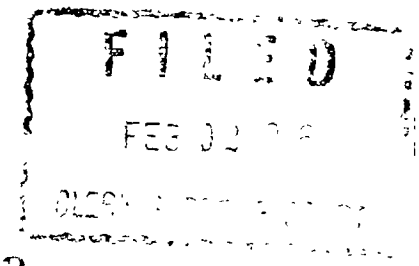
IN THE COURT OF APPEALS OF IOWA



No 5-672 / 95-0066

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STATE OF IOWA,

Appellee,

vs.

LORRAINE MARCIE MAEDCHE,

Appellant.

Appeal from the Iowa District Court for Page County, Charles L Smith III, Judge.

Lorraine Maedche appeals her conviction, following a jury trial, for manufacturing marijuana, possession of marijuana, and possession of methamphetamine **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Andi S Lipman, Assistant State Appellate Defender, for appellant

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Verd Bailey, County Attorney, for appellee.

Considered by Hayden, P J , and Sackett and Huitink, JJ.

HUITINK, J.

Lorraine Maedche appeals her conviction, following a jury trial, for manufacturing marijuana, possession of marijuana, and possession of methamphetamine We reverse

Police obtained a search warrant for Lorraine Maedche's home based on information provided by a confidential informant who had purchased drugs from Maedche's live-in boyfriend, Charles McCuen Upon execution of the warrant, the police found an elaborate marijuana growing operation in the basement of Maedche's home A six-foot-by-six-foot growing room under the basement stairway had walls covered with aluminum foil and plastic The room contained a temperature and humidity gauge, a timer for the lights, a hose, and seven growing marijuana plants In another part of the basement, the police found a triple beam scale, sandwich bags, drying trays, marijuana seeds, and a small amount of methamphetamine.

In the living room and bedroom areas of the house police found marijuana pipes with residue, dried marijuana, and marijuana seeds A search of the bedroom also revealed three loaded pistols, a loaded shotgun, and three unloaded rifles. An unloaded shotgun was also found outside the bedroom door. Maedche was not in her house when the search commenced and did not arrive home until police had begun to seize the marijuana and the firearms.

Maedche was charged with manufacturing marijuana, manufacturing methamphetamine, possession of marijuana, and possession of methamphetamine The State further charged Maedche with immediate possession of a firearm while participating in the offenses in violation of Iowa Code section 124 401(1)(e) (1993) The case proceeded to a jury trial At the close of the evidence, Maedche moved for judgment of acquittal on the possession of firearms charge under section 124 401(1)(e) She claimed the evidence presented at trial was insufficient to allow a jury to conclude she was in immediate possession of a firearm while manufacturing marijuana. The district court denied the motion

The jury found Maedche guilty of manufacturing marijuana, possession of marijuana, and possession of methamphetamine In a special interrogatory the jury further found Maedche was in immediate possession of a firearm under section 124 401(1)(e).

Maedche was sentenced to a ten-year prison term for manufacturing, one year for possession of methamphetamine, and six months for possession of marijuana The court noted the manufacturing sentence was augmented by the double punishment under Iowa Code section 124 401(1)(e) for being in immediate possession or control of a firearm. The district court also imposed the one-third mandatory minimum sentence pursuant to Iowa Code section 124 413. Maedche appeals

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Our review is for correction of errors of law Iowa R App P 4 Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, we will uphold that verdict if there is substantial evidence to support it *State v. Conyers*, 506 N W 2d 442, 444 (Iowa 1993) Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W 2d 844, 846 (Iowa 1989) When considering insufficiency of evidence challenges, we examine the evidence in the light most favorable to the State *State v. Robinson*, 266 N.W 2d 337, 340 (Iowa 1980). Evidence is not insubstantial merely because it could support contrary inferences *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N W.2d 783, 785 (Iowa 1988).

On appeal, Maedche does not challenge her convictions for manufacture and possession of marijuana or possession of methamphetamine. Instead, she challenges the jury's special interrogatory finding that she was in immediate possession or control of a firearm while manufacturing marijuana. She contends the evidence at trial was insufficient to support this finding because under applicable law immediate possession requires a showing of actual rather than constructive possession. She claims that no direct link exists between the guns found in the upstairs bedroom and the manufacturing greenhouse found in the basement. As a result, she claims the trial court should have granted her motion for judgment of acquittal on the possession of a firearm charge. We agree.

Iowa Code section 124 401(1)(e) provides for an enhanced penalty in cases where defendants are found guilty of having immediate possession of a firearm while committing certain drug offenses The statute provides

> A person in the immediate possession or control of a firearm while participating in a violation of [section 124 401(1)] shall be sentenced to two times the term otherwise imposed by law and no such judgment, sentence, or part thereof shall be deferred or suspended

Iowa Code § 124 401(1)(E) (1993) Iowa case law distinguishes between actual and constructive possession for purposes of defining "immediate possession" under this provision *See State v. Mehner*, 480 N W 2d 872 (Iowa 1992). Actual possession exists when an accused has direct physical control of something on or around her person *Id.* at 879 A person who is not in actual possession, but who has both the power and the intention to later take control over something, either alone or together with someone else, is in constructive possession of it. *Id.* A showing of constructive possession does not satisfy the statutory requirement that a defendant must have immediate possession or control of a firearm *Id.* Instead, for possession of a firearm to be immediate under Iowa Code section 124.401(1)(e), possession must be actual *Id.*

Despite Maedche's contentions to the contrary, the State asserts substantial evidence supports the jury's finding that Maedche was in immediate possession of a firearm while manufacturing marijuana. In support of its claim, the State references pre-*Mehner* case law distinguishing between actual and constructive possession The

State claims these cases demonstrate the definition of actual possession in *Mehner* is broader than under previous case law

In *State v. Rudd*, our supreme court defined actual possession as occurring when substances are found on the person of the accused 454 N W 2d 570, 571 (Iowa 1990). *accord State v. Parrish* 502 N W 2d 1, 3 (Iowa 1990) In *Mehner*, actual possession under Iowa Code section 124 401(1)(e) was defined to include direct physical control of something on or around an accused's person *Mehner*, 480 N W 2d at 879 While we recognize the definition of actual possession under *Mehner* is broader than previous definitions of the same term, we find this distinction immaterial for purposes of this case Our review of the record and resulting application of *Mehner* leads us to conclude that substantial evidence does not support the jury's finding that Maedche was in actual possession of a firearm while manufacturing marijuana.

Our review of the record reveals Maedche was not at her residence when the police discovered the greenhouse and firearms By the time Maedche returned home, officers had already begun to seize the marijuana and firearms found in the house Maedche did not have any firearms on her person at the time of the search, nor were there any firearms found anywhere near the manufacturing operation in Maedche's basement. Instead, the firearms were found in an upstairs bedroom while the greenhouse was contained to the lower level of the home Based on this evidence, the jury could not have rationally concluded that Maedche had direct physical control of

a firearm on or around her person while manufacturing marijuana. Accordingly, the jury could not have found the immediate possession requirement of Iowa Code section 124.401(1)(e) was satisfied. The trial court erred in failing to grant Maedche's motion for judgment of acquittal. We reverse Maedche's conviction under Iowa Code section 124.401(1)(e).

Maedche further argues the district court erred in imposing the one-third mandatory prison sentence pursuant to Iowa Code section 124.413. The State does not contest this claim, recognizing that the mandatory minimum sentence under this section does not apply if the drug involved is marijuana. We agree with both parties that insofar as the district court imposed a mandatory minimum sentence, that sentence is not authorized by statute and is therefore void. *See State v. Austin*, 503 N.W.2d 604, 607 (Iowa 1993). Accordingly, we remand Maedche's case to the district court for resentencing.

REVERSED AND REMANDED.