IN THE COURT OF APPEALS OF IOWA

No. 2-895 / 11-2080
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LHA SOUTHIDETH-WHITEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Lha Southideth-Whiten appeals following his conviction for robbery in the first degree, being a felon in possession of a firearm, and two counts of delivery of a controlled substance. **AFFIRMED.**

Judy Johnson of Borseth Law Office, Altoona, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

A jury convicted Lha Southideth-Whiten (Whiten) of robbery in the first degree, felon in possession of a firearm, and two counts of delivery of a controlled substance. He appeals, contending the district court erred in overruling his motion for judgment of acquittal, he was denied his right to effective assistance of counsel, and the district court abused its discretion in sentencing. We conclude there was substantial evidence supporting the verdicts; Whiten was not denied the effective assistance of counsel; he was not subject to an abuse of discretion during sentencing. We affirm.

Benjy Boutchee made two controlled purchases of methamphetamine from the defendant, Lha Southideth-Whiten, on July 13 (6.4 grams) and July 18 (12.39 grams), 2011. Before and after each controlled purchase, Boutchee's vehicle and body were searched by law enforcement. He was given money to make the purchase and an audio/visual recording device, which looked like a key fob to carry. After the purchase, the methamphetamine and recording device were collected. On July 27, Boutchee attempted a third controlled purchase of methamphetamine. When Boutchee went to Whiten's apartment, Whiten showed Boutchee a box with three or four grams of methamphetamine. Whiten then demanded money from Boutchee so Whiten could go purchase more methamphetamine. Boutchee would not give the money to Whiten initially, but Whiten placed a gun in Boutchee's mouth and others in the apartment assaulted Boutchee, who then threw the money. Boutchee left the apartment without the

money, the recording device,[1] or methamphetamine. Upon the execution of a search warrant for Whiten's apartment the following morning, officers found drug paraphernalia, a knife, one note of serialized currency provided to Boutchee by police for the controlled purchase of methamphetamine, and—outside Whiten's bedroom window—a handgun, which Whiten's girlfriend stated had been thrown out the window by Whiten.

Whiten was charged with robbery in the first degree, being a felon in possession of a firearm, and two counts of delivery of a controlled substance. He was convicted as charged following a jury trial. The district court sentenced him to consecutive terms of incarceration.

Whiten now appeals, contending there is insufficient evidence to support any of the charges, he was denied effective assistance of counsel when counsel failed to adequately challenge the chain of custody of the proffered drug evidence, and the trial court abused its discretion in imposing consecutive sentences.

"To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011) (internal quotation marks and citation omitted). The motions for judgment of acquittal and directed verdict by Whiten's trial

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[1] Whiten's girlfriend, who was at the apartment upon execution of the search warrant, testified about finding the device on Boutchee and stated, "I took it from him and we broke it open and it didn't look like anything but it had a little memory stick in it thing and we took it and we broke it and then we were getting ready to leave and I told them to baby-sit him, not to let him go anywhere."

counsel did not identify the specific grounds raised on appeal,[2] and thus, the error asserted was not preserved. *See id.*

Even if error had been properly preserved, viewing the evidence in the light most favorable to upholding the verdicts, and considering the fair inferences that can be drawn from the evidence, there is substantial evidence from which a rational fact-finder could have found that all essential elements of each of the crimes were established beyond a reasonable doubt. *See id.* at 171-72 (addressing sufficiency of evidence and inferences to be drawn from evidence); *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (noting it is for the jury to determine the credibility of witnesses). Here, Whiten demanded Boutchee's money, and when he refused, Whiten put a gun in Boutchee's mouth until Boutchee threw the money down. Whiten stipulated that he was previously convicted of a felony. The two counts of delivery of a controlled substance involved controlled buys by Boutchee and law enforcement.

Whiten's ineffective-assistance-of-counsel claim fails because there is nothing in this record that indicates a chain-of-custody challenge was warranted or would have been successful. *See Brubaker*, 805 N.W.2d at 171 ("We will not find counsel incompetent for failing to pursue a meritless issue."); *see generally State v. Biddle*, 652 N.W.2d 191, 196 (2002) ("[T]o establish a chain of custody adequate to justify admission of physical evidence, the State must show only

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[2] At trial, counsel relied upon challenges to the number of people who had access to the apartment and the purported lack of witness credibility. On appeal, counsel asserts there is a deficiency of evidence of the defendant's specific intent to commit a theft or that defendant assaulted Boutchee to support the robbery conviction; of knowing possession or dominion or control over a firearm to support the felon in possession conviction; and of delivery to support the delivery of a controlled substance convictions.

'circumstances making it reasonably probable that tampering, substitution or alteration of evidence did not occur. Absolute certainty is not required.'" (citation omitted)). The-chain-of-custody issue relates to the methamphetamine introduced into evidence and obtained via the controlled buys. Although the officers were not able to maintain constant surveillance of Boutchee, they did search him before and after each buy, equipped him with an audio-visual recording device, kept surveillance on him until he entered the building and when he exited. These facts are similar to the facts in *Biddle*. *See* 652 N.W.2d at 197 (concluding the lack of continuous surveillance during a controlled buy did not prevent the admission of drugs where the individual was searched before the buy, observed all but a few minutes during the transaction and searched after the buy). We conclude under these facts it was reasonably probable that tampering, substitution, or alteration did not occur.

As to the imposition of consecutive sentences, Whiten contends the district court did not give the defendant's age "appropriate weight." Age is one factor a district court is to consider in imposing a sentence. Other factors are the rehabilitation of the defendant; the protection of the community; the defendant's criminal history, employment, and family circumstances; the nature of the offense; and other relevant factors. Iowa Code §§ 901.5, 907.5; *see State v. Bentley*, 757 N.W.2d 257, 266 (Iowa 2008) (discussing the appropriateness of the imposition of consecutive sentences). We find the record demonstrates that the trial court appropriately weighed a number of factors in reaching its decision. We find no abuse of discretion. *See State v. Dicks*, 473 N.W.2d 210, 215 (Iowa

Ct. App 1991) (noting Iowa Code section 901.5 "poses a difficult balancing act" upon the court). We therefore affirm.

AFFIRMED.