but it appeared to be an attempt to attack defendant's credibility by evidence of a conviction of a crime. Defendant did not take the stand to testify in the instant matter. Under La. C.E. art. 609.1, the state cannot introduce evidence of a prior conviction unless the defendant testifies, thereby subjecting himself to examination about his criminal convictions. *See State v. Powell*, 28,788, p. 6 (La. App. 2nd Cir. 11/1/96), 683 So.2d 1281, 1286, *writ denied*, 97-0092 (La. 5/30/97), 694 So.2d 243.

Further, we find unpersuasive the state's argument that the evidence was admissible under La. C.E. art. 404(A)(1). Comment (d) to article 404 states that subparagraph (A)(1) "preserves the traditional rule that an accused has the option to introduce evidence of his character with respect to the pertinent trait involved in the crime charged." The comment further states:

> If the accused affirmatively exercises this option, the prosecution may then offer evidence to rebut the character evidence thus offered by the accused as to the pertinent character trait involved in the crime. By taking the stand as a witness, an accused does not thereby put his general character at issue, nor his character as to the pertinent trait involved in the crime, but only his credibility as a witness . . .

La. C.E. art. 404, Comment (d). *See also State v. James*, 569 So.2d 135, 137 n.2 (La. App. 1st Cir. 1990). Here, defendant did not take the stand and presented no character or defense witnesses. As such, we do not find that

defendant affirmatively exercised the option to introduce evidence of his character by way of defense counsel's cross-examination of a state's witness on the subject of defendant's apparent legitimate status as a truck driver. *See State v. Vessell*, 450 So.2d 938, 946 (La. 1984).

The issue, ultimately, is whether defense counsel "opened the door" regarding defendant's general truthfulness during his cross-examination of Officer Cowart. When defense counsel established during cross-examination that defendant had been truthful regarding his truck route and documented cargo, defense counsel then established with several more questions that defendant had denied knowing about the cocaine.[3] It is arguable, therefore, that defense counsel sought to impress upon the jury that if defendant was truthful in general, then he was truthful about his lack of knowledge of the cocaine. As such, the "door" would have been "opened" on redirect examination for the prosecutor, at least insofar as defendant's prior drug arrest was concerned, to explore if defendant had been consistently truthful with Officer Cowart. *See State v. Jackson*, 98-277, pp. 6-12 (La. App. 3rd Cir. 2/3/99), 734 So.2d 658, 662-64.

However, we need not decide the foregoing issue because we find the trial court erred in admitting testimony regarding defendant's prior drug conviction. The video recording of defendant's traffic stop shows that after

---

[3] Whether there was an outright denial of knowledge of the cocaine is unclear. The relevant exchange between defense counsel and Officer Cowart was as follows:

> Q. Did he ever admit any knowledge of the cocaine?
>
> A. No, sir. He did not.
>
> Q. Did he not, in fact, deny that he knew anything about it?
>
> A. Well, his exact words to me was that he didn't want to talk about it. He didn't have anything to say.
>
> Q. But he denied knowing about the cocaine?
>
> A. That's correct. Yes, sir.

defendant was arrested and read his rights under *Miranda*, Officer Cowart asked defendant, "Have you ever been arrested for drugs before?" Defendant responded that he had not. Officer Cowart determined that defendant had lied to him because a computer check indicated defendant had a drug conviction. Thus, after defense counsel arguably "opened the door" on cross-examination, the prosecution would have been allowed to question Officer Cowart about whether or not defendant lied about any prior drug arrests. However, Officer Cowart did not ask defendant at the scene if he had ever been *convicted* of a drug charge. Thus, when the prosecution gratuitously offered on redirect examination, "In fact, he had been convicted of a felony drug charge based on your criminal history search," he exceeded the scope of what "opening the door" would have allowed. *See State v. Washington*, 03-1135, pp. 7-12 (La. App. 5th Cir. 1/27/04), 866 So.2d 973, 978-81; *Jackson*, 98-277 at pp. 8-10, 734 So.2d at 663-64.

Testimony of the defendant's prior drug conviction, therefore, should not have been allowed into evidence, either to attack credibility or as other crimes evidence. *See* La. C.E. arts. 404(B)(1) and 609.1(A), (B). We also note that neither at trial nor on appeal did the state suggest that any of the exceptions listed in La. C.E. art. 404(B) were applicable. The other crimes evidence of a prior drug conviction had no independent relevancy besides simply showing a criminal disposition. *See State v. Lafleur*, 398 So.2d 1074, 1080 (La. 1981).

The erroneous admission of other crimes evidence is a trial error subject to harmless-error analysis on appeal. *State v. Johnson*, 94-1379, p. 17 (La. 11/27/95), 664 So.2d 94, 102. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279,

113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *Johnson*, 94-1379 at p. 14, 664 So.2d at 100.

In this matter, we find defendant could not have been prejudiced by the prosecution's mention of a prior drug conviction. The defendant was found transporting 52 kilos of cocaine. While some of the cocaine was hidden in compartments behind the sleeper upholstery, to which only a torque wrench would allow access, 22 kilos of the cocaine were found in the closet right next to the sleeper. Officer Cowart testified that, as he sat on the sleeper, he simply reached over and opened the closet door. The closet door was not locked. Thus, defendant, while driving the truck for at least a day, was seated only feet away from an unlocked closet full of packaged cocaine. The state's evidence clearly established defendant's guilt. As such, the guilty verdict rendered was surely unattributable to Officer Cowart's testimony as to defendant's prior drug conviction, and any error in allowing such testimony to be heard by the jury was harmless. *See Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081; La. C.Cr.P. art. 921.

The counseled assignment of error is without merit.

FIRST *PRO SE* ASSIGNMENT OF ERROR

In his first *pro se* assignment of error, defendant argues the evidence was insufficient to support the conviction. Specifically, defendant contends the state failed to prove he knowingly or intentionally possessed the illegal drugs.

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. C.Cr.P. art. 821(B); *State v. Ordodi*, 06-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson* standard of review, incorporated in article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *See State v. Patorno*, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

To support a conviction for possession of cocaine in violation of La. R.S. 40:967(F)(1)(c), the state must present evidence establishing beyond a reasonable doubt that: (1) the defendant was in possession of the drug; (2) the defendant knowingly or intentionally possessed it; and (3) the amount possessed was 400 grams or more of cocaine or of a mixture or substance containing a detectable amount of cocaine or of its analogues as provided in Schedule II(A)(4) of La. R.S. 40:964. *State v. Major*, 03-3522, p. 7 (La. 12/1/04), 888 So.2d 798, 802.

Possession of narcotic drugs can be established by actual physical possession or by constructive possession. *State v. Trahan*, 425 So.2d 1222, 1226 (La. 1983). A person can be found to be in constructive possession of a controlled substance if the state can establish that he had dominion and control over the contraband, even in the absence of physical possession. *State v. Harris*, 94-0970, p. 4 (La. 12/8/94), 647 So.2d 337, 338-39 (per curiam). *See Major*, 03-3522 at p. 7, 888 So.2d at 802.

A determination of whether there is sufficient "possession" of a drug to convict depends on the peculiar facts of each case. *Trahan*, 425 So.2d at

1226. Although mere presence in an area where drugs are located or mere association with one possessing drugs does not constitute constructive possession, our supreme court has acknowledged several factors to be considered in determining whether a defendant exercised sufficient control and dominion to establish constructive possession, including: (1) his knowledge that drugs were in the area; (2) his relationship with the person, if any, found to be in actual possession; (3) his access to the area where the drugs were found; (4) evidence of recent drug consumption; and (5) his physical proximity to drugs. *State v. Toups*, 01-1875, p. 4 (La. 10/15/02), 833 So.2d 910, 913. *See Major*, 03-3522 at pp. 7-8, 888 So.2d at 802.

The evidence at trial established defendant, by virtue of his dominion and control over the eighteen-wheeler as its driver, exercised dominion and control over the large amount of cocaine stored in the sleeper closet and hidden behind the walls of the sleeper in the cab. *See State v. Walker*, 03-188, p. 7 (La. App. 5th Cir. 7/29/03), 853 So.2d 61, 65-66, *writ denied*, 03-2343 (La. 2/6/04), 865 So.2d 738 (holding that the driver and sole passenger had custody of the car and the cocaine found in the car was within his immediate control even though ownership of the vehicle was not proven). *See also Major*, 03-3522 at p. 8, 888 So.2d at 802-03.

As driver of the vehicle, defendant had complete and authorized access to the glove compartment where the torque wrench was found and to the areas where the cocaine was found. Furthermore, the location of the cocaine was within the reach of, and immediately accessible to, defendant as the driver and as the sole occupant of the cab sleeper. Those facts alone are sufficient to convince a rational trier of fact beyond a reasonable doubt that defendant exercised ample control and dominion over the cocaine to

constitute the required element of constructive possession. *See Major*, 2003-3522 at p. 8, 888 So.2d at 803.

Guilty knowledge is an essential element of the crime of possession of cocaine. However, since knowledge is a state of mind, it need not be proven as fact, but rather may be inferred from the circumstances. *Major*, 03-3522 at pp. 8-9, 888 So.2d at 803. Defendant argues in his *pro se* brief that the state did not prove he had knowledge of the cocaine in the cab of the truck because his fingerprints or palm prints were not found on the packages of cocaine. Further, defendant argues that his guilty knowledge was not proven because the state failed to establish that the backpack and the cell phone box inside the backpack belonged to him.

At trial, Officer Cowart testified that defendant's level of nervousness increased as he spoke to Corporal Hart. Officer Cowart also testified that Brownsville, Texas, defendant's point of origin in his truck route, was a known source area for narcotics trafficking. Officer Cowart's computer check revealed that defendant had a prior drug conviction. Also, as we have previously noted, while some of the cocaine was hidden behind the sleeper upholstery, to which only a torque wrench would allow access, 22 kilos of the cocaine were found in the unlocked closet right next to the sleeper, in close proximity to the driver's seat. Based on the aforementioned evidence, it was entirely reasonable for the jurors to conclude that defendant had the requisite guilty knowledge of the concealed cocaine behind the sleeper walls and in the sleeper closet. *See Major*, 03-3522 at pp. 9-10, 888 So.2d at 803.

We further acknowledge that the sheer volume and value of the cocaine in the truck are indicative of drug dealing, and it is therefore reasonable to believe that defendant, as driver, had knowledge of such activity and was not an innocent third party. *See Maryland v. Pringle*, 540

U.S. 366, 373, 124 S.Ct. 795, 801, 157 L.Ed.2d 769 (2003) ("The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."). *See also United States v. Serrano-Lopez*, 366 F.3d 628, 635 (8th Cir. 2004) ("The large quantity of drugs involved is evidence of the defendants' knowledge. Even if the drugs were not owned by the defendants, it is unlikely that the owner would place approximately $130,000 worth of cocaine in the hands of people who do not even know it is there."). *See also Major*, 03-3522 at p. 10, 888 So.2d at 803-04.

In this case, the jury was presented with two theories of who possessed the cocaine found by Officer Cowart: the state's theory that defendant knowingly and constructively possessed the cocaine found in the truck he was driving, and defendant's theory that he had no knowledge of the cocaine that belonged to someone else.[4] When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), *writ denied*, 514 So.2d 126 (La. 1987). The jury's verdict reflected its reasonable conclusion that, based upon the evidence viewed in the light most favorable to the prosecution, defendant, having dominion and control over the area where the cocaine was found, constructively and knowingly possessed the cocaine.

Thus, with the evidence establishing defendant's constructive possession of 52 kilos of cocaine and that such possession was knowing or

[4] Defendant did not testify, and no witnesses for the defense testified. Defendant's theory is gleaned from his closing argument and defense counsel's cross-examination at trial.

intentional, the state proved the elements of the charged crime. The jury heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding the lack of fingerprint evidence or proof of ownership of the backpack or cell phone box, the jury found defendant guilty. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. *State v. Taylor*, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. *See State v. Mitchell*, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Quinn*, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

The sufficiency inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt, but rather whether a rational fact finder viewing the evidence as a whole could have found the defendant guilty beyond a reasonable doubt. *See Mussall*, 523 So.2d at 1310-11. Based on the evidence as a whole, and viewed in its totality, reasonable factfinders could have inferred from the evidence presented at trial that defendant was aware of the concealed cocaine and had constructive possession of it, thus rejecting the defense's

hypothesis of innocence. *See Major*, 03-3522 at pp. 11-12, 888 So.2d at 804.

After a thorough review of the record, we find that the evidence supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was guilty of possession of 400 grams or more of cocaine. *See State v. Calloway*, 07-2306, pp. 10-12 (La. 1/21/09), 1 So.3d 417, 423 (per curiam).

This *pro se* assignment of error is without merit.

SECOND *PRO SE* ASSIGNMENT OF ERROR

In his second *pro se* assignment of error, defendant argues that the trial court erred in denying his motion to suppress. Specifically, defendant contends that no probable cause existed for the investigatory stop.

Defendant asserts that there is no evidence in the record to indicate Officer Cowart was justified in stopping him and seizing him. He contends that Officer Cowart "and the State attempted to justify the stop due to alleged erratic driving" by him. According to defendant, "[t]he allegation of erratic driving was simply a pretext for stopping [him], because he is Hispanic in appearance, and the truck was from Texas." Defendant argues that Officer Cowart lacked the necessary probable cause to make the stop because his whole basis for the stop "was ***subjective*** in nature, not objective, as required." Defendant further asserts that once Officer Cowart stopped and confronted him and found no particularized and objective reason to arouse suspicions, Officer Cowart should have terminated the investigatory stop and allowed him to leave.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. *See State v. Green*, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. *See State v. Hunt*, 09-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.[5]

The Fourth Amendment to the federal constitution and Article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by La. C.Cr.P. art. 215.1, as well as by both state and federal jurisprudence. Reasonable cause for an investigatory detention is something less than probable cause and must be determined under the facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. The right to make an investigatory stop and question the particular individual detained must be based upon reasonable cause to believe that he has been, is, or is about to be engaged in criminal conduct. *State v. Belton*, 441 So.2d 1195, 1198 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984).

Officer Cowart testified at the motion to suppress hearing and at trial that he pulled defendant over because defendant, driving an eighteen-wheeler in the center lane, crossed the white dividing line into the right lane several times without signaling. Based on defendant's failure to remain in

[5] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. *State v. Chopin*, 372 So.2d 1222, 1223 n. 2 (La. 1979).

his proper lane of travel and to signal when he moved into a different lane, Officer Cowart had probable cause to believe a traffic violation or violations had occurred. Accordingly, Officer Cowart had an objectively reasonable basis for stopping defendant's vehicle. La. C.Cr.P. art. 215.1; La. R.S. 32:79 and 32:104. *See State v. Shapiro*, 98-1949, p. 9 (La. App. 4th Cir. 12/29/99), 751 So.2d 337, 342.

Officer Cowart had a legitimate reason to stop defendant, and any suggestion by defendant as to Officer Cowart's real motives for stopping him is irrelevant. The United States Supreme Court in *Whren v. United States*, 517 U.S. 806, 812-13, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) addressed the issue of the subjective intent of law enforcement officers when making a stop or arrest:

> Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n. 3, 103 S.Ct. 2573, 2577, n. 3, 77 L.Ed.2d 22 (1983), we . . . flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. In *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," *id.*, at 221, n. 1, 94 S.Ct., at 470, n. 1[.] . . . And in *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978), . . . we said that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." We described *Robinson* as having established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." [*Scott,*] 436 U.S., at 136, 138, 98 S.Ct., at 1723. . . .
>
> Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. . . . .

When Officer Cowart stopped defendant and questioned him about where he was coming from, defendant told him he was coming from

Brownsville, Texas, known to Officer Cowart to be a source area for narcotics trafficking. When Officer Cowart ran a computer check on defendant, Corporal Hart spoke to the defendant. Officer Cowart testified that as defendant spoke to Corporal Hart, defendant's nervousness increased, which raised Officer Cowart's suspicion. Officer Cowart's computer check revealed that defendant had an extensive criminal history, including a history of narcotics trafficking. At that point, Officer Cowart requested and obtained defendant's oral consent to search the truck.

Given the lawfulness of the initial stop, the reasonableness of the escalating encounter between defendant and Officer Cowart hinged on whether the actions undertaken by Officer Cowart following the stop were reasonably responsive to the circumstances justifying the stop in the first place, as augmented by information obtained by Officer Cowart during the stop. Defendant's responses, nervous demeanor, and prior criminal record prompted a shift in Officer Cowart's focus that was neither unusual nor impermissible. Officer Cowart obtained oral consent from defendant to search the truck and, within moments, officers conducted the search while defendant stood near Officer Cowart's patrol unit. The time between defendant's being stopped and his consent to search the vehicle was about seven minutes. The time between the consent to search and the discovery of the cocaine was about three minutes. Thus, the entire span of time, from the moment the defendant was pulled over until the cocaine was found, was about ten minutes. The officers diligently pursued their investigation and the relatively brief duration of the traffic stop and consensual search was reasonable under the Fourth Amendment. *See State v. Miller*, 00-1657, pp. 2-5 (La. 10/26/01), 798 So.2d 947, 949-51 (per curiam). Accordingly, we find no merit to defendant's argument that he was unlawfully detained.

Regarding the search of the truck, Officer Cowart did not need probable cause for the search, as defendant gave Officer Cowart oral consent to search the vehicle. A search that is conducted pursuant to consent is one of the specifically established exceptions to the requirements of both a warrant and probable cause. The validity of such consent is dependent upon it having been given voluntarily, free of duress or coercion either express or implied. *See State v. Montgomery*, 432 So.2d 340, 343 (La. App. 1st Cir. 1983). *See also State v. Tennant*, 352 So.2d 629, 633 (La. 1977), *cert. denied*, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543 (1978). Oral consent to a search is valid. *State v. Ossey*, 446 So.2d 280, 287 n.6 (La.), *cert. denied*, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984). Our review of the recording of the traffic stop indicates that defendant's consent was neither forced nor coerced, and was clearly given voluntarily. Accordingly, defendant's voluntary consent rendered the search and seizure of the cocaine constitutionally valid. *Montgomery*, 432 So.2d at 343.

We find no legal error or abuse of discretion in the trial court's denial of the defendant's motion to suppress. Accordingly, defendant's second *pro se* assignment of error is without merit.

THIRD *PRO SE* ASSIGNMENT OF ERROR

In his third *pro se* assignment of error, defendant argues that the trial court erred in denying his motion for a new trial. Specifically, defendant contends that the admission at trial of other crimes evidence violated his Sixth Amendment rights, and that it was legal error for the trial court to deny his motion to suppress.

Both of these issues have already been addressed and found to be meritless in our determination of the counseled assignment of error and the second *pro se* assignment of error, respectively. Defendant also asserts that

his trial counsel was "woefully ineffective and inadequate." According to defendant, he has been forced to preserve all of his own rights.

We have been unable to locate a written motion for a new trial in the record. At a hearing just prior to sentencing, however, the trial court denied defendant's (presumably *pro se*) motion for a new trial, which essentially argued appointed counsel was ineffective. The trial court pointed out that a motion for new trial was not the proper vehicle to allege ineffective assistance of counsel, and that such a claim was more properly made on appeal or by post-conviction relief.

We agree with the trial court's observation. A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. *State v. Carter*, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

The allegation of ineffective assistance of counsel raised in defendant's brief cannot be sufficiently investigated from an inspection of the record alone. Other than his assertion that he was forced to preserve all of his own rights, defendant provides no support in his brief as to how his counsel's performance at trial was insufficient. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant

record, could this allegation be sufficiently investigated.[6] Accordingly, this allegation is not subject to appellate review. *See State v. Albert*, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64.

Notwithstanding the claim of ineffective assistance of counsel, defendant's third *pro se* assignment of error is without merit.

FOURTH *PRO SE* ASSIGNMENT OF ERROR

In his fourth *pro se* assignment of error, defendant argues that his sentence is excessive. Specifically, defendant contends that, because he has never been convicted of a crime of violence, the maximum sentence of 30 years is grossly out of proportion to the severity of the crime. Defendant also contends that the $250,000.00 fine is excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be excessive. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). 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. 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. *State v. Andrews*, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454.

The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. *See State v. Holts*, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure

[6] Defendant would have to satisfy the requirements of La. C.Cr.P. art. 924, *et seq.*, in order to receive such a hearing.

article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the article's criteria. *State v. Brown*, 02-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C.Cr.P. art. 894.1. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. *See State v. Jones*, 398 So.2d 1049, 1051-52 (La. 1981).

In this matter, defendant was sentenced to the maximum sentence of 30 years at hard labor for the possession of 400 grams or more of cocaine conviction. As a general rule, maximum or near maximum sentences are to be reserved for the worst offenders and the worst offenses. *State v. James*, 02-2079, p. 17 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 586. Also, maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. *See State v. Hilton*, 99-1239, p. 16 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, *writ denied*, 00-0958 (La. 3/9/01), 786 So.2d 113.

At sentencing, the trial court stated in pertinent part:

> All right. . . . Mr. Cisnero[s] is -- appears to be 36 years old. He is classified and -- in the probation report as a third convicted felon. . . . It was very clear to this court, this defendant, without question, was track -- trafficking huge amounts of cocaine. The court -- after reviewing his record and information provided by the District Attorney's Office indicating that Mr. Cisnero[s] has been convicted previously of a burglary charge which is a felony, a separate charge of unauthorized use of a motor vehicle which is a felony and possession of marijuana in excess of a certain amount which is a felony, as well, the court concludes that this defendant is, in fact, a third -- this would be his fourth felony conviction. The court . . . considering the sentencing guidelines as outlined in Article 894 of the Code of Criminal Procedure, does not believe, even if allowed probation, would be appropriate in this case. The court finds that there is an undue risk that during a period of probation or suspension of sentence that this defendant would commit more crimes and that the defendant is need -- in need of correctional treatment or a custodial environment that can be provided most efficiently by his commitment to an institution and that a lesser sentence would deprecate the seriousness of the defendant's crime.

The trial court adequately considered the factors set forth in La.C.Cr.P. art. 894.1. Considering the trial court's careful review of the circumstances and the nature of the crime, we find no abuse of discretion by the trial court. The trial court provided justification in imposing the maximum sentence on defendant who, in "trafficking huge amounts of cocaine," brazenly disregarded the laws of our state. We find this to be the worst type of offense in the category of possession of cocaine and defendant, with his repeated criminal behavior, to be the worst type of offender. Defendant was involved in the transportation across states lines of over 100 pounds of cocaine, almost 150 times the weight of 400 grams specified in the statute, worth over $1,000,000.00 if illegally sold. We thus conclude that defendant poses an unusual risk to the public safety. *See State v. Mickey*, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), *writ denied*, 610 So.2d 795 (La. 1993). *See also Hilton*, 99-1239 at p. 16, 764 So.2d at 1037; *State*

v. Herrin, 562 So.2d 1, 11 (La. App. 1st Cir.), *writ denied*, 565 So.2d 942 (La. 1990).

Accordingly, the sentence imposed, including the minimum $250,000.00 fine,[7] is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

Defendant's final *pro se* assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

[7] For a conviction under La. R.S. 40:967(F)(1)(c), the range of the mandatory fine is $250,000.00 to $600,000.00.