

**IN THE COURT OF APPEALS OF IOWA**

No. 0-217 / 09-1302  
Filed April 8, 2010

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

**vs.**

**GATBEL THOUK CHANY,**  
Defendant-Appellant.

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

A defendant appeals from sentences imposed following his guilty pleas to  
three counts of second-degree robbery and one count of ongoing criminal  
conduct. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County  
Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

**POTTERFIELD, J.**

The defendant appeals from sentences imposed following his guilty pleas to three counts of second-degree robbery and one count of ongoing criminal conduct.

**I. Background Facts and Proceedings.**

Gatbel Chany admitted that he and an accomplice robbed a Domino's Pizza restaurant, a Git-N-Go convenience store, and a Fazoli's restaurant. While robbing Domino's and Git-N-Go, Chany and/or his accomplice was armed with a pistol. A knife was used to threaten the Fazoli's employee. Chany also admitted that he and his accomplice carried out their acts to obtain money and had plans to continue to do so if they had not been caught. Based upon these admissions, the court accepted the defendant's guilty pleas to three counts of robbery in the second degree and one count of ongoing criminal conduct.

At the sentencing hearing, the State recommended that two of the robbery counts be served consecutively, noting the defendant's lengthy history of violent behavior, which included a "prior robbery arrest in juvenile court that was resolved as less serious charges." The prosecutor noted, "The juvenile history also shows . . . he has an assault or harassment charge where he essentially retaliated against that robbery victim for testifying against him and later threatened to shoot him . . . ."

The court sentenced Chany to indeterminate terms of incarceration not to exceed ten years on each robbery conviction, and an indeterminate twenty-five year term on the ongoing criminal conduct conviction. The court imposed

consecutive sentences on two of the robbery counts, the other sentences to be served concurrently.

Chany appeals, arguing the court considered unproven charges in imposing the sentences, and alleges the sentences should be vacated and the case remanded for resentencing.

## **II. Scope and Standard of Review.**

We review the district court's sentences for correction of errors at law. Iowa R. App. P. 6.907; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *Grandberry*, 619 N.W.2d at 401. "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *Id.* (citation omitted).

## **III. Discussion.**

"There is no general prohibition against considering other criminal activities by a defendant as factors that bear on the sentence to be imposed." *State v. Longo*, 608 N.W.2d 471, 474 (Iowa 2000). If a defendant asserts that the sentencing court improperly considered unproven criminal activity, "the issue presented is simply one of the sufficiency of the record to establish the matters relied on." *Id.* If the sentencing court did rely on an impermissible factor, we must set aside the sentence and remand for resentencing. *Grandberry*, 619 N.W.2d at 401.

Chany contends the court improperly considered a juvenile charge of robbery that was adjudicated as a theft. During Chany's plea and sentencing

hearing, the court asked whether the parties had any recommendations as to sentencing. The State recommended that Chany's sentences run consecutively, and recited Chany's criminal history as support for its recommendation.

The sentencing court stated, in part:

Well, I have considered the presentence investigation report, the statements of counsel, the statements of the defendant, what I observed. And I, in some respects, am repeating what's already been said. But, what I observed about the defendant is a history of violent behavior, the use of weapons.

These offenses were committed, at least two of them, while the defendant was on probation in juvenile court for harassment in the first degree. *I assume that's the case [the prosecutor] mentioned with the threat to the victim of his prior robbery which was eventually adjudicated as a theft*, and so there's no question that the defendant has established a pattern of violent behavior and the use of weapons, and that's noted in the presentence investigation report.

I don't know what brought the defendant at such a young age to the point where he has obviously decided to get through life with violence and the threat of violence and the use of weapons, and that is, obviously, unfortunate and a concern of mine.

But more prominent in my mind is the danger that the defendant presents to the public because of that pattern of behavior that he's established over a significant period of time despite his young age.

Chany argues the italicized portion of the court's statement establishes the court's reliance upon an unproven offense of robbery. However, we believe that reading misconstrues the court's reasoning. The court noted that Chany committed at least two of the offenses for which he was being sentenced while he was on probation in juvenile court for harassment in the first degree—which was a proven offense. The court then refers to the harassment case as the one involving the victim of the “robbery which was eventually adjudicated as a theft.” The court's specification of the harassment conviction for which Chaney was on probation did not indicate a reliance on the underlying robbery charge, but rather

the court's understanding of the circumstances of the harassment case, which resulted in a probationary sentence. The court went on to state, "there's no question that the defendant has established a pattern of violent behavior and the use of weapons, and that's noted in the presentence investigation report." The presentence investigation report noted the juvenile charges of first-degree harassment<sup>1</sup> and simple assault, based on the allegations that Chany threatened a witness and displayed a firearm, and the juvenile court's adjudication that Chany committed the delinquent acts as alleged.

We discern no reliance on improper factors here, and thus conclude that the trial court did not err. We affirm the sentences imposed.

**AFFIRMED.**

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<sup>1</sup> Harassment in the first degree as alleged and adjudicated was harassment that "involved a threat to commit a forcible felony." Iowa Code § 708.7(2) (2007).