VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 5th day of November, 2021.

Akeem Markiese Rogers, Appellant,

against Record No. 210147
Court of Appeals No. 0486-20-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of Northampton County shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: Shirley K. Smith
Deputy Clerk

Appendix A

VIRGINIA:

In the Court of Appeals of Virginia on **Friday** *the* **15th** *day of* **January, 2021.**

Akeem Markiese Rogers, Appellant,

against Record No. 0486-20-1
Circuit Court Nos. CR18000120-01 through CR18000120-03

Commonwealth of Virginia, Appellee.

From the Circuit Court of Northampton County

Before Chief Judge Decker, Judges Beales and Huff

For the reasons previously stated in the order entered by this Court on November 23, 2020, the petition for appeal in this case hereby is denied.

It is ordered that the trial court allow court-appointed counsel for the appellant an additional fee of $100 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. In addition to the costs incurred in this Court's November 23, 2020 order, the Commonwealth shall also recover of the appellant the costs reflected in this order.

This order shall be certified to the trial court.

Additional costs due the Commonwealth
by appellant in Court of Appeals of Virginia:

Attorney's fee $100.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Kristen M. McKenzie

Deputy Clerk

Appendix B

VIRGINIA:

In the Court of Appeals of Virginia on **Monday** *the* **23rd** *day of* **November, 2020.**

Akeem Markiese Rogers, Appellant,

against Record No. 0486-20-1
Circuit Court Nos. CR18000120-01 through CR18000120-03

Commonwealth of Virginia, Appellee.

From the Circuit Court of Northampton County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

A jury found appellant guilty of possession with intent to distribute cocaine; possession with intent to distribute marijuana, third offense; and possession with intent to distribute Dibutylone. On appeal, appellant argues that the evidence was insufficient to prove that he committed the offenses.

"In accordance with familiar principles of appellate review, the facts will be stated in the light most favorable to the Commonwealth, the prevailing party at trial." Gerald v. Commonwealth, 295 Va. 469, 472 (2018) (quoting Scott v. Commonwealth, 292 Va. 380, 381 (2016)). In doing so, we discard any of appellant's conflicting evidence, and regard as true all credible evidence favorable to the Commonwealth and all inferences that may reasonably be drawn from that evidence. Id. at 473.

On April 14, 2017, Northampton County Sheriff's Deputy Glenn Bailey and other officers executed a search warrant for drugs and firearms at a single family, two-bedroom residence rented by appellant in 2016. No one was inside the residence at the time of the search. About ten to fifteen minutes after the search began, appellant's brother, Rovante Rogers, arrived at the residence.

In the "back" bedroom of the residence, officers found a Perdue identification card bearing appellant's photograph and name, a Perdue boot, a UPS invoice containing appellant's name, and clothing on the floor. They found .9mm ammunition in the other bedroom.

Northampton County Sheriff's Sergeant Steve Lewis found on the kitchen counter a battery box containing an orange pill bottle bearing no label and with thirteen small baggies of cocaine inside. The battery box was described as a box for a nine-volt power sport battery that could be used in an ATV or motorcycle. The box contained another clear, plastic baggie of cocaine, a clear plastic baggie of a pink substance that Lewis believed was bath salts, and thirty-four baggies of marijuana inside another bag. Lewis, an expert in the field of drug packaging and distribution, testified that the marijuana packaged into thirty-four bags and the cocaine packaged into multiple bags were consistent with drug distribution. The pink substance was analyzed as Dibutylone, an illegal psychedelic drug.

Lewis also found on the kitchen counter beside the battery box, a box of fold-top sandwich baggies and a digital scale. Lewis stated that the sandwich baggies and the digital scale were consistent with drug packaging materials and drug distribution.

Lewis found a loaded Springfield .9mm handgun, with a magazine in the gun and a bullet in the chamber, on top of the microwave in the kitchen. Lewis testified that the gun was within reach of the battery box and drugs. Lewis stated that the firearm was consistent with drug distribution because a dealer needs to protect his assets.

Neal Baldwin, a Virginia Department of Forensic Science expert witness in latent fingerprint analysis, compared fourteen latent fingerprints recovered from the battery box to appellant's fingerprints and determined that seven latent fingerprints on the battery box matched appellant's fingerprints. Two of the fourteen latent fingerprints matched Roquan Rogers, whose fingerprint exemplar Baldwin located in an AFIS search. Baldwin also identified appellant's fingerprint on the digital scale.

Brenden Graney, an expert in DNA evidence, testified that appellant could not be eliminated as a

contributor to the DNA mixture profile found at the base and loading ramp of the recovered ammunition

magazine. Danny Campbell, a convicted felon, testified that in 2016, he sold the firearm recovered in the case to appellant.

The total amount of recovered cocaine was 20.14 grams, including the packaging material. Lewis testified that the bags of cocaine appeared to contain about .2 gram each, worth about $20 per bag. The total amount of marijuana recovered was 16.4237 grams. The total weight of recovered Dibutylone was 6.36 grams, including the packaging.

United States Drug Enforcement Administration Special Agent Brian Ford, an expert in the use, packaging, sale, and distribution of drugs, testified that the thirty-four small baggies of marijuana were indicative of drug distribution. He also opined that each of the baggies would sell for $10 or $20, depending on the quality of the marijuana. Ford testified that the numerous small baggies of cocaine, weighing a total of just over twenty grams, were indicative of distribution and not personal use. He estimated that twenty grams of cocaine had a street value of between $800 and $1,000. Ford was not personally familiar with Dibutylone.

Ford stated that the sandwich baggies, digital scale, the pill bottle, the firearm, and magazine were indicative of drug distribution. He also opined that the battery box containing the drugs, located next to the box of sandwich baggies and digital scale, and within four to five feet of the firearm, were indicative of drug distribution. Ford testified that not all drug cases involve large amounts of cash, razor blades, or numerous cell phones.

I. Appellant argues that the evidence was insufficient to prove that he possessed with the intent to distribute Dibutylone because the evidence did not show that the quantity of Dibutylone was consistent with distribution and not personal use.

"When reviewing the sufficiency of the evidence, '[t]he judgment of the trial court is presumed correct and will not be disturbed unless it is plainly wrong or without evidence to support it.'" Smith v. Commonwealth, 296 Va. 450, 460 (2018) (quoting Commonwealth v. Perkins, 295 Va. 323, 327 (2018)). "In such cases, '[t]he Court does not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Secret v. Commonwealth, 296 Va. 204, 228 (2018) (quoting Pijor v.

Commonwealth, 294 Va. 502, 512 (2017)). "Rather, the relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Vasquez v. Commonwealth, 291 Va. 232, 248 (2016) (quoting Williams v. Commonwealth, 278 Va. 190, 193 (2009)). "If there is evidentiary support for the conviction, 'the reviewing court is not permitted to substitute its own judgment, even if its opinion might differ from the conclusions reached by the finder of fact at the trial.'" Chavez v. Commonwealth, 69 Va. App. 149, 161 (2018) (quoting Banks v. Commonwealth, 67 Va. App. 273, 288 (2017)).

"Because direct proof of intent [to distribute drugs] is often impossible, it must be shown by circumstantial evidence." Scott v. Commonwealth, 55 Va. App. 166, 172 (2009) (*en banc*) (quoting Servis v. Commonwealth, 6 Va. App. 507, 524 (1988)). "As with any case, the fact-finder is entitled to make reasonable inferences from the evidence presented at trial to determine whether the defendant possessed drugs with the intent to distribute them." Burrell v. Commonwealth, 58 Va. App. 417, 434 (2011). "Several factors may constitute probative evidence of intent to distribute a controlled substance. These factors include the quantity of the drugs seized, the manner in which they are packaged, and the presence of an unusual amount of cash, equipment related to drug distribution, or firearms." Gregory v. Commonwealth, 64 Va. App. 87, 100 (2014) (quoting McCain v. Commonwealth, 261 Va. 483, 493 (2001)); see also Emerson v. Commonwealth, 43 Va. App. 263, 278 (2004) (same).

Lewis found the 6.36 grams of Dibutylone in the same battery box as the fourteen baggies of cocaine and the thirty-four small baggies of marijuana. The two expert witnesses stated that the quantity and packaging of the cocaine and marijuana were indicative of drug distribution. Appellant's fingerprints were on the battery box containing the drugs. A digital scale containing appellant's fingerprint and a box of sandwich baggies, which both experts testified are used in drug distribution, were next to the battery box. A loaded firearm was within reach of the battery box containing all of the recovered drugs. The experts testified that a firearm is indicative of drug distribution.

Although neither expert witness testified about any inferences that could be drawn from the quantity of Dibutylone recovered in this case, the quantity of a recovered drug is only one factor to be considered when analyzing whether an accused possessed a drug with the intent to distribute. See Dukes v. Commonwealth, 227 Va. 119, 122 (1984) (where proof of intent to distribute rests upon circumstantial evidence, the quantity defendant possesses is "a circumstance to be considered"). Further, even "possession of a small amount of a drug, 'when considered with other circumstances, may be sufficient to establish an intent to distribute.'" White v. Commonwealth, 25 Va. App. 662, 668 (1997) (*en banc*) (quoting Monroe v. Commonwealth, 4 Va. App. 154, 156 (1987)). Moreover, as stated above, other factors to consider as probative evidence of intent to distribute include equipment related to drug distribution and the presence of firearms. Gregory, 64 Va. App. at 100. Here, the Commonwealth proved that the Dibutylone was in the same box as the cocaine and marijuana that was packaged for distribution and was in close proximity to other items of distribution-related paraphernalia -- plastic baggies, a digital scale, and a gun. Considering this evidence in its totality, a rational fact finder could have found that appellant intended to distribute the Dibutylone. "If there is evidence to support the conviction[], the reviewing court is not permitted to substitute its own judgment, even if its opinion might differ from the conclusion[] reached by the finder of fact at the trial." Clark v. Commonwealth, 279 Va. 636, 641 (2010) (quoting Commonwealth v. Jenkins, 255 Va. 516, 520 (1998)). The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant was guilty of possession with intent to distribute Dibutylone.

II. Appellant contends that the evidence was insufficient to prove that he possessed with intent to distribute cocaine, marijuana, and Dibutylone because the evidence failed to prove that he possessed any of the drugs.

"In order to convict a person of illegal drug possession, the Commonwealth must prove beyond a reasonable doubt that the accused was aware of the presence and character of the drug and that the accused consciously possessed it." Yerling v. Commonwealth, 71 Va. App. 527, 532 (2020). "Ownership or

occupancy of the premises where the drug is found does not create a presumption of possession." Id. "Nonetheless, these factors may be considered in deciding whether an accused possessed the drug." Id. (quoting Lane v. Commonwealth, 223 Va. 713, 716 (1982)). "Constructive possession may be established when there are 'acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the [accused] was aware of both the presence and character of the substance and that it was subject to his dominion and control.'" Id. at 532-33 (quoting Drew v. Commonwealth, 230 Va. 471, 473 (1986)).

"While no single piece of [circumstantial] evidence may be sufficient, the 'combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion.'" Ervin v. Commonwealth, 57 Va. App. 495, 505 (2011) (*en banc*) (quoting Stamper v. Commonwealth, 220 Va. 260, 273 (1979)). "The reasonableness of 'an alternate hypothesis of innocence' is itself a question of fact, and thus, the fact finder's determination regarding reasonableness 'is binding on appeal unless plainly wrong.'" Rams v. Commonwealth, 70 Va. App. 12, 28 (2019) (quoting Wood v. Commonwealth, 57 Va. App. 286, 306 (2010)).

In 2016, appellant rented the house in which the officers found the drugs and drug paraphernalia on the kitchen counter. In one of the bedrooms of the house, officers found a Perdue identification badge bearing appellant's name and photograph, a Perdue work boot, and an invoice in his name. Appellant's fingerprints were on the battery box that contained all of the recovered drugs, and his fingerprint was on the digital scale, an item used in drug distribution. Appellant could not be eliminated as a contributor to a DNA profile developed from a sample taken from the recovered gun magazine, and a witness testified that he sold appellant the firearm that was found within arm's reach of the drugs and drug paraphernalia in the kitchen. Considering the totality of this evidence, there were sufficient concurrent and related circumstances which excluded any reasonable hypotheses of innocence. Further, as addressed above, the two expert witnesses testified that the packaging and quantity of the cocaine and marijuana, the digital scale, the sandwich baggies and the firearm were indicative of drug distribution. See Gregory, 64 Va. App. at 100. In addition, appellant had two prior convictions for possession with intent to distribute marijuana. Based upon the evidence

presented, the jury could infer beyond a reasonable doubt that appellant was aware of the presence and character of the drugs in the battery box containing his fingerprints, located in plain view on the kitchen counter of the house he rented in 2016 and that they were subject to his dominion and control. The Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that appellant possessed the recovered drugs with the intent to distribute them.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Kristin Paulding, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee $400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty K P. Ring

Deputy Clerk