

**IN THE COURT OF APPEALS OF IOWA**

No. 7-849 / 07-0110  
Filed January 16, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**TONY WILLIAM ALBERT,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Bremer County, Paul W. Riffel,  
Judge.

Tony William Albert appeals his convictions for manufacturing methamphetamine in an amount greater than five grams while in the immediate possession or control of a firearm, and possession of a drug precursor (anhydrous ammonia) with the intent to use the product to manufacture methamphetamine. **AFFIRMED.**

Kevin D. Engels of Correll, Sheerer, Benson, Engles, Galles & Demro, P.L.C., Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Kasey E. Wadding, County Attorney, and Jill Dashner, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

**MILLER, J.**

Tony William Albert appeals his convictions, following jury trial, for manufacturing methamphetamine in an amount greater than five grams while in the immediate possession or control of a firearm, and possession of a drug precursor (anhydrous ammonia) with the intent to use the product to manufacture methamphetamine. He contends the trial court erred in finding the convictions for manufacturing methamphetamine and possession of the precursor, as well as the allegation concerning the firearm, are supported by sufficient evidence. We affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

The record reveals the following facts. On April 30, 2005, Deputy Aaron Booth of the Bremer County Sheriff's Office met with Jeff Gretillat, a three-time convicted felon, at the Bremer County Law Enforcement Center in order to arrange an undercover drug purchase by Gretillat. Gretillat agreed to wear a body wire and assist the sheriff's office in buying drugs from Albert in exchange for being released from jail without having to post bond.

On the same day, while wearing the recording device, Gretillat went to Albert's home to buy methamphetamine. Albert told Gretillat he did not have any at that time and needed "vitamins" so that more could be made. Deputies Booth and Hoff both testified that "vitamins" is a common slang term used by drug dealers to discuss pseudoephedrine or ephedrine pills, a main component of methamphetamine. Gretillat also testified he was aware that Albert was referring to pseudoephedrine pills. Gretillat told Albert he would get the pseudoephedrine

pills. Deputies Booth and Hoff provided Gretillat with ground up pseudoephedrine pills, taken from a kit kept by the Bremer County Sheriff's Office, to give to Albert.

Gretillat returned to Albert's home a second time that same day, again wearing the recording device, and Albert agreed to provide Gretillat with one gram of methamphetamine in exchange for two hundred pills. Gretillat provided Albert with the pills and left his residence. The next day, May 1, 2005, law enforcement obtained and executed a warrant to search Albert's residence, shed, and workshop building. The workshop building housed Albert's autobody repair business. Included in the workshop building was an office apparently used by Albert for his business.

Deputy David McDonald of the Bremer County Sheriff's Office drove a van to Albert's residence pretending to need a mechanic to assist him with his van. McDonald got out of the van and Albert, who was standing outside of his house, came toward the vehicle. McDonald gave a signal and the other officers got out of the vehicle. Albert yelled something and ran a few steps, but was then apprehended by the officers and bent over the open hood of a nearby vehicle to complete his arrest. As Albert straightened up, one of the deputies noticed a pill bottle lying on the engine of the car Albert had been bent over. The bottle contained a substance which later tested positive for methamphetamine.

During the search of Albert's house and outlying buildings law enforcement found several items the officers recognized through their training and experience as relating to the manufacture, sale and consumption of

methamphetamine. In Albert's shed officers found a hydrogen chloride gas (HCL) generator, Coleman fuel, and a fitting or valve for an anhydrous ammonia tank. The officers located a black cylinder outside the shed. The cylinder was later determined to contain anhydrous ammonia.

In the workshop another HCL generator was found sitting in cat litter. Deputy Booth testified at trial that he had read cat litter was sometimes used to decrease the smell created in the process of manufacturing methamphetamine. A hose end was removed from the generator and tested positive for methamphetamine and pseudoephedrine. In addition, muriatic acid, three cans of starting fluid, and several cans of Heet were all found in the workshop. A garbage can in the workshop area was emptied and a rag with a pink substance was found in it. Two containers were on the workbench, one containing pink liquid and one containing blue liquid. Subsequent laboratory testing showed these substances contained methamphetamine.

Built into the workshop was a separate, small office with an attached door. The office was approximately twenty feet from the workbench where the liquids containing the methamphetamine were found. In the office law enforcement located a fitting commonly used to steal anhydrous ammonia and a bag of pickling salt. There was also a monitor in the office that provided surveillance of the front of the house. In the drawers of the desk in the office officers found a propane fuel tank with a torch attachment, a torch, a package of cold medicine containing pseudoephedrine, a book of checks with Albert's name and address imprinted on them, and several glass pipes commonly used to smoke

methamphetamine with burnt residue on them. Finally, the officers found a loaded handgun on the top of the desk under some magazines. Additional ammunition for the handgun was found hanging in a bag on the wall of the office.

In the upstairs area of the workshop officers found rubbing alcohol, scales with a white residue, and a glass jar containing a blue "sludge" substance that smelled like Coleman fuel. Subsequent testing showed the blue substance in the jar contained methamphetamine with a gross weight of 401.3 grams. Officers also discovered Blake Payne in the upstairs area of the workshop. Payne said he was painting up there. Methamphetamine and paraphernalia were discovered on his person. Payne indicated to officers that he had been at Albert's place since approximately 4:00 or 5:00 a.m. Deputy Booth testified the upstairs area smelled strongly of Coleman fuel.

A burn pile was located near the workshop. It included numerous burned containers of starting fluid and Coleman fuel with puncture holes consistent with use in the process of manufacturing methamphetamine. Officers searched Albert's residence and found a scale, baggies, and pseudoephedrine tablets in a closet. They found a rifle in his bedroom.

Brandy Sundt, an employee of Albert's, was present when the officers arrived to execute the warrant. When interviewed at the scene Sundt stated Albert had offered her methamphetamine on May 1, 2005, and she used it with him. However, she recanted part of this testimony at trial, stating she in fact did not use methamphetamine with Albert that day and had only said so because she was told to do so by law enforcement officials. However, she confirmed that

on that day Albert did offer her methamphetamine from a pill bottle he kept in his shirt pocket. Sundt also stated at trial that around the day in question Albert asked her to pick up some allergy medication containing pseudoephedrine for him and she had her husband do so.

On June 2, 2005, the State charged Albert, by trial information, with: manufacturing methamphetamine in an amount greater than five grams while in the immediate possession or control of a firearm (Count I), in violation of Iowa Code sections 124.401(1)(b)(7) and 124.401(1)(e) (2005); conspiracy to manufacture methamphetamine in an amount greater than five grams while in the immediate possession or control of a firearm (Count II), in violation of sections 124.401(1)(b)(7) and 124.401(1)(e); delivery of methamphetamine while in the immediate possession or control of a firearm (Count III), in violation of sections 124.401(1)(c)(6) and 124.401(1)(e); possession of anhydrous ammonia and pseudoephedrine with the intent to use them to manufacture methamphetamine (Counts IV and V respectively), in violation of sections 124.401(4)(d) and 124.401(4)(b) respectively; and possession of methamphetamine (Count VI), in violation of section 124.401(5).

A jury trial was held November 28 through December 1, 2006. At the end of the State's evidence Albert made a motion for judgment of acquittal on all charges. The court granted the motion as to the conspiracy and delivery charges, dismissing Counts II and III, and denied Albert's motion as to all other charges and the Count I firearm allegation. Albert renewed his motion for judgment of acquittal on the remaining charges and the firearm allegation at the

close of all the evidence. The trial court overruled the motion. The jury found Albert guilty as charged on the remaining counts (Counts I, IV, V, and VI). Following the verdict Albert filed motions for new trial and in arrest of judgement. The trial court denied the motions. The court sentenced Albert to an indeterminate term of imprisonment of no more than fifty years on the manufacturing while in the immediate possession or control of a firearm conviction, an indeterminate term of no more than five years on each of the possession of precursor convictions, and a sixty-day jail sentence on the possession conviction. The court ordered all of the sentences to run concurrently.

Albert appeals his convictions for manufacturing methamphetamine in an amount greater than five grams while in the immediate possession or control of a firearm and possession of anhydrous ammonia as a drug precursor.<sup>1</sup> He contends the trial court erred in finding there is sufficient evidence to support the guilty verdicts on these charges and in finding there is sufficient evidence to include the sentencing enhancement based on the allegation he was in the immediate possession or control of a firearm.

## **II. SCOPE AND STANDARDS OF REVIEW.**

Our scope of review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the

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<sup>1</sup> Albert does not appeal his convictions for possession of pseudoephedrine with the intent to use it to manufacture methamphetamine and possession of methamphetamine.

State. *Id.* A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Lambert*, 612 N.W.2d at 813.

“Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence.” *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). “A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive.” *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(p); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). Inferences are a staple of our adversary system of fact-finding. *State v. Simpson*, 528 N.W.2d 627, 632 (Iowa 1995).

### **III. MERITS.**

#### **A. Manufacturing Methamphetamine.**

Albert first claims the trial court erred in concluding there is sufficient evidence for the jury to find he manufactured methamphetamine. The jury was instructed that to prove Albert manufactured methamphetamine the State had to establish, beyond a reasonable doubt, that on or about May 1, 2005, Albert manufactured methamphetamine and that he knew the substance he manufactured was methamphetamine. The trial court also instructed the jury on aiding and abetting. It properly instructed that all persons involved in the commission of a crime, whether a person directly commits the crime or knowingly

aids and abets its commission, shall be treated the same way, and thus that whether it found Albert directly committed the crimes or he knowingly aided and abetted other persons in doing so he was equally guilty of the crimes charged.

The record is undisputed that there was a large quantity of methamphetamine, and methamphetamine in various stages of production, on Albert's property. Thus, it appears his only contention on this issue is that there is not sufficient evidence to prove Albert himself manufactured methamphetamine or knowingly participated in or encouraged its manufacture.<sup>2</sup> For the following reasons, we conclude there is sufficient evidence for a rational jury to find beyond a reasonable doubt that Albert either manufactured methamphetamine or knowingly aided and abetted its manufacture.

Albert owned, lived at, and conducted his auto body repair business on the property where the methamphetamine and numerous ingredients and many items used to manufacture methamphetamine were located. As set forth in detail above, such items were found throughout Albert's workshop, the office in his workshop, his shed, his residence, and in a burn pile on his property. Furthermore, Gretillat testified at trial that Albert told him that in exchange for two hundred pseudoephedrine pills he would provide him with a gram of methamphetamine. He further testified that he had traded Albert pseudoephedrine pills and anhydrous ammonia for methamphetamine in the past.

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<sup>2</sup> Albert also does not challenge the finding that any manufacturing involved more than five grams of methamphetamine.

Albert allegedly told Gretillat that someone else would come to pick up the ingredients and manufacture the methamphetamine somewhere else. However, the pseudoephedrine pills provided by Gretillat to Albert were pink. Testimony at trial established that the color of the pills can dictate the color of the finished methamphetamine. During the search of Albert's workshop officers found pink sludge containing methamphetamine as well as rags with such pink sludge on them in the shop trash can. Thus, based on this evidence a reasonable juror could conclude that Albert had used the pink pills provided to him by Gretillat and the manufacturing was in fact being done by Albert in his workshop.

Further, even assuming manufacturing was taking place elsewhere, a reasonable jury could find that Albert knowingly approved and agreed to the manufacturing and knowingly encouraged the act by providing the ingredients to manufacture the methamphetamine. Accordingly, there is also sufficient evidence for a rational factfinder to conclude that Albert was guilty of aiding and abetting in the manufacture of methamphetamine.

We conclude that based on the items found in Albert's workshop, office, shed, and home, together with evidence of his agreement to provide one gram of methamphetamine in exchange for two hundred pseudoephedrine pills, there is sufficient evidence for a rational jury to find, beyond a reasonable doubt, that Albert either manufactured methamphetamine or knowingly aided and abetted its manufacture. There is sufficient evidence to support Albert's conviction on Count I.

**B. Possession or Control of a Firearm.**

Albert next claims the trial court improperly submitted the issue of whether he was in the immediate possession or control of a firearm<sup>3</sup> for the jury's consideration. More specifically, he contends there is not any proof the firearm was subject to his immediate control because he was not near the handgun at the time of his arrest, and there was no evidence placing him in the office anytime on the date of the arrest, that the handgun was registered to him, or that his fingerprints were on the handgun. He further argues there is no evidence showing any manufacturing activities took place in the office where the handgun was found. The trial court rejected these arguments in denying Albert's motion for judgment of acquittal, motion in arrest of judgment, and motion for new trial. In denying the motions in arrest of judgment and for new trial the trial court concluded that the proximity of the firearm to Albert at the time of his arrest was not controlling but that its close proximity during the manufacturing process was the relevant issue.

Section 124.401(1)(e) provides for an enhanced sentence for certain drug offenses if the person is in the "immediate possession or control of a firearm while participating" in the crime. The court instructed the jury that if it found Albert guilty on Count I, it then had to determine whether he had a firearm in his immediate possession or control. To prove Albert was in the immediate

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<sup>3</sup> The firearm at issue here is the handgun found on the desk in Albert's workshop. The rifle found in his bedroom is not at issue with regard to the question of the firearm enhancement.

possession or control of a firearm while manufacturing methamphetamine the court instructed the jury, in relevant part, as follows:

To have immediate possession of a firearm means to have actual possession of the firearm on or around one's person. To have immediate control of a firearm means to have the firearm in close proximity so that the person can reach for it or claim dominion or control over it. In order to prove that the Defendant had immediate possession or control of the firearm, the State must prove that the Defendant had knowledge of its existence and its general location.

Our supreme court has stated that "the word possession has more than one meaning and can be used interchangeably to describe actual possession and constructive possession." *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1998). Immediate possession of a firearm means actual possession on one's person. *State v. McDowell*, 622 N.W.2d 305, 307 (Iowa 2001); *Eickelberg*, 574 N.W.2d at 3. Immediate control of a firearm may be established by showing that the defendant was in such close proximity to the weapon as to claim dominion over it. *McDowell*, 622 N.W.2d at 307. To show either immediate possession or immediate control, it must be established that the defendant had knowledge of the presence of the firearm. *Id.* Because the firearm at issue here was not located on Albert's person this is an immediate-control case rather than an immediate-possession case.

In *Eickelberg* our supreme court found the defendants were in immediate control of the guns located in their bedroom closet because "[w]hile neither defendant had actual possession of the weapons while they were in the bedroom, they were 'in such close proximity to the [weapons] as to claim immediate dominion over them.'" *Eickelberg*, 574 N.W.2d at 5 (quoting *State v.*

*Rudd*, 454 N.W.2d 570, 571 (Iowa 1990)). Based on the facts the handgun was found on Albert's property in his office workshop, Albert's checkbook was in the desk the handgun was on top of, the handgun was immediately accessible under some catalogs apparently used in Albert's business, and Albert was present on the property when the officers arrived, a reasonable jury could infer the gun was Albert's and that it had at times been within his immediate control. "One of the functions of the jury is to decide what reasonable inferences may be drawn from the evidence." *State v. Parrish*, 502 N.W.2d 1, 4 (Iowa 1993).

Furthermore, it was not necessary that Albert have been in immediate control of the firearm at the time of his arrest, as he asserts. The immediate control of the firearm must only have occurred while he was "participating" in the crime, rather than being required to have occurred at the time of his arrest. Iowa Code § 124.401(1)(e); *State v. Franklin*, 564 N.W.2d 440, 444-45 (Iowa Ct. App. 1997); see also Iowa Code § 702.13 (a person participates in a crime beginning with the first act done toward the commission of the crime and ending with the arrest). Thus, to support the court's submission of the firearm instruction to the jury there only had to be sufficient evidence from which a reasonable jury could find Albert had immediate control of the handgun while manufacturing methamphetamine, or while aiding and abetting in the manufacture of methamphetamine.

There were several items used in the manufacture of methamphetamine in Albert's office. These included an anhydrous ammonia tank fitting such as is often used for the purpose of stealing anhydrous ammonia, pickling salt often

used to create HCL gas, pseudoephedrine pills, and a propane fuel tank. In addition, pipes for smoking methamphetamine, with residue on them, and a surveillance monitor were located in the office.<sup>4</sup> Additional items used to manufacture methamphetamine, and substances containing methamphetamine, both sat only twenty feet from the desk on which with the loaded handgun was located.

Furthermore, as set forth above, Albert's entire property, including his workshop, office, house, shed, and burn pile were littered with ingredients normally involved in the manufacture, sale, and use of methamphetamine. Accordingly, the evidence may be seen as indicating Albert had transformed his entire workshop, if not his entire property, into a facility for the manufacture of methamphetamine, thereby establishing a sufficient connection between the crime committed and the immediate control of the firearm as was required for the court to submit the challenged instruction to the jury. See *Eickelberg*, 574 N.W.2d at 6 (stating the fact the defendants established a marijuana growing facility in their basement transformed their entire home into a facility for the manufacture of marijuana, thereby establishing sufficient connection between the offense and immediate possession or control of a firearm located on the premises to support application of the firearm penalty-enhancement provision).

Accordingly, we conclude there is sufficient evidence in the record to support the trial court's submission to the jury of the sentence enhancement issue of immediate possession or control of a firearm.

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<sup>4</sup> The surveillance camera might reasonably be viewed as designed and intended to help warn of potential detection of ongoing criminal activity.

**C. Possession of Anhydrous Ammonia.**

Finally, Albert contends there is not sufficient evidence to support his conviction for possession of anhydrous ammonia with the intent to use the product to manufacture methamphetamine.

The anhydrous ammonia tank in question was found on the ground on Albert's property, immediately outside his shed. A fitting that could be used to steal anhydrous ammonia was found in Albert's office, and Deputy Booth testified he saw no other purpose for the fitting. Gretillat testified he had in the past traded anhydrous ammonia to Albert for methamphetamine. He also testified that Albert had told him Albert supplied the ingredients and another person manufactured the methamphetamine. Anhydrous ammonia is a known ingredient in the production of methamphetamine using the lithium-ammonia manufacturing method. Methamphetamine at various stages of production, including methamphetamine produced using the lithium-ammonia method, was found throughout Albert's workshop. Albert's property is a secluded rural property surrounded by farm fields. Although there were two others on the property at the time of Albert's arrest, there is no substantial evidence in the record that either of them had any connection to or knowledge of the tank.

Based on all the evidence in the record, when viewed in the light most favorable to the State, we conclude a rational jury could find, beyond a reasonable doubt, that Albert possessed the anhydrous ammonia with the intent

to use it to manufacture methamphetamine. Sufficient evidence supports Albert's conviction on Count IV.

#### **IV. CONCLUSION.**

We conclude there is sufficient evidence in the record as a whole, when viewed in the light most favorable to the State, for a rational jury to conclude beyond a reasonable doubt that Albert either manufactured methamphetamine or knowingly aided and abetted its manufacture, and possessed anhydrous ammonia with the intent to use it to manufacture methamphetamine. We further conclude there is sufficient evidence to submit the issue of Albert's immediate possession or control of a firearm to the jury. Accordingly, Albert's convictions, and the sentencing enhancement on Count I, should be affirmed.

**AFFIRMED.**