IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092592

HUGH LINCOLN CORDON, JR.

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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RECORD NO. 092592

HUGH LINCOLN CORDON, JR.

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BRIEF FOR THE COMMONWEALTH

This case calls upon the Court to decide whether the evidence was sufficient to convict the defendant of possessing cocaine.

STATEMENT OF THE CASE

On May 30, 2008, the defendant, Hugh Cordon, was convicted in the Hampton Circuit Court of one count of possession of cocaine,

in violation of Virginia Code § 18.2-250. (App. at 54-55). By final order dated July 3, 2008, Cordon was sentenced to three years incarceration, with two years and six months suspended. (App. at 77-78).

On December 1, 2009, the Court of Appeals affirmed Cordon's conviction. See Cordon v. Commonwealth, No. 1724-08-1, 2009 Va. App. LEXIS 530 (Va. Ct. App. Dec. 1, 2009). (App. at 83 and Brief Addendum).[1] Cordon then appealed his conviction to this Court, which granted the petition for appeal on June 1, 2010.

CORDON'S ASSIGNMENT OF ERROR

> "The Court of Appeals erred by affirming the Circuit Court's finding that the appellant constructively possessed cocaine located in a closed cooler in a room in which he had stayed one month earlier, when there was no evidence that appellant had recently been in the room or knew of the cocaine."

(Def. Br. at 5).

STATEMENT OF THE FACTS

On September 29, 2007, Officer Michael Brown of the Hampton Police Department investigated a home invasion/burglary complaint made by the defendant, Hugh Cordon. (App. at 9-10, 23). Cordon told

[1] It appears that the Court of Appeals' opinion was inadvertently omitted when the appendix was compiled. Accordingly, the Commonwealth has attached the opinion to its brief as an Addendum.

Brown that after returning home from a nightclub that evening, he had encountered two masked men inside his home.[2] (App. at 10-11, 18). The men had ransacked the front room of the house and assaulted Cordon before fleeing the home. (App. at 10-12, 18). Cordon alleged that his assailants had stolen several collectible knives, a DVD player, and several DVDs, but nothing was missing from "his room." (App. at 11-12, 39).

On November 14 – more than six weeks after Cordon reported the robbery – Detective John Baer, who had been assigned to Cordon's case, spoke with him over the phone about the incident. (App. at 19-20). During that phone conversation Cordon repeated his story of the home invasion to Detective Baer. (App. at 20-21). But this time Cordon claimed that the only item that had been stolen was a lockbox from underneath "his bed" containing various personal effects. (App. at 21-22, 39).

Four days later, Detective Baer spoke with Cordon in person at his home. (App. at 22). During their conversation, Cordon changed various details of the robbery. (App. at 22-23). When Baer confronted

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[2] The home was owned by Cordon's uncle, who was out of town when the burglary occurred. (App. at 11-12). The record shows that Cordon lived in the home with his uncle. (App. at 11-12).

him with these inconsistencies, Cordon denied ever making contrary statements. (App. at 22-23). He continued to insist, however, that the only item that had been stolen was the lockbox from "underneath his bed." (App. at 23, 39). At the conclusion of their conversation, Baer gave Cordon his business card. (App. at 23-24).

Two days later, Baer returned to the home to execute a search warrant. (App. at 24). In Cordon's bedroom, underneath a nightstand, Baer found a digital scale, a bag of white powder, and a box of .22 caliber rounds. (App. at 24-25, 27, 29, 39). In the nightstand drawer, Baer found two boxes of baking soda, a knife, glass tubes, a "wooden crusher," a torch, a marijuana pipe, and his own business card. (App. at 27-29, 39). Baer also found two bags of powder cocaine, baggies and drug paraphernalia inside a separate cooler located in the room. (App. at 25-26, 31, 41-43, 53). Additionally, there were several checks, papers and other things in the bedroom bearing Cordon's name. (App. at 43).

Several days after the search, Baer spoke with Cordon once more. (App. at 34). Baer told Cordon what he had found in his bedroom, and Cordon "immediately" denied living at the home. (App. at 34, 39). Baer then asked Cordon if he remembered receiving his

business card. (App. at 35). When Cordon confirmed that he had received it, Baer told him that he had found the card in the nightstand among the drug paraphernalia. (App. at 35). At that point, Cordon "terminated" the interview. (App. at 35).

ARGUMENT

THE COURT OF APPEALS CORRECTLY AFFIRMED THE JUDGMENT OF THE CIRCUIT COURT, WHICH HELD THAT CORDON WAS GUILTY OF POSSESSING COCAINE.

Cordon argues on brief that there "was no evidence that [he] knew of or was in possession of the cocaine found in the bedroom." (Def. Br. at 6). This argument is without merit.

Standard of Review

When a criminal defendant appeals his conviction, "'the evidence and all reasonable inferences flowing thereform must be viewed in the light most favorable to the prevailing party in the trial court.'" Maxwell v. Commonwealth, 275 Va. 437, 442, 657 S.E.2d 499, 502 (2008). Importantly, "'[t]he judgment of the trial court is presumed to be correct and will be reversed only upon a showing that it is plainly wrong or without evidence to support it.'" Id.

This Court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-319 (1979) (emphasis in original). Rather, the relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original).

Possession of a Controlled Substance

Unless certain exceptions are met, it is "unlawful for any person [to] knowingly or intentionally . . . possess a controlled substance." Va. Code § 18.2-250(A).

Element I: Possession

In order to prove that a person "possessed" a controlled substance, the Commonwealth must show "'that the defendant was aware of the presence and character of the drugs and that he intentionally and consciously possessed them.'" Castaneda v. Commonwealth, 7 Va. App. 574, 583, 376 S.E.2d 82, 86 (1989) (en banc). "Possession may be actual or constructive." Id. "Constructive possession exists when 'an accused has dominion or control over the drugs.'" Id. And it may be proven by "'evidence of acts, declarations or conduct of the accused from which the inference may be fairly

drawn that he knew of the existence of narcotics at the place where they were found.'" Id. See also Maxwell, 275 Va. at 442, 657 S.E.2d at 502 (The evidence must show "'that the defendant was aware of both the presence and character of the substance and that it was subject to his dominion and control.'"); McMillan v. Commonwealth, 277 Va. 11, 19, 671 S.E.2d 396, 399-400 (2009) (same).

Importantly, "possession of drugs need not always be exclusive. It may be shared with another." Castaneda, 7 Va. App. at 583, 376 S.E.2d at 87. Accord Tucker v. Commonwealth, 18 Va. App. 141, 144, 442 S.E.2d 419, 421 (1994).

Element II: Knowing and Intentional

A defendant's possession of a controlled substance – without more – is insufficient to support his conviction. See Young v. Commonwealth, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008). "'The Commonwealth must also establish that the defendant intentionally and consciously possessed [the drug] *with knowledge of its nature and character*.'" Id. (emphasis in original). "That knowledge is an essential element of the crime." Id. As such, it "may be shown by evidence of the acts, statements or conduct of the accused." Id.

Accord Garland v. Commonwealth, 225 Va. 182, 184, 300 S.E.2d 783, 784 (1983).

Analysis

The evidence proved that Cordon knowingly possessed cocaine. Up until the police executed a search warrant at Cordon's home, which led to the discovery of the cocaine, Cordon never denied living at the home. Indeed, he consistently referred to the bedroom as "his." While occupancy *alone* is insufficient to support his conviction, see § 18.2-250(A), it is significant that his residency denial came only after he was confronted with the drugs.[3] (App. at 34, 39).

This case is remarkably similar to Rawls v. Commonwealth, 272 Va. 334, 634 S.E.2d 697 (2006). Rawls lived in a rental home

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[3] Cordon argues that the evidence showed he actually resided at an address in Newport News. (Def. Br. at 8-12). On the night Cordon first reported the robbery, he was asked to fill out an incident report. (App. at 15-16). During trial, Officer Brown was asked to read the address that Cordon had listed on the report. (App. at 15-16). Officer Brown stated that the address was "illegible," but he nevertheless attempted to decipher Cordon's handwriting. (App. at 16). It is immaterial, however, that Cordon might have listed a Newport News address in the incident report. Cordon never claimed to live anywhere else until he was confronted about the drugs. More importantly, on the day the room was searched – over six weeks after the robbery – several of Cordon's personal items were located in the room, along with the business card that Detective Baer had specifically given to Cordon.

with four roommates. Id. at 341, 634 S.E.2d at 700. One day police officers came to the home to arrest Rawls for violating his probation. Id. The officers were allowed inside of the home and directed to a bedroom where Rawls was located. Id. The door to the bedroom was closed, so the officers knocked on the door. Id. Rawls opened the door and his "appearance and clothing suggested that he had been sleeping." Id. When the officers told Rawls he was under arrest, Rawls "blurted out that the bedroom was not his, and that it belonged to his roommate." Id. The police searched the bedroom and found a loaded .22 caliber handgun between the mattress and the box spring. Id. at 342, 634 S.E.2d at 700. They also found male clothing and many personal effects bearing Rawls' name. Id.

Rawls was convicted of possession of a firearm by a previously convicted felon. Id. at 349-350, 634 S.E.2d at 704-705. Upholding his conviction, this Court held that the evidence proved the bedroom belonged to Rawls and he knew the firearm was in the room. Id. at 350, 634 S.E.2d at 705. Particularly incriminating was Rawls' denial that the room was his. Id. This denial permitted the jury to "conclude[] that Rawls was lying to conceal his guilt" and was "precisely the kind

of act, statement, or conduct that tends to prove the defendant's knowledge of the presence and character of contraband." Id.

Just as Rawls denied ownership of his room when confronted by the police, Cordon denied ownership of the room only after he knew the police had discovered drugs there. This prevarication – in addition to Cordon's personal effects and Detective Baer's business card – proves that Cordon lived in the room and knowingly possessed cocaine.[4] As the Court of Appeals held, because the trial court "did not believe Cordon's explanation that the room was not his at the time police discovered the cocaine," it was entitled to infer that he was "lying to conceal [his] guilt." Cordon, No. 1724-08-1, 2009 Va. App. LEXIS 530, at *8 (Va. Ct. App. Dec. 1, 2009) (quoting Phan v. Commonwealth, 258 Va. 506, 511, 521 S.E.2d 282, 284 (1999)). (Addendum).

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[4] Cordon's denial that he lived at the home is what significantly distinguishes this case from Drew v. Commonwealth, 230 Va. 471, 338 S.E.2d 844 (1986). (Def. Br. at 6-7). In Drew, the evidence only proved the defendant lived at the home where drugs were found "and that he was near the residence the night the cocaine was seized." Id. at 474, 338 S.E.2d at 846. There was no evidence, however, of any "statements or conduct" by the defendant that proved he was "aware of the . . . cocaine in the dwelling." Id. at 473, 338 S.E.2d at 845. Both the nature and the timing of Cordon's statement make him more like the defendant in Rawls than the defendant in Drew.

Cordon claims, however, the trial court committed "clear error" when it convicted him of possessing cocaine. (Def. Br. at 12). He partly bases this argument on the trial court's factual findings at the end of his trial. (App. at 48).

> [A]s I sit here now as the judge, more or less sitting as a jury, making the decision, I'm entitled to make all the inferences that are reasonable. The defendant told the officer that, I don't own this home, but I reside here, this is my room. *And then to put the icing on the cake, the officer gives him a calling card which is found with the items in question.* I don't think there's any doubt at all. I deny your motion to strike. Find the defendant guilty as charged.

(App. at 48) (emphasis added).

Cordon objects to the trial court's use of the phrase "found with the items in question." (Def. Br. at 12). He interprets this phrase to mean that the trial court convicted him because it mistakenly believed the business card was found <u>in</u> the cooler <u>with</u> the cocaine, even though the record indicates otherwise. (Def. Br. at 12). Cordon misreads the trial court's statement.

Properly understood, the trial court's factual findings address exactly what the evidence proved. Not only did the evidence prove that Cordon lived at the house, it also proved that Cordon had received Baer's business card and that Baer had discovered it among the drug paraphernalia. (App. at 11-12, 21-24, 27-29, 35, 39). The

discovery of the business card completely contradicted Cordon's claim that he did not live at the home; it also permitted the trial court to reasonably infer – as it did – that Cordon was aware of the cocaine because of the card's placement among the drug paraphernalia.[5]

Because the evidence was sufficient to support Cordon's conviction for possessing cocaine, this Court should affirm the conviction.

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[5] Cordon also argues that his conviction should be reversed because of the holding in Brickhouse v. Commonwealth, 276 Va. 682, 668 S.E.2d 160 (2008). (Def. Br. at 7-8). Brickhouse, however, is inapplicable to Cordon's case. Brickhouse was convicted of possession with the intent to distribute cocaine as a *principle in the second degree*. Id. at 684, 668 S.E.2d at 161. Cordon was not convicted as a principle in the second degree – a crime with very different elements and requirements. Additionally, as the Court of Appeals found, "unlike Brickhouse, who disclaimed any connection to the criminal activity occurring in her home the very moment police arrived to execute a search warrant," Cordon denied his connection to the room "only *after* the discovery of contraband." Cordon, No. 1724-08-1, 2009 Va. App. LEXIS 530, at *8 (Va. Ct. App. Dec. 1, 2009) (emphasis in original). (Addendum).

CONCLUSION

This Court should affirm the judgment of the Court of Appeals and the Hampton Circuit Court.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee.

KENNETH T. CUCCINELLI, II
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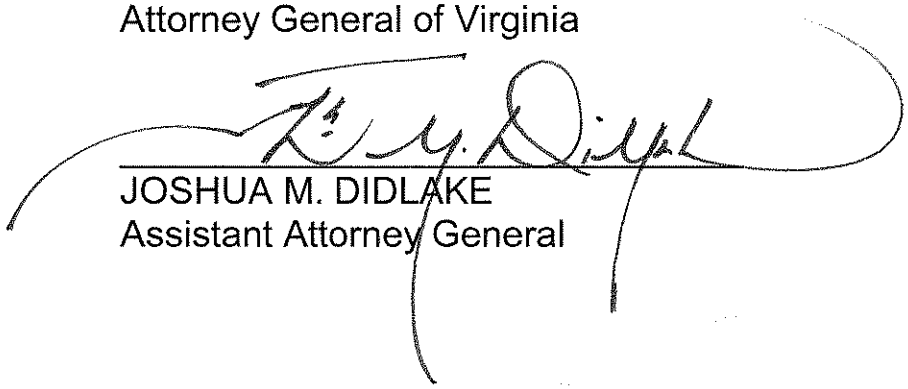

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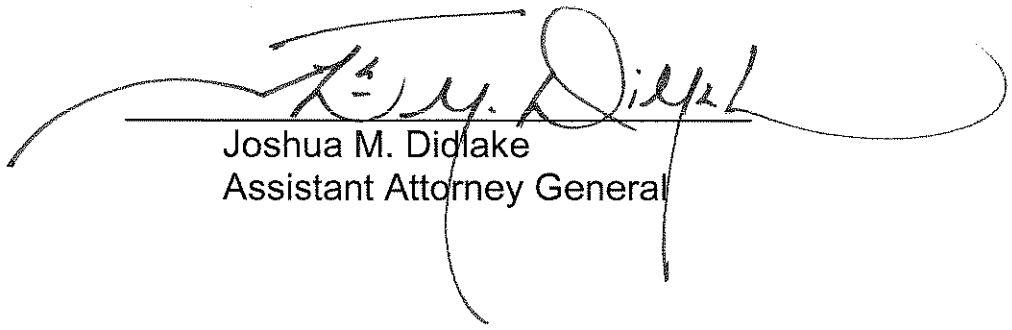
CERTIFICATE AND TRANSMISSION OF SERVICE

On July 28, 2010, in accordance with Rule 5:26, the required number of copies of this brief, paper and electronic, were hand-delivered to the Clerk of this Court and three copies were mailed to: Kimberly Enderson Hensley, 12 West Queen's Way, Hampton, Virginia 23669, counsel for the appellant. An electronic copy of this brief (PDF) was also submitted to this Court and to counsel via e-mail at: scvbriefs@courts.state.va.us and khensley@idc.virginia.gov.

The undersigned also certifies that the brief, excluding the cover page, table of contents, table of authorities, addendum and certificate, contains 2,542 words.

The Commonwealth wishes to present oral argument.



Joshua M. Didlake
Assistant Attorney General

Brief Addendum

LEXSEE 2009 VA. APP. LEXIS 530

HUGH LINCOLN CORDON, JR. v. COMMONWEALTH OF VIRGINIA

Record No. 1724-08-1

COURT OF APPEALS OF VIRGINIA

2009 Va. App. LEXIS 530

December 1, 2009, Decided

NOTICE: PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

PRIOR HISTORY: [*1]
FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON. Louis R. Lerner, Judge.

DISPOSITION: Affirmed.

COUNSEL: Kimberly Enderson Hensley, Assistant Public Defender, for appellant.

Joshua M. Didlake, Assistant Attorney General (William C. Mims, Attorney General, on brief), for appellee.

JUDGES: Present: Judges Frank, McClanahan and Petty. MEMORANDUM OPINION BY JUDGE WILLIAM G. PETTY.

OPINION BY: WILLIAM G. PETTY

OPINION

MEMORANDUM OPINION * BY JUDGE WILLIAM G. PETTY

* Pursuant to *Code § 17.1-413*, this opinion is not designated for publication.

Appellant, Hugh Lincoln Cordon, Jr. challenges his conviction for possessing cocaine in violation of *Code § 18.2-250*, arguing that the evidence was insufficient to prove that he was in constructive possession of the drug. We disagree with

Cordon, and, accordingly, we affirm the conviction.

I.

Upon familiar principles, we state the evidence on appeal in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. See *Bailey v. Commonwealth, 38 Va. App. 794, 797, 568 S.E.2d 440, 442 (2002)*. On September 29, 2007, Cordon reported that he had been the victim of a home invasion/burglary. When Officer Michael Brown of the Hampton Police Department investigated the [*2] report, Cordon told him that he returned home in the evening to find two masked men inside the home owned by his uncle. The men ransacked part of the house and assaulted Cordon before they fled. Cordon reported that, although the men had stolen several things from the front part of the house, they had not taken anything from "his room."

On November 14, 2007, Detective John Baer contacted Cordon as part of his on-going investigation of the home invasion. At that time, Cordon told Baer that the only item that had been stolen was a lockbox from underneath his bed. On November 16, Detective Baer interviewed Cordon again, and again Cordon's version of the events surrounding the home invasion changed. Cordon was, however, consistent in stating that the only item that had been stolen was the lockbox that had been under his bed. Before he left, Detective Baer gave Cordon his business card.

On November 20, about seven weeks after Cordon reported the break-in, Detective Baer again returned to Cordon's home to execute a search warrant. In Cordon's bedroom, beneath a nightstand, the detective found a digital scale, a bag of white powder, and a box of .22 caliber rounds. Detective Baer also found [*3] two boxes of baking soda, a knife, glass tubes, a "wooden crusher," a torch, a marijuana pipe, and his business card in the nightstand drawer. The detective also found two bags of powder cocaine, baggies, and drug paraphernalia inside a cooler in the bedroom, as well as checks, papers, and other items bearing Cordon's name. Following the discovery of drugs and drug paraphernalia, Cordon denied living in the home or having any connection with the bedroom.

II.

Cordon argues that the trial court did not have sufficient evidence to determine that he was in constructive possession of the cocaine located in the bedroom. Cordon reasons that the lapse of time between his complaint and the execution of the search warrant, and his denial that he lived at the home in which the drugs were found, required the trial court to determine that there was no nexus between him and the cocaine police later found in the room. Essentially, Cordon's argument raises a question of credibility: that the trial court should have believed that he had no connection

to the room at the time it was searched and that he was unaware of the presence of cocaine and drug paraphernalia in the room--rather than the Commonwealth's [*4] theory of the case--that Cordon falsely denied his connection to the room to avoid conviction for possessing cocaine. Cordon concludes that if the trial court believed his version of the facts, the evidence would be insufficient to support his conviction for possessing cocaine. As explained below, we disagree with Cordon and affirm his conviction.

"Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *United States v. Powell, 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)*. As an appellate court, we review the trial court's factfinding "with the highest degree of appellate deference." *Thomas v. Commonwealth, 48 Va. App. 605, 608, 633 S.E.2d 229, 231 (2006)*.

A reviewing court does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)* (emphasis in original and citation omitted). Instead, we ask only '"whether, after 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 [*5] doubt.'" *Maxwell v. Commonwealth, 275 Va. 437, 442, 657 S.E.2d 499, 502 (2008)* (quoting *Jackson, 443 U.S. at 319*) (emphasis in original). These principles recognize that an appellate court is "not permitted to reweigh the evidence," *Nusbaum v. Berlin, 273 Va. 385, 408, 641 S.E.2d 494, 507 (2007)*, because appellate courts have no authority "to preside *de novo* over a second trial," *Haskins v. Commonwealth, 44 Va. App. 1, 11, 602 S.E.2d 402, 407 (2004)*.

This deferential standard of review "applies not only to the historical facts themselves, but the inferences from those facts as well." *Crowder v. Commonwealth, 41 Va. App. 658, 663 n.2, 588 S.E.2d 384, 387 n.2 (2003)*. Thus, a factfinder may "draw reasonable inferences from basic facts to ultimate facts," *Haskins, 44 Va. App. at 10, 602 S.E.2d at 406* (citations omitted), unless doing so would push "into the realm of *non sequitur*," *Thomas, 48 Va. App. at 608, 633 S.E.2d at 231* (citation omitted).

At trial, the Commonwealth argued that Cordon constructively possessed the cocaine. "Constructive possession may be established by evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the [*6] defendant was aware of both the presence and the character of the substance and that it was subject to his dominion and control." *Logan v. Commonwealth, 19 Va. App. 437, 444, 452 S.E.2d 364, 368-69 (1994)* (*en banc*) (citations omitted). Constructive possession may be established by circumstantial evidence provided such

evidence excludes every reasonable hypothesis of innocence that flows from the evidence. See *Tucker v. Commonwealth, 18 Va. App. 141, 143, 442 S.E.2d 419, 420, 10 Va. Law Rep. 1107 (1994)*; *Hamilton v. Commonwealth, 16 Va. App. 751, 755, 433 S.E.2d 27, 29, 10 Va. Law Rep. 28 (1993)*. Whether a hypothesis of innocence is reasonable is a question of fact. See *Cantrell v. Commonwealth, 7 Va. App. 269, 290, 373 S.E.2d 328, 339, 5 Va. Law Rep. 734 (1988)*.

Cordon relies on our Supreme Court's opinion in *Brickhouse v. Commonwealth, 276 Va. 682, 668 S.E.2d 160 (2008)*, to argue that the trial court was plainly wrong when it rejected his hypothesis of innocence. In Brickhouse, police executed a search warrant on Brickhouse's home, where she lived with her aunt and uncle. When the police arrived at her home, Brickhouse told them that "she knew why the police were there, whom they were there for, and that 'she wasn't the one doing it.'" *Id. at 684, 668 S.E.2d at 162*. [*7] The police subsequently found crack cocaine in an air-conditioning vent in an upstairs bedroom closet, and found various items of drug paraphernalia in plain view throughout the home. *Id. at 685, 668 S.E.2d at 163*. Our Supreme Court reversed Brickhouse's conviction for possession of cocaine with the intent to distribute because the facts only showed that Brickhouse was aware of criminal activity, not that she took part in that activity herself. *Id. at 687, 668 S.E.2d at 163*.

The facts of this case stand in sharp contrast to those in *Brickhouse*. While it is true that Cordon, like Brickhouse, lived in a house with other people, Cordon identified the room where the drugs were found as his room that contained his bed and his belongings at the time of the original home invasion investigation. Further, when the police executed the search warrant less than one week after Cordon identified the room as his own, the police found papers, checks, and other items bearing Cordon's name in the room. Detective Baer also testified that he found the business card that he had given to Cordon in the nightstand drawer next to "two boxes of baking soda, a knife, a . . . couple of glass tubes, . . . a wooden [*8] crusher," and what appeared to be a "little marijuana pipe." Indeed, it was only *after* the discovery of contraband that Cordon recanted his acknowledged connection to the room. This is unlike Brickhouse, who disclaimed any connection to the criminal activity occurring in her home the very moment police arrived to execute a search warrant.

Moreover, "[t]he factfinder need not believe an accused's explanation and, if that explanation is not believed, may infer that the accused is lying to conceal [her] guilt." *Phan v. Commonwealth, 258 Va. 506, 511, 521 S.E.2d 282, 284 (1999)*. Here, the trial court did not believe Cordon's explanation that the room was not his at the time police discovered

the cocaine. The trial court was within its rights as the factfinder to infer guilt from Cordon's incredible statements.

III.

For the reasons explained in this opinion, Cordon's conviction is affirmed.

Affirmed.