IN THE COURT OF APPEALS OF IOWA

No. 16-1094
Filed November 22, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH MECO COLLINS,
Defendant-Appellant.

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

The defendant appeals from his conviction for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Kevin R. Cmelik and Zachary C. Miller, Assistant Attorneys General, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ.

POTTERFIELD, Judge.

Keith Collins appeals from his conviction for first-degree murder. He claims: (1) the trial court should have granted his motion to suppress the evidence of the photo array and out-of-court identifications because the array was impermissibly suggestive and unreliable, (2) counsel was ineffective for failing to request a more detailed eyewitness-identification jury instruction incorporating system and estimator variables, (3) counsel was ineffective for failing to request a jury instruction on the *Heemstra*[1] requirements for the assault element of the predicate felony of robbery, and (4) the sentence was illegal. Because the photo array was not impermissibly suggestive, counsel did not have a duty to request a more detailed jury instruction on eyewitness identification or on the assault element of robbery, and the sentence was not illegal, we affirm.

I. Background Facts and Proceedings.

On November 7, 2016, police officers discovered the dead body of Aaron McHenry with multiple gunshot wounds to the shoulder, arm, chest, and head. The shooting occurred on a dead-end street at the twenty-six hundredth block of Hickman Lane in Des Moines, Iowa.

Following the shooting and after finding a cell phone connecting Collins to the murder, the police presented a six-person photo-array depicting Collins and five other individuals to several residents in the neighborhood. Shirley Dick, a local resident, said she spoke with Collins while chasing her dog through the neighborhood around the time of the shooting. Dick identified Collins in the photo

[1] *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006).

array. Dick also claimed she had seen Collins in the neighborhood at an earlier time.

P.D., another local resident, saw two males through a window of her house—one was running and one was "speed walking." P.D. told law enforcement the speed-walking person was familiar to her because he attended the same high school and people thought he looked like Bobby Shmurda.[2] The police created a photo-array for P.D. containing a picture of Collins, another student resembling Collins, and four other individuals. P.D. identified Collins.

On December 18, 2014, the State charged Collins by trial information with the crime of first-degree murder. In February 2016, Collins filed a motion to suppress evidence related to Dick's and P.D.'s out-of-court identification of Collins and "any testimony of the witness's identification by way of the photo array," claiming the photo array used in the identification process was impermissibly suggestive. Collins argued the age of the individuals in the lineup varied, the background color on his picture varied from the other individuals, and the size of his head is smaller than the other individuals' heads. The State argued the discrepancies were inconsequential.

At the March 25, 2016 suppression hearing, during direct examination by the State, Officer Lorna Garcia testified about the creation of the photo arrays:

> Q. How do you typically gather your photographs to put together a photo array? A. Really our only options for juveniles are

[2] According to the record, Bobby Shmurda is a famous hip-hop artist. P.D. gave a picture of Shmurda to the police. Police contacted the school resource officer at the high school attended by P.D. and the defendant to verify if anyone at the school matched P.D.'s description of the shooter. The resource officer stated there are two people that resemble P.D.'s description—the defendant and another individual, E.F. The police then created a photo array for P.D. that contained a picture of the defendant and E.F.

> school photos, if they have a driver's license which oftentimes they don't, booking photos which we usually don't have for juveniles and so really our only option, really only photo we had access to at this time was the photo that was in the Des Moines Public Schools' database.
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> Q. Was the photo that the Des Moines Public Schools had in their database, did that have a background that's similar to a driver's license photo? A. No.
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> Q. What was different about the photo that you had of Mr. Collins? A. It was a bright yellow background, which was kind of unusual.
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> Q. Typically what is the background of a driver's license photo? A. It's a blue, light blue.
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> Q. Did you or one of the other officers at the station attempt to do something to the photograph to remove the yellow background? A. Yes.
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> . . . .
>
> Q. How did you select the photos of the individuals that were in the lineup? A. Same process as the previous lineup with [E.F.]. I went again to my database of photos. I picked out pictures of black males that appeared to be the same age as the defendant and similar in appearance.
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> Q. In the defense's motion they have challenged the lineup and one of the grounds that they have challenged it on is they are alleging that there was nobody that has approximately the same birth date as Mr. Collins in the photo array. Is that true that the date when these individuals were born, that it was not the same year necessarily as Mr. Collins? A. Correct.
>
> Q. But that doesn't really completely tell the whole story, does it? Because you have indicated that the photographs that you have in your database are photographs that you have used before. Are those photographs of individuals that were approximately the same age as the defendant at the time the photographs were taken? A. Yes. And, in my opinion, the appearance was of the same age range.
>
> Q. So even if they weren't the exact same age, your take on it was they at least looked to be the same age? A. Yes.
>
> Q. Were there any startling differences between the photographs? A. No.

On cross-examination, the officer continued the explanation of her process in selecting the photographs:

> Q. When you determined from looking at the photos who you were going to place in the photo array, did you look at the birth dates? A. I did not.

> Q. Did you subsequently learn that three of the individuals were nearly six years or even over six years older than Mr. Collins? A. Yes.
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> Q. One was I think it's two years older than Mr. Collins, right, and one was four years older. A. Yes.
>
> . . . .
>
> Q. Before you select photos to include in a photo array, are you able to look at their dates of birth? A. Yes. If I am doing jail booking photos, sure, I can do an age range, that's how we search. But when I was using my database, I don't search. I look for similar photographs.
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> Q. When you say your "database," you just mean the photos you have collected on your computer? A. Yes.
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> Q. There is actually a database that assists in gathering up and finding photos for law enforcement and you have access to that, right? A. Which one are you talking about?
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> Q. The jail booking photos and license photos, those databases you can search by dates of birth. A. The jail booking I can and then I would have to use that information to plug in to find comparison photos. It's a little more difficult for DL photos but, yes.
>
> Q. You didn't do that in selecting the photos in this case. A. No.

Officer Garcia testified the photo array containing the picture of Collins was shown to P.D. at approximately 1:00 a.m. and to Dick at approximately 1:18 a.m. at the respective residences of the witnesses. The officers testified that both witnesses were asleep when they arrived to present the photo arrays.

Officer Brad Youngblut also testified during direct examination by the State about his role in assisting with the photo array:

> Q. What was your role with regard to the photo spreads? A. The picture was obtained by Detective Garcia. When she showed it to me, there was a background on it that was bright yellow and it differed greatly from the DOT photos that we planned to use to create the photo spread.
>
> Q. The picture you are talking about is a picture of who? A. The defendant, Keith Collins.
>
> Q. So because that background is different, what did you do? A. She was able to provide me the file electronically. I then used Microsoft Paint, the paint program that's in the Microsoft operating system and I was able to change the background from the yellow to a light blue with a similar shade to the DOT.

> Q. Did you make any other changes to the photograph of Mr. Collins? A. No, I did not.

On cross-examination, Officer Youngblut testified that he has the ability to "zoom in and zoom out" on the digital photographs.

On March 31, 2016, the district court entered a ruling denying Collins's motion to suppress, stating:

> The court does not believe the photo array employed by detective Garcia is unduly suggestive. Some of the individuals look marginally older than the defendant, but the differences are within normal variations one would expect to see within a population of individuals the same age. This observation is supported by the fact that, regardless of their actual age in relation to the defendant's age, the individuals portrayed in the array were the same age as the defendant when the photo of them used in the array was taken. Further, with the change made to the background color of the defendant's photo, there is no significant difference in the background color of any of the photos. The defendant's contention about the extent of the head shown in each photo is the most serious complaint. Even so, the court does not find that this variation unduly emphasizes the defendant's picture. Each person's facial features are clearly discernible. And there are variations in the degree of "cropping" or "zoom" even among the other photos. Additionally, the lighting conditions make two of the other photos stand out more than the extent of cropping or "zoom" makes the defendant's photo stand out.

A jury trial commenced on April 8. At trial, several witnesses testified about the day of the shooting, and Shirley Dick and P.D. testified about their pre-trial identifications using the photo array. Dick stated she was sleeping when the police arrived at her home around 1:00 a.m. and they showed her a photo array of six individuals. She stated she was confident the individual she identified in the photo array—Collins—was the individual she had seen in the neighborhood. P.D. testified the police woke her around 1:18 a.m. She stated at first she was groggy and unhappy about the police waking her up but she "woke up out of it." She

stated there was "medium" difficulty in selecting the individual in the photo array and she was "seventy percent sure" the individual was the one she witnessed "speed walking" away from the scene.

Dick identified Collins at trial. The State did not ask P.D. for an in-court identification, and she was cross-examined about her inability to identify Collins at a pre-trial deposition.

J.G., who lived near the site of the shooting, testified that he saw a black male and a white male conversing while walking north on 26th Street toward the Hickman Lane intersection, and a white female and black male on Hickman Lane. J.G. then testified that the black male and white male started pushing one another. J.G. turned away from the scene and heard gunshots as he was entering his house. J.G. saw the white male fall to the ground and two black males running away from the scene.

Following trial, the jury was instructed on eyewitness identification and the elements of first degree murder, felony murder, robbery. The court gave the jury the Iowa State Bar Association's model jury eyewitness- identification instruction:

> The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.
>
> In evaluating the identification testimony of a witness, you should consider the following:
>
> 1. If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.
>
> 2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to

> the witness for identification, and the length of time that passed between the crime and the witness's next opportunity to see the defendant.
>
> 3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.
>
> 4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.

The felony-murder instruction stated, in relevant part:

> The State must prove all of the following elements of Murder in the First Degree:
>
> 1. On or about November 7, 2014, the defendant, or someone he aided and abetted, shot Aaron McHenry.
>
> 2. Aaron McHenry died as a result of being shot.
>
> 3. The defendant, or someone he aided and abetted, acted with malice aforethought.
>
> 4. Either:
>
> a. The defendant, or someone he aided and abetted, acted willfully, deliberately, premeditatedly and with a specific intent to kill Aaron McHenry; or
>
> b. The defendant, or someone he aided and abetted, was participating in the forcible felony of robbery.

The jury was instructed on the predicate felony, robbery:

> A person commits a robbery when, having the specific intent to commit a theft, the person commits an assault to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property.

The jury returned a general verdict of guilty of first-degree murder on April 19. On June 21, Collins was sentenced to a term of life imprisonment with the possibility of parole and victim restitution in the amount of $150,000.

Collins appeals.

II. Standard of Review.

Because unnecessarily suggestive identifications implicate the Due Process Clause, our review is de novo. *See State v. Folkerts*, 703 N.W.2d 761,

763 (Iowa 2005). Claims of ineffective assistance of counsel are also reviewed de novo. *See State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003).

An illegal-sentence claim is reviewed for correction of errors at law. *See Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

III. Discussion.[3]

A. Motion to Suppress Pre-trial Identifications.[4]

Collins claims the photo array identification procedures used to identify him as a suspect violated his due process rights under the Iowa and United States Constitutions. Determining whether pretrial identification procedures violate the Due Process Clause requires a two-step analysis:

> First, we decide whether the procedure used for the identification was impermissibly suggestive. If we find that it was, we must then decide whether "under the totality of [the] circumstances the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." The critical question under the second step is whether the identification was reliable . . . .
>
> On the question of reliability, we give weight to five factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

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[3] The State concedes Collins preserved the federal constitutional claim regarding the evidence of pretrial identifications. However, the State argues any challenge to the in-court identifications has been waived. Collins contends the in-court identification by Dick was inadmissible to the extent the photo array was suggestive and unreliable. *See State v. Salazar*, 213 N.W.2d 490, 493 (Iowa 1973).

[4] Collins urges us to adopt a new approach to evaluate identification procedures under the Iowa Constitution, arguing no identification could be reliable after an impermissibly suggestive pre-trial identification procedure. The State argues Collins has waived any argument to apply a different approach under the Iowa Constitution. Because we are not at liberty to overturn Iowa Supreme Court precedent, we decline to address the State's error-preservation claim or Collins's argument regarding a new approach to Iowa law. *State v. Miller*, 841 N.W.2d 583, 584 n.1 (Iowa 2014) ("Generally, it is the role of the supreme court to decide if case precedent should no longer be followed.").

State v. Taft, 506 N.W.2d 757, 762–63 (Iowa 1993) (citations omitted); *see also Manson v. Brathwaite*, 432 U.S. 98, 108–09, 114 (1977) (holding "reliability is the linchpin in determining the admissibility of identification testimony" and identifying factors for review). The Iowa supreme Court has applied this test to challenges under both the United States and Iowa Constitutions. *Taft*, 506 N.W.2d at 762–63. The burden is on Collins to establish the photo array was impermissibly suggestive and the identification was unreliable. *See State v. Neal*, 353 N.W.2d 83, 86 (Iowa 1984) ("To succeed on this claim, defendant must establish that the procedures were suggestive and the irregularities gave rise to a substantial likelihood of irreparable misidentification in the totality of the circumstances."). If Collins fails to meet his burden, "the identification evidence and its shortcomings or credibility are for the jury to weigh." *Id.* at 97.

"When unnecessarily suggestive pretrial out-of-court identification procedures conducive to mistaken identification that are incapable of repair are used, the Due Process Clause requires exclusion of the testimony of the identification." *Folkerts*, 703 N.W.2d at 763.

***1. Impermissibly Suggestive Procedures*.**

We turn to the first step in the analysis—"whether the procedure used for the identification was impermissibly suggestive." *Taft*, 506 N.W.2d at 762. Collins argues the photo array was impermissibly suggestive in that Collins's photo stood out because: (1) The police selected Collins's photo from a different source than the other photos; (2) Collins's photo contains a jagged white outline around his head; (3) Collins's photo was cropped so that his head was smaller than the heads in other photographs; (4) Collins is the only individual wearing a black hooded

sweatshirt in the array; (5) Collins was the only Hoover student in one of the arrays; (6) the age of the individuals varied between seven years.[5]

We first address Collins's claim that his appearance in the photo array was too distinct, making the display impermissibly suggestive. In *Neal*, the Iowa Supreme Court held, unique characteristics to the defendant are not impermissibly suggestive when they are not a "single and riveting characteristic of the display." 353 N.W.2d at 88; *see also Commonwealth v. Mobley*, 344 N.E.2d 181, 184 (Mass. 1976) (holding identification procedures were not impermissibly suggestive where suspect's photo was the only one with ski cap similar to one worn by robber).

Here, in the six-photo array, Collins's portrait is slightly smaller than the other five photos—the five photos are cropped at the ears and top and bottom of the heads and Collins's photo is cropped slightly beyond the ears and just below the neckline. The photo also depicts Collins wearing an article of black clothing; however, the crop of the photograph makes it difficult to tell whether the article of clothing contains a hood. While individuals were born over a number of years, the officers responsible for creating the photo array testified that the age of the individuals at the time each photo was taken was approximately the same as Collins's age at the time the photo array was shown to witnesses. *See Neal*, 353 N.W.2d at 88 (citing *United States v. Mefford*, 658 F.2d 588, 591 (8th Cir. 1981) (holding lineup was constitutionally permissible when suspect was only man in lineup who was within age range described by witness)). Moreover, "due process

[5] Collins also argues the array was impermissibly suggestive because he was the only Hoover High School student depicted. Collins does not cite authority for the proposition that the police must obtain photos from different schools if the suspect is a student. *See* Iowa R. Civ. P, 6.903(2)(g)(3).

does not require the police to scour their files to come up with a photographic display that would eliminate all subtle differences between individuals," and, "even rather startling differences between defendant's characteristics and those of others depicted in a photo display have not resulted in a finding of suggestiveness." *Id.* The subtle differences in appearance depicted in Collins's photo array are not impermissibly suggestive.

Next, we address whether the selection and construction of the array violates Collins's constitutional rights. Collins's photograph was selected from a different database than the others, but the officers altered the background and appearance to attempt uniformity. *See State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987) ("A reasonable effort to harmonize the lineup is normally all that is required). Moreover, "characteristics of a photo such as a darker background or greater or sharper contrast are of no consequence in a suggestiveness claim." *Neal*, 353 N.W.2d at 89 (citing *United States v. Bubar*, 567 F.2d 192, 198–99 (2d Cir. 1977)). Based on the record before us, the outline is barely recognizable to the naked eye. All of the backgrounds in the photographs are blue. Collins's background is nearly identical to one other photograph and only a few shades lighter than the other photographs' backgrounds. The crop of the photograph is also inconsequential. In Collins's photograph, both ears are shown. Only two other photographs are cropped to cover the ears and the size difference is minor—the photographs are cropped near the outline of the subject's head. The photo array was not impermissibly suggestive.

2. Totality of the Circumstances.

Since we find the photo array procedures were not impermissibly suggestive, we need not consider whether the identification was reliable based on the factors outline in *Taft.* *See* 506 N.W.2d at 762–63. We summarize the arguments here because the facts may affect the merits of the ineffective-assistance claim regarding the adequacy of the jury instructions.

Collins claims Dick's identification was unreliable. He claims Dick was only face-to-face with the person she saw for a short duration, and because Dick was white and Collins black, cross-racial identification issues support a finding of unreliability. Collins also argues Dick's identification was unreliable because she was sleeping before the police presented the photo array to her. The State argues the identification was reliable despite the brief face-to-face contact.

Collins also claims P.D.'s identification was unreliable. He argues P.D. only observed the person speed walking for a short duration and she only saw the person's profile. Collins also argues P.D.'s identification was unreliable because she was asleep shortly before the police presented the photo array.

At trial, Dick testified that she had contact with the defendant while attempting to retrieve her dog. She stated the contact lasted approximately five seconds during daylight. Dick testified that she saw a "black male walking up Hickman Lane." She stated she was approximately ten feet away from him when she asked the defendant several questions and then returned to her home. Dick testified the defendant was wearing a black hoodie and jeans. Dick stated it was not the first time she has seen Collins in the area.

P.D. viewed two individuals from approximately ten feet away through the front windows of her house. One individual was running at the time of P.D.'s

observation; the other was speed-walking. P.D. testified that she could see the profile of the speed-walking individual. She described his appearance as resembling a known hip-hop artist, Bobby Schmurda. *See State v. Nagel*, 458 N.W.2d 10, 13 (Iowa 1990) (identification was reliable even though the witness only briefly saw defendant as he jogged past, where defendant "specifically drew her attention because he looked like someone she had seen in a movie").

Following the shooting, the police presented a photo array to Dick and P.D. The police contacted P.D. at approximately 1:00 a.m. and Dick at 1:18 a.m., the morning after the shooting. Both witnesses were sleeping when the police arrived. P.D. testified that she was a little groggy at first but she "woke up out of it." She stated the difficulty was "medium" in selecting Collins photo and she was "seventy percent sure." She acknowledged a little doubt in the selection of Collins. Dick testified that she was confident the person she selected was the same person she encountered in the street.

B. Ineffective Assistance.

To prove his claims of ineffective assistance of counsel, Collins must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) he suffered prejudice as a result. *See State v. Morgan*, 877 N.W.2d 133, 136 (Iowa Ct. App. 2016). The claim fails if either prong is not proved. *Id.* When a defendant chooses to raise an ineffective-assistance-of-counsel claim on direct appeal, we may either determine the record is adequate and decide the claim or find the record is inadequate and preserve the claim for postconviction proceedings. *See State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011).

To prove the first prong of this claim, Collins must show counsel's performance fell outside the normal range of competency. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Starting "with the presumption that the attorney performed his duties in a competent manner," "we measure counsel's performance against the standard of a reasonably competent practitioner." *State v. Maxwell*, 743 N.W.2d 185, 195–96 (Iowa 2008). Although counsel is not required to predict changes in the law, counsel must "exercise reasonable diligence in deciding whether an issue is 'worth raising.'" *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999) (citation omitted). In accord with these principles, counsel has no duty to raise an issue that has no merit. *State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008) ("Counsel cannot fail to perform an essential duty by merely failing to make a meritless objection.").

Under the second prong, "prejudice is shown when it is 'reasonably probable that the result of the proceeding would have been different.'" *State v. Schaer*, 757 N.W.2d 630, 638 (Iowa 2008) (quoting *State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995)). When analyzing the prejudicial effect of several allegations of ineffective assistance of counsel, we "look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the *Strickland* test." *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012).

1. Jury Instruction Request.

Collins argues trial counsel was ineffective for failing to request a more detailed eyewitness-identification jury instruction incorporating system and estimator variables, such as those included in model instructions in the states of New Jersey and Massachusetts:

Collins does not suggest a specific instruction on appeal but argues defense counsel should have proposed an instruction that included information about: (1) blind versus non-blind administration; (2) cross-racial identification; (3) limitations of witness certainty as an indicator of accuracy; (4) stress as a factor that reduces accuracy; and (5) the reality that memory is imperfect and bad faith on the part of the witness is not necessary to mistaken misidentification. Collins cites decisions in other courts that have recognized the importance of such information. *See, e.g.*, *Commonwealth v. Gomes*, 22 N.E.3d 897, 905 (Mass. 2015); *State v. Henderson*, 27 A.3d 872, 920–26 (N.J. 2011).

Generally, "[a]s long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Iowa courts, however, have not adopted Collins's interpretation of eyewitness-identification instructions. Moreover, the jury was instructed pursuant to the standard Iowa Criminal Jury Instruction on eyewitness identification. *See* Iowa State Bar Ass'n, Iowa Crim. Jury Instruction 200.45 (2016); *see also State v. Shorter*, 893 N.W.2d 65, 85 (Iowa 2017) (finding defendant would have been entitled to model eyewitness-identification instruction had counsel requested it). Counsel had no duty to request a more detailed jury instruction. *See State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983) ("[W]e are convinced that not every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency."); *see also State v. Schaer*, 757 N.W.2d 630, 637 (Iowa 2008).

2. **Heemstra *Instruction*.**

Collins claims trial counsel was ineffective for failing to ensure the jury was instructed to find separate assaultive acts for the robbery and murder under the felony-murder doctrine. Collins argues since he cannot commit robbery without committing assault, he was entitled to a jury instruction or separate interrogatory to require the jury to make a finding the assault element of the robbery was distinct from the shooting.

In *Heemstra*, the Iowa Supreme Court addressed the problems with the felony-murder rule when the predicate felony of assault is the same act that causes the death. The court held, "[I]f the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." *Heemstra*, 721 N.W.2d at 558. Thus, when a felony assault is the predicate felony to murder, the State must prove the felony assault was a separate act from the murder. *Id.*

In *State v. Pollard*, a panel of our court addressed the felony-merger doctrine when robbery is the predicate felony:

> Against this backdrop of case law on the merger rule, we decline to find counsel was ineffective for not challenging the felony murder instruction. We cannot rule out the possibility our supreme court might ultimately extend the merger rule for felony murder to the predicate felony of robbery. But it has not done so yet. Accordingly, we reject [the defendant's] argument that his attorney provided subpar representation by not objecting to robbery as the underlying felony. We do not require defense counsel to be a "crystal gazer"—channeling the ability to predict future developments in the law. Counsel did not breach an essential duty by failing to object to the marshalling instruction.

No. 13-1255, 2015 WL 405835, at *3–4 (Iowa Ct. App. Jan. 28, 2015) (citations omitted); *see also State v. McCoy*, No. 14-0918, 2016 WL 3269458, at *5–6 (Iowa Ct. App. June 15, 2016). We decline to extend the *Heemstra* rule to the predicate

felony of robbery. Counsel was not ineffective for failing to ensure the jury was instructed to find separate assaultive acts for the robbery and the murder under the felony-murder doctrine. *See Schaer*, 757 N.W.2d at 637.

C. Illegal Sentence.

Collins argues the sentence is illegal because the jury was not asked to make a factual finding that the assault element of the robbery conviction must be a separate act from the shooting that supported the murder conviction. The State claims Collins is attacking the absence of a jury instruction rather than the sentence itself.

Normal error-preservation rules do not apply when a sentence is challenged for its illegality; Collins can challenge the illegality of a sentence at any time. *See* Iowa R. Crim. P. 2.24(5)(a). "[A] challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional." *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009). However, a challenge to an illegal sentence must attack the "inherent power of the court to impose a particular sentence." *Id.* "Failure to properly object to an instruction not only waives the right to assert error on appeal, but also allows the instruction, right or wrong, to become the law of the case." *State v. Hepperle*, 530 N.W.2d 735, 740 (Iowa 1995).

Here, the sentence—life in prison with the possibility of parole—is mandated by statute for the crime of first-degree murder committed by a person under the age of eighteen. *See* Iowa Code § 902.1 (2016). Collins's attack on the sentence does not challenge statutory bounds of the sentence or the

constitutionality of the sentence. Collins has failed to cite any error against the sentence imposed. *See McCoy*, 2016 WL 3269458, at *5–6.

IV. Conclusion.

The size, color, and clothing differences in the photographs within the photo array were not impermissibly suggestive and did not violate Collins's constitutional rights. Counsel was not ineffective for failing to request a more detailed identification jury instruction or request the *Heemstra* principle apply to the predicate felony of robbery. The sentence was authorized by statute.

AFFIRMED.