VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 11th day of April, 2019.

Present: All the Justices

Roger Paul Hodnett, Appellant,

against Record No. 180528
Court of Appeals No. 1309-17-3

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

The trial court found Roger Paul Hodnett guilty of constructive possession of ammunition after having been convicted of a felony in violation of Code § 18.2-308.2(A).[1] In the Court of Appeals, Hodnett challenged the sufficiency of the evidence to support his conviction. The Court of Appeals found the evidence sufficient. We agree and affirm.

I.

"On appeal, we review the evidence in the 'light most favorable' to the Commonwealth, the prevailing party in the trial court." *Vasquez v. Commonwealth*, 291 Va. 232, 236 (2016) (citation omitted). "Viewing the record through this evidentiary prism requires us to 'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.'" *Id.* (citation omitted).

So viewed, the evidence at trial showed that on July 14, 2016, several officers executed a search warrant at Hodnett's residence. When the officers arrived, Hodnett was at the residence with his wife Michelle, Darrell Robertson, David Hall, and several young children. During the search of the residence, the officers found a loaded .270-caliber rifle in the closet of a bedroom occupied by Robertson. Robertson knew the caliber of the rifle and claimed that he had

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[1] Hodnett was also convicted of possession of marijuana, which he does not challenge on appeal.

borrowed the rifle from a friend for hunting and that he did not let Hodnett touch the rifle. Robertson testified that he had his own pickup truck that he used for hunting and in which he usually kept the rifle, but he explained that he brought the rifle into the house after hunting on a rainy day instead of leaving it in the truck.[2]

An investigator also searched a vehicle parked outside of the residence and discovered not only marijuana and cash in the center console between the driver's and passenger's seats but also a box of "12 gauge shotgun turkey loads" in the pouch on the back of the front passenger's seat. J.A. at 67; *see also id.* at 68-71. The side of the 12-gauge shotgun shell box was visible when looking down at the pouch because the pouch protruded approximately 3 inches from the back of the front passenger's seat given the box's size. *See* R. at 212.[3] Earlier on the same day, one of the officers, while on his way to surveil Hodnett's residence, observed Hodnett driving the vehicle with no other passengers. While surveilling Hodnett's residence, the officer also observed Hodnett open a passenger's side door of the vehicle and do "something on the inside" for "a minute or so" before closing the door and walking to the residence.[4] J.A. at 61. Hodnett admitted to the officers after the search that the vehicle belonged to him.

Robertson, Hodnett's only defense witness, testified that Hodnett "sometimes" allowed Robertson to use the vehicle "to go out to get a loaf of bread or something" and to go hunting "a couple times," *id.* at 113-14, but he confirmed that the vehicle was Hodnett's and that Hodnett used it "all the time," *id.* at 117. When asked whether he had left "any ammunition" in the vehicle, Robertson replied: "Well, I probably, it might have been some. I have used it, you know, a time or two. Probably some of the bullets might have been in there, yeah." *Id.* at 113.

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[2] Hodnett was also charged with possession of a firearm after having been convicted of a felony, but the trial court found him not guilty of that offense because the evidence failed to prove that he had the requisite knowledge of the rifle's presence in the residence or that he had exercised dominion and control over it.

[3] The trial court record contains a color photograph of the 12-gauge shotgun shell box inside the pouch. This photograph has a clearer resolution than the photocopy contained within the Joint Appendix filed in this Court. The color photograph in the trial court record shows the 12-gauge shotgun shell box inside the protruding pouch with the top of the box facing the back of the passenger's seat. *See* R. at 212. The side of the box stated that it contained 3-inch Magnum turkey loads. *See id.*

[4] The evidence does not demonstrate whether Hodnett opened the front or back passenger's side door or whether he reached into the pouch while in the passenger's side of the vehicle.

Subsequently, Robertson was asked whether he had ever used "shotgun shells with . . . birdshot," and he answered affirmatively and explained that he had a 12-gauge, single-barrel shotgun in addition to the .270-caliber rifle. *Id.* at 114.[5]

Hodnett moved to strike the evidence after the Commonwealth's case-in-chief and at the conclusion of all of the evidence. The trial court denied the motions and found Hodnett "guilty of the possession of the twelve gauge shotgun ammunition," *id.* at 129, without any specific mention of the "bullets" that Robertson said he might have left in Hodnett's vehicle, *id.* at 113. Hodnett appealed to the Court of Appeals, arguing that the evidence was insufficient to prove that he had constructively possessed the ammunition in his vehicle. Unsuccessful there, Hodnett now raises his sufficiency challenge on further appeal to us.

II.

Hodnett focuses his argument on the contention that "the evidence failed to prove that [he] had the requisite knowledge of the ammunition." Appellant's Br. at 2. He claims that he did not have knowledge of the ammunition for two reasons: (i) because "[t]he ammunition was not in a place where it was visible to [him] when he was driving the vehicle" or "when he opened the front passenger side of the vehicle when the officers were conducting surveillance" and (ii) because "Robertson stated that he had put the ammunition in the vehicle when he used the vehicle to go hunting." *Id.* at 9.

A.

When reviewing the sufficiency of the evidence, "[a]n appellate court does not 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Williams v. Commonwealth*, 278 Va. 190, 193 (2009) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). "'Rather, the relevant question is,' upon review of the evidence in the light most favorable to the prosecution, 'whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017) (emphasis in original) (citation omitted). Thus, "it is not for this [C]ourt to say that the evidence does or does not establish his guilt beyond a

[5] No shotgun was discovered as a result of the search warrant executed on Hodnett's residence and vehicle.

reasonable doubt because as an original proposition it might have reached a different conclusion." *Cobb v. Commonwealth*, 152 Va. 941, 953 (1929).

To shoulder its burden of proof, the Commonwealth must exclude "every *reasonable* hypothesis of innocence, that is, those 'which flow from the evidence itself, and not from the imagination of defendant's counsel.'" *Tyler v. Commonwealth*, 254 Va. 162, 166 (1997) (emphasis in original) (citation omitted). This "reasonable-hypothesis principle," however, "is not a discrete rule unto itself" and "does not add to the burden of proof placed upon the Commonwealth in a criminal case," *Vasquez*, 291 Va. at 249-50 (citation omitted), because the Commonwealth need not "negate what 'could have been' or what was a 'possibility,'" *Nelson v. Commonwealth*, 281 Va. 212, 217-18 (2011).[6]

A factfinder may draw inculpatory inferences not only from the prosecution's evidence but also from the defendant's. "Wherever pertinent and material evidence by which an alibi might, if true, have been supported, is withheld, or is the result of afterthought or contrivance, the attempt to set it up recoils with fatal effect upon the party who asserts it." *Dean v. Commonwealth*, 73 Va. (32 Gratt.) 912, 925 (1879). "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the [permissible inference] that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). The burden of proof in criminal cases always rests on the Commonwealth,[7] but "the failure or neglect of an accused to produce evidence within his power" is an incriminating circumstance that the factfinder may consider. *Robinson v. Commonwealth*, 165 Va. 876, 880

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[6] Consequently, while "[i]t is true that a factfinder cannot 'arbitrarily' choose, as between two equally plausible interpretations of a fact, one that incriminates the defendant," an arbitrary choice occurs "only when no rational factfinder could believe the incriminating interpretation of the evidence and disbelieve the exculpatory one." *Vasquez*, 291 Va. at 250 (citation omitted). "When examining an alternate hypothesis of innocence, the question is not whether 'some evidence' supports the hypothesis, but whether a rational factfinder could have found that the incriminating evidence renders the hypothesis of innocence unreasonable." *Id.* (citation omitted).

[7] *See Gibson v. Commonwealth*, 287 Va. 311, 320 n.3 (2014) ("The burden of proof is not to be confused with the burden of going forward to produce evidence. The burden of proof . . . never shifts. When a plaintiff presents a prima facie case, the burden of producing evidence to overcome that prima facie case . . . then shifts to the defendant. The same is true in a criminal prosecution." (citations omitted)).

(1936); *see also Taylor v. Commonwealth*, 90 Va. 109, 118-20 (1893); 1 Simon Greenleaf, A Treatise on the Law of Evidence § 195b, at 326-27 (John Henry Wigmore ed., 16th ed. 1899); Thomas Starkie et al., A Practical Treatise of the Law of Evidence 74 (Metcalf et al. eds., 10th Am. ed. 1876).

B.

In Virginia, "a conviction for unlawful possession . . . may be based solely on evidence of constructive possession." *Wright v. Commonwealth*, 278 Va. 754, 759 (2009); *see also* John L. Costello, Virginia Criminal Law and Procedure § 20.4[1], at 309 (4th ed. 2008). The issue of constructive possession "is largely a factual one" and requires circumstantial proof "that the defendant was aware of the presence and character of the [contraband] and that the [contraband] was subject to his dominion and control." *Smallwood v. Commonwealth*, 278 Va. 625, 630 (2009) (citations omitted). This proof usually involves evidence showing "the defendant's proximity" to the contraband, *Bolden v. Commonwealth*, 275 Va. 144, 148 (2008); the "ownership or occupancy of the premises where the [contraband] is found," *Rawls v. Commonwealth*, 272 Va. 334, 350 (2006); and that the contraband "was open and obvious to someone looking in the vehicle," particularly if "it was located in immediate proximity to where [the defendant] had been sitting," *Bolden*, 275 Va. at 149.

Here, several circumstances support the trial court's finding that Hodnett constructively possessed the ammunition. Hodnett owned the vehicle and drove it "all the time." J.A. at 117. He had been in close proximity to the ammunition on the same day that the search warrant was executed. Earlier that day, Hodnett had driven the vehicle alone with the ammunition within arm's reach of the driver's seat, and thus, "in immediate proximity to where [he] had been sitting," *Bolden*, 275 Va. at 149. Just prior to the execution of the search warrant, an officer had observed him doing "something on the inside" of the passenger's side of the vehicle for "a minute or so." J.A. at 61. Additionally, the box of 12-gauge shotgun shells would have been "open and obvious," *Bolden*, 275 Va. at 149, to anyone looking down at the pouch because the pouch protruded approximately 3 inches from the back side of the passenger's seat given the box's size. *See supra* note 3.

Equally significant is Hodnett's reliance on Robertson's testimony to support his hypothesis of innocence. Contrary to Hodnett's multiple assertions that "Robertson testified that the ammunition was his and he had left it inside the vehicle when he had driven it," *see, e.g.*,

Appellant's Br. at 11, Robertson only testified that he "probably" or "might have" left "*bullets*" in Hodnett's vehicle, J.A. at 113 (emphasis added). Robertson's equivocal testimony about the "ammunition" found in the vehicle, *id.*, stands in stark contrast to his unequivocal testimony regarding the loaded .270-caliber rifle found inside the residence. To the question whether he had claimed ownership of the rifle (which included a chambered round) following the search, Robertson responded, "Yes, sir," *id.* at 112, but Robertson never stated that he owned the 12-gauge shotgun shells found in Hodnett's vehicle or even that he may have ever left any shotgun *shells* in the vehicle.

An obvious opportunity existed for Hodnett to ask Robertson whether Robertson had left the shotgun shells found in Hodnett's vehicle. Robertson testified that he had previously used "shotgun shells with . . . birdshot" because he owned a 12-gauge, single-barrel shotgun in addition to his .270-caliber rifle. *Id.* at 114. But Hodnett never asked Robertson, nor did Robertson ever volunteer information regarding, whether Robertson had ever left shotgun shells in Hodnett's vehicle. Rather, when asked whether he may have left "ammunition" in Hodnett's vehicle, Robertson merely answered that he "probably" or "might have" left some "*bullets*" in Hodnett's vehicle. *Id.* at 113 (emphasis added). Robertson's testimony reveals that he was aware of the specific caliber of bullets used to fire his loaded rifle and that he was also aware that shotgun shells, not bullets, are used to fire shotguns. Yet he only said that he "probably" or "might have" left "*bullets*," not shotgun shells, in Hodnett's vehicle. *Id.* (emphasis added). Hodnett's conspicuous failure or neglect to have Robertson, his only alibi witness, directly say something that Robertson could have said, knew how to say, but did not say, is an incriminating circumstance that the factfinder could consider. *See Robinson*, 165 Va. at 880.

While each of these circumstances may be insufficient, standing alone, to support Hodnett's conviction, "the combined force of many concurrent and related circumstances may lead a reasonable mind irresistibly to a conclusion." *Pijor*, 294 Va. at 512-13 (alteration and citation omitted). When viewing all of the circumstantial evidence, a rational factfinder could have found Hodnett guilty beyond a reasonable doubt of possessing ammunition after having been convicted of a felony. Thus, we cannot say that the trial court's judgment was "plainly wrong or without evidence to support it." *Id.* at 512 (quoting Code § 8.01-680).

III.

Finding no error in the decision or reasoning of the Court of Appeals, we affirm.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Pittsylvania County.

JUSTICE GOODWYN, with whom JUSTICE POWELL joins, dissenting.

I respectfully dissent. Hodnett was charged and convicted pursuant to Code § 18.2-308.2(A), which makes it unlawful for one who has been convicted of a felony "to knowingly and intentionally possess or transport any . . . ammunition for a firearm." Code § 18.2-308.2(A). As noted in the Court's Order, "Constructive—rather than actual—possession of contraband [is] sufficient to obtain a criminal conviction." *Smallwood v. Commonwealth*, 278 Va. 625, 629-30 (2009).

To establish constructive possession, "the Commonwealth must present evidence of acts, statements or conduct by the defendant or other facts and circumstances, proving that the defendant was aware of the presence and character of the [ammunition] and that the [ammunition] was subject to his dominion and control." *Bolden v. Commonwealth*, 275 Va. 144, 148 (2008); *see also Rawls v. Commonwealth*, 275 Va. 334, 349 (2006) (same). The Commonwealth bears the burden of proof of each element of the offense beyond a reasonable doubt. *Vasquez v. Commonwealth*, 291 Va. 232, 249-50 (2016). In his assignment of error, Hodnett asserts that the evidence failed to prove that he had the requisite knowledge of the ammunition. I agree.

The facts that Hodnett owned the vehicle, was driving the vehicle alone earlier on the day of the search, and that he "did something" on the passenger side of the vehicle on the day of the search are only probative of his ownership of the vehicle and proximity to the ammunition. The same is true regarding the closeness of the driver's seat to the protruding pocket on the back of the passenger seat. Those facts do not provide any circumstances indicating Hodnett's awareness of the presence and character of the ammunition, other than his ownership and occupancy of the vehicle and his proximity to the ammunition. Thus, those facts are insufficient to establish constructive possession. Proximity is probative of possession, but it is insufficient to establish possession. *Smallwood*, 278 Va. at 630-31. "Nor does an accused's ownership or

occupancy of the premises or vehicle where [contraband] is found create a presumption of possession." *Jordan v. Commonwealth*, 273 Va. 639, 645-46 (2007).

Although the box of 12-gauge shotgun shells would have been "open and obvious to anyone looking down at the protruding pouch on the back side of the passenger's seat," there was no evidence that Hodnett was ever in a position which would have allowed him to "look down" into the pouch on the back side of the passenger's seat. His proximity to the ammunition and his ownership of the vehicle are not sufficient to presume that he did so. There is no testimony that the box of shells was open and obvious to a driver of the vehicle or someone who "did something" somewhere on the passenger side of the vehicle.

As noted by the majority, when asked whether he had left "any ammunition" in Hodnett's vehicle after hunting, Robertson replied, "Well, I probably—there might have been some. I have used it, you know, a time or two." He then stated, "Probably some of the bullets might have been in there, yeah."

"The bullets" would seem to refer to the ammunition for the rifle found in Hodnett's home, which Robertson was asked about in the immediately preceding questions and which was the only firearm that, up to that point, had been discussed in the case. As noted in the Court's Order, Robertson was subsequently asked whether he had used shotgun shells with birdshot when he hunted. He answered affirmatively, and he explained that he also had a 12-gauge single barrel shotgun he used to hunt, in addition to the rifle. He was never specifically asked whether the ammunition he admitted to probably leaving in the vehicle included shotgun shells as well as bullets.

I disagree with the conclusion that Hodnett's failure to directly ask Robertson if the 12-gauge shotgun shells belonged to him was an incriminating circumstance for the trier of fact to consider. The authority cited in the Court's Order, asserting that the failure of the accused to produce evidence within his power may be considered as incriminating, is not applicable in this instance where the defendant produced a witness that both he and the Commonwealth had the opportunity to cross-examine at trial. An obvious opportunity existed for Hodnett, *as well as the Commonwealth*, to ask Robertson whether Robertson had left the shotgun shells found in Hodnett's vehicle. Neither did. An inference that Hodnett did not ask the question because he knew the shells did not belong to Robertson is no more likely than an inference that the Commonwealth did not ask the question because it knew that the shells did belong to Robertson.

Accordingly, there is no circumstantial proof, other than Hodnett's ownership and occupancy of the vehicle and his physical proximity to the ammunition, that Hodnett was aware of the presence and character of the ammunition in his vehicle. Our precedent indicates that proximity and ownership alone are not sufficient to prove constructive possession. Therefore, I would reverse the judgment of the Court of Appeals.

A Copy,

Teste:

Clerk