IN THE COURT OF APPEALS OF IOWA

No. 1-017 / 09-1836
Filed February 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIE JAMES HERRON, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Willie Herron, Jr. appeals from judgment and sentences imposed upon his convictions of first-degree burglary (two counts) and robbery (one count). **AFFIRMED.**

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

Willie Herron, Jr. appeals from judgments entered and sentences imposed upon his convictions of first-degree burglary (two counts) and robbery (one count). Herron, by counsel, contends: (1) the district court erred in denying his motion to suppress identification testimony after an impermissibly suggestive show-up; (2) the evidence was insufficient to sustain the convictions; (3) his counsel was ineffective in not objecting to jury instruction concerning reasonable doubt; (4) the court erred in refusing to submit his proposed instruction on eyewitness identification; (5) the fifty-year sentence imposed was an abuse of discretion. In a pro se brief, in addition to asserting his own arguments concerning the motion to suppress and the sufficiency of the evidence, Herron also contends the trial court erred in admitting evidence without a spoliation instruction.

I. Background Facts and Proceedings.

On May 17, 2009, Willie Herron, Jr. borrowed his girlfriend's black Mercury Mountaineer to travel from their home in Cedar Rapids to Des Moines. According to his girlfriend, Herron went to Des Moines with a friend to visit his nieces and nephews. While in Des Moines, Herron stayed at a house on 7th Street with the mother of Herron's brother's children.

At about 12:30 or 1:00 a.m., May 18, 2009, two African-American men broke in the back door of a residence on 9th Street. One man armed with a handgun stayed with the resident and her seven-year-old child while the other searched the basement, first, and second floors of the residence. The man with the handgun demanded of the resident, "Where is the dope?" One of the men

asked if "this was #3." The resident told them there was no apartment three. She believed the two men were in her home for twenty to thirty minutes.

At about 1:00 a.m., two African-American men armed with one handgun entered a couple's apartment on 30th Street, where two other people were visiting. The two men demanded money. One man held the gun pointed at the other occupants of the apartment while the second took the male resident to the back bedroom, where he continued to demand money and ordered him to place shoes and other items in a duffel bag. When the two men left, they took the blue duffel bag into which had been placed several pairs of shoes, two iPhones, a digital camera, and a shirt.

A short time later, police officer Daobandon Meunsaveng responded to a police radio alert of a robbery or burglary in the area of the 1100 block of 9th Street. He saw a black SUV, later determined to be owned by Herron's girlfriend. The SUV's headlights were off as it approached the officer. Officer Meunsaveng tried to stop the Mountaineer SUV, but the vehicle sped up. After a short pursuit, three African-American men ran from the Mountaineer while the vehicle was still in gear. The SUV collided with parked cars before coming to a stop. Officer Meunsaveng observed a fourth man get out of the SUV after it came to a stop and run away.

The other three men ran into the house at which Herron was staying on 7th Street. The officer approached the 7th Street residence the men had entered and was able to observe the interior; he watched three men run upstairs.

When additional officers arrived on the scene, Officer Meunsaveng and others entered the residence, secured the downstairs, and found three adult

African-American men upstairs. Officer Meunsaveng saw Herron lying on a bed, apparently asleep; however, Herron was sweating and breathing hard.

A duffel bag containing property taken from the Joiner/Black apartment was recovered outside the 7th Street residence.

Several police cars with their emergency lights flashing and several uniformed officers were outside the 7th street residence as the crime victims came to the scene. The first female victim was transported by law enforcement to 7th and College, which was less than a mile from her residence, to view the three potential suspects. About thirty or forty minutes had passed since the break-in at her home. The victim was asked if she could identify any of the three men standing in the street as those who broke into her home. The victim saw Herron standing with his hands behind his back and she assumed he was hand-cuffed. A light was directed at the men one at a time. The victim identified Herron as one of the two men who entered her home. She stated she did not recognize the other two.

After the break-in at the 30th Street residence, the two residents and one of the guests drove to 9th Street to check on the sister of the male resident, who lived next door to the first apartment that had been burglarized and had reported that burglary to her brother. When the three arrived at 9th Street, they met Des Moines Police Officer Deanna Harding answering a dispatch about the first break-in. As the male victim of the 30th street burglary was explaining the break-in at his own apartment, Officer Harding received a radio call about a stopped vehicle and a duffel bag full of shoes. The witnesses may have heard the radio transmittal.

Officer Harding transported the two female witnesses from the 30th street apartment to the 7th street residence to view the three men in police custody. The witnesses were transported together and not separated when they viewed the suspects. Both women identified Herron as one of the two men who had entered the 30th Street apartment. Both also stated they did not recognize the other two men they were asked to observe. The women were also shown a duffel bag and they identified several pairs of shoes and a digital camera as having been taken from the apartment. Officer Harding returned the items and the duffel bag to Joiner.

Herron was charged with two counts of burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3(1)(b) (2009), and with robbery in the first degree, in violation of section 711.1 and 711.2.

At their depositions on August 21, 2009, two witnesses were shown a photo array of six individuals and asked if the intruders of May 18th were among them. Herron's photo was not included in the array. Neither witness identified any individual in the photo array.

Herron moved to suppress the identifications by the three on-the-scene identification witnesses contending they were tainted by impermissibly suggestive identification procedures and violated his due process rights. Following a hearing at which Otto Maclin, Ph.D., provided expert witness testimony about eye witness identification and factors that might lead to misidentification, the district court denied the motion to suppress.

With respect to the first witness, the district court ruled:

> [The witness] was asked by police to view three suspects within 30 to 40 minutes of the crime. The events surrounding this "show-up" of Mr. Herron are typical of any police-conducted, on-the-scene identification, and to the extent any of them were suggestive, they were not unnecessarily or impermissibly so. . . .
>
> . . . .
>
> The procedure used by police in the instant case was even less suggestive than the typical show-up because police presented three suspects. [The witness] viewed all three and determined that two were not involved in the robbery at her home. The fact that this was not a "one-on-one" show-up lends credibility to the identification.

The court noted: the witness had ample opportunity to observe the intruder in her home; she was in close proximity to him and the lighting was good; and she made the identification of Herron a very short time after the break-in. Further, the witness did not identify any of the six photos in the photo array at her deposition.

In discussing the identifications made by the other two female witnesses from the second burglary, the court wrote:

> The identifications made by [the witnesses] are corroborated by several material facts. First, Mr. Herron was independently identified by [the first witness] who describes an incident remarkably similar to that of [the second witnesses]. Second, according to all three Mr. Herron was accompanied by another individual who was never identified, consistent with the officer's observation that a fourth man fled from the SUV and escaped. Third, property from the robbery at the [30th Street] residence was recovered at the location where the Defendant was located. Fourth, the gun and iPhones were never recovered, presumably taken by the second robber. Fifth, [all three female witnesses] [] rejected, as being involved in the robberies, the two other males who were with Herron.
>
> While the Court recognizes that the identifications by [the two female witnesses from the 30th Street apartment] would have been less open to question if they had been transported separately for the "show-up" identification and if the officer had not informed them that some of the stolen property had been found with the suspects, the totality of the circumstances, including but not limited to, the length of time these witnesses had to observe the robbers; their certainty in the identifications; their failure to identify two other suspects; and their descriptions of the suspects to police lead the

> Court to conclude the identifications did not lead to a substantial likelihood of irreparable misidentification of the accused.

Following a jury trial where the witnesses made in-court identifications of Herron, and Maclin testified about the weaknesses in the out-of-court identification procedures, the jury convicted Herron of two counts of first-degree burglary and one count of first-degree robbery. The court denied Herron's motion for new trial and arrest of judgment, stating "[t]here was overwhelming evidence of guilt in this case."

At sentencing, Herron's counsel acknowledged the "only issue is the burglary running consecutive rather than concurrent." He asked that the court run the three twenty-five-year terms concurrently. The court ruled counts I (Miller burglary) and II (robbery) would be served concurrently and count III (Joiner/Black burglary) would be served consecutive to that sentence.

II. Motion to Suppress.

Herron raises a constitutional challenge to the identification procedure here and our review is thus de novo. *State v. Folkerts*, 703 N.W.2d 761, 763 (Iowa 2005).

It is generally conceded that one-on-one confrontations or "show-ups" between an accused and an eyewitness are inherently suggestive. *State v. Salazar*, 213 N.W.2d 490, 493 (Iowa 1973). However, the Iowa Supreme Court has recognized that "on-the-scene identification procedures, held shortly after the crime, are not violative of due process unless the confrontation is *unnecessarily* suggestive." *Id.* at 493–94.

In *Folkerts*, 703 N.W.2d at 763–64, our supreme court summarized the law concerning impermissibly suggestive identification procedures as follows:

> In *Stovall v. Denno*, the United States Supreme Court condemned the practice of singly, and not as part of a lineup, showing suspects to witnesses for identification purposes. 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199, 1206 (1967). 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. *Id.* at 301–02, 87 S. Ct. at 1972–73, 18 L. Ed. 2d at 1206. The Supreme Court stated, however, that the totality of the circumstances must be examined to determine if a defendant's due process rights were violated as a result of the identification procedure. *Id.* at 302, 87 S. Ct. at 1972, 18 L. Ed. 2d at 1206.
>
> In *Neil v. Biggers*, the Supreme Court reviewed the identification of a defendant by a victim at the police station without the benefit of a photo lineup. 409 U.S. 188, 195, 93 S. Ct. 375, 380, 34 L. Ed. 2d 401, 408–09 (1972). The Supreme Court reviewed the case law and stated:
>
> > It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.
>
> *Id.* at 198, 93 S. Ct. at 381–82, 34 L. Ed. 2d at 410–11. In *Neil*, the Supreme Court reiterated that if the totality of the circumstances indicates that the identification is reliable, a court does not have to exclude testimony concerning an identification derived from a necessarily suggestive procedure. *Id.* at 199, 93 S. Ct. at 382, 34 L. Ed. 2d at 411. The *Neil* court then prescribed a two-part analysis to determine whether testimony concerning an identification procedure is admissible. *Id.* at 199–200, 93 S. Ct. at 382–83, 34 L. Ed. 2d at 411.

The *Folkerts* court reiterated its approval of the two-part analysis to determine whether testimony is admissible concerning the identification procedure:

> The first part of the analysis requires the court to decide whether the identification procedure was in fact impermissibly suggestive. Second, if the court finds the procedure was impermissibly suggestive, then the court must determine whether,

> under the totality of the circumstances, an identification made by the witness at the time of trial is irreparably tainted.

Id. at 764. "The critical question under the second step is whether the identification was reliable." *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). The defendant must show the identification procedure gave rise to "a very substantial likelihood of irreparable misidentification." *State v. Webb*, 516 N.W.2d 824, 829 (Iowa 1994). Relevant factors in determining the reliability of the identification include: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at confrontation; and (5) the length of time between the crime and confrontation. *Folkerts*, 703 N.W.2d at 764.

"The presence of police officers is a usual and necessary element in the ordinary identification confrontation." *Salazar*, 213 N.W.2d at 494. And the fact that the defendant is handcuffed or near a police car is not sufficient to support a claim of suggestiveness. *Id.* (finding it not unnecessarily suggestive where twelve officers were on scene, defendant was handcuffed, and placed against police car for identification); *State v. Schaffer*, 182 N.W.2d 413, 414 (Iowa 1970) (not unnecessarily suggestive where defendant was handcuffed and inside police car when identified). The *Salazar* court observed prompt on-the-scene identifications promote fairness by assuring reliability. 213 N.W.2d at 495.

In *State v. Jackson*, this court rejected a defendant's claim that counsel was ineffective in failing to challenge an on-the-scene identification, noting:

> Jackson was handcuffed, placed in a police car, and taken to the Quik Trip about fifteen to twenty minutes after the store had been

> robbed. When Jackson was taken out of the police car in the parking lot, [the witness] stated that he could not identify the robber's face, but Jackson's clothes looked like what the robber had worn.
>
> We find that the points Jackson raises [including the arresting officer's statement to the witness that they "had a person in custody they thought was involved"] are usual elements in any police-conducted on-the-scene confrontation and to the extent that they are suggestive, they are not unnecessarily so.

387 N.W.2d 623, 631–32 (Iowa Ct. App. 1986).

We do not find the on-the-scene confrontation here unnecessarily suggestive. We first note that the procedure was not a typical "show-up" where a witness is presented with a single suspect. *See, e.g., id.* Rather, Herron was one of three suspects shown to the three female witnesses.

Even if we were to find the procedure was impermissibly suggestive, we must determine whether under the totality of the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." *State v. Mark*, 286 N.W.2d 396, 405 (Iowa 1979); *see State v. Whetstine*, 315 N.W.2d 758, 766 (Iowa 1982) (analyzing factors and concluding "we cannot say under the totality of circumstances in this case there was a very substantial likelihood of irreparable misidentification of defendant"). If there is not a substantial likelihood of irreparable misidentification, the evidence is for the jury to weigh. *Mark*, 286 N.W.2d at 405.

We think the identifications were surrounded by sufficient indicia of reliability so as to render them admissible. Each of the witnesses had ample opportunity to view the perpetrator at the time of the crimes. And while there were some differences between the victims' descriptions of the robbers, these

differences were not as contradictory as Herron suggests.[1] Each woman demonstrated certainty in her identification at both the on-the-scene confrontation and at trial. Moreover the time between the crime and on-the-scene confrontation in each instance was less than one hour. All three witnesses positively identified Herron as having been involved in the two break-ins, but did *not identify* two other suspects. *See State v. Emery*, 230 N.W.2d 521, 524 (Iowa 1975) ("In the instant case the State has a most convincing argument in pointing out two of the three suspects were not identified by the witnesses. The failure of the witnesses to identify the other two suspects strongly negates any suggestion the identification procedure was unnecessarily suggestive.").

And as noted by the district court, other facts corroborated the identifications. We do not find a substantial likelihood of irreparable misidentification and thus we find no error in trial court's admission of evidence of the out-of-court and in-court identifications. The evidence was for the jury to weigh. *Mark*, 286 N.W.2d at 405.

III. Sufficiency of the Evidence.

Herron next contends there was insufficient evidence that he was the perpetrator of the crimes to sustain the convictions.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). In

[1] Each of the witnesses paid a high degree of attention to the intruders, particularly the person holding the handgun. They each described the two robbers as African-American males; one older, taller, and heavier than the other (Herron); wearing dark clothing, the taller one wearing a hooded sweatshirt and having short hair or being bald. The inconsistencies and discrepancies that do exist in the victims' descriptions do not significantly undermine the overall consistency of their descriptions.

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 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).

Having found the identifications of Herron as the perpetrator by the three female witnesses to be sufficiently reliable, we reject Herron's claim that there was not substantial evidence of his being the perpetrator. The first witness identified Herron as one of two persons who entered her residence without permission, armed with a handgun, and demanding to know where to find drugs.

Three witnesses from the 30th Street residence all testified that Herron was one of two men who entered the apartment without permission, armed with a handgun, and demanded money. They also testified Herron and his partner took a duffel bag containing shoes, a shirt, a camera, and cell phones. Herron was found in a nearby house into which three people ran after abandoning an SUV, which belonged to Herron's girlfriend. A duffel bag containing items taken from

the 30th Street residence was found outside the house where Herron was found pretending to be asleep, but breathing heavily and sweating.

Although Herron's expert witness challenged the validity of the identifications of the defendant as the perpetrator, it was the jury's responsibility to weigh the evidence. *See State v. Walton*, 424 N.W.2d 444, 448 (Iowa 1988) ("Questions of the reliability and credibility of the witnesses, in which [defendant] grounds his present challenge, are committed by our system to the jury.").

In his pro se brief, Herron also contends there is insufficient evidence that the perpetrator of the break-ins was armed with a dangerous weapon because the "State never presented a gun in the trial, only testimony in regards to a gun."

There is no doubt a handgun is a dangerous weapon. Iowa Code § 702.7 ("Dangerous weapons include but are not limited to any offensive weapon, pistol, revolver, or other firearm . . . ."). And testimony that Herron was armed with a handgun constitutes substantial evidence. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (stating the "victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt"); *see also State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008) (noting circumstantial and direct evidence are equally probative for purposes of proving guilt beyond a reasonable doubt). The district court did not err in denying the motion for judgment of acquittal.

IV. Jury Instructions.

Herron's appellate counsel argues the trial court erred in denying a requested eye witness jury instruction. In his pro se brief, Herron also contends the court erred in denying his requested spoliation instruction.

We review challenges to jury instructions for the correction of errors at law. *State v. Carey*, 709 N.W.2d 547, 551 (Iowa 2006). "We review jury instructions to decide if they are correct statements of the law and are supported by substantial evidence." *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996) (citation omitted). "When reviewing a claim that an instruction was not supported by substantial evidence, we view the evidence in the light most favorable to the party seeking the instruction." *State v. Mott*, 759 N.W.2d 140, 149 (Iowa Ct. App. 2008). "Error in giving an instruction does not merit reversal unless it results in prejudice to the defendant." *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

A. Eyewitness identification. Herron asked the trial court to give an eyewitness identification instruction from *State v. Ledbetter*, 881 A.2d 290, 317 (Conn. 2005), in which the Connecticut supreme court, recognizing the "inherent risks of relying on eyewitness identification" and exercising its supervisory authority directed

> the trial courts of this state to incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification, in those cases where: (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification procedure; and (3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure. We adopt the following language for use by our trial courts in such cases in the future:
>
> In this case, the state has presented evidence that an eyewitness identified the defendant in connection with the crime charged. That identification was the result of an identification procedure in which the individual conducting the procedure either indicated to the witness that a suspect was present in the procedure or failed to warn the witness that the perpetrator may or may not be in the procedure.
>
> Psychological studies have shown that indicating to a witness that a suspect is present in an identification procedure or failing to warn the witness that the perpetrator may or may not be in the procedure increases the likelihood that the witness will select

> one of the individuals in the procedure, even when the perpetrator is not present. Thus, such behavior on the part of the procedure administrator tends to increase the probability of a misidentification.
>
> This information is not intended to direct you to give more or less weight to the eyewitness identification evidence offered by the state. It is your duty to determine whether that evidence is to be believed. You may, however, take into account the results of the psychological studies, as just explained to you, in making that determination.

Ledbetter, 881 A.2d at 318–19.

The district court rejected the requested instruction but gave Iowa Criminal Jury Instruction 200.45,[2] which addresses the reliability of eyewitness identification.

Herron had the opportunity to, and by way of Maclin's testimony, did present evidence concerning the reliability of eyewitness identification. The eyewitnesses were extensively questioned about the conditions under which they

---

[2] The instruction given, Instruction No. 16, is identical to Iowa Criminal Jury Instruction 200.45 and reads as follows:

> 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.

observed the intruders and their identification of the defendant. The instruction given accurately stated the law and incorporated the concept embodied in the defendant's request. We find no error. *See State v. Everett*, 214 N.W.2d 214, 219 (Iowa 1974).

B. Spoliation. In his pro se brief, Herron contends the district court erred in denying his request to give a spoliation instruction. He contends the State "destroyed" evidence in returning the duffel bag, shoes, and camera to its owner. He recognizes that his argument is not supported by current case law because there is no showing of bad faith on the part of the police. *See State v. Craig*, 490 N.W.2d 795, 796–97 (Iowa 1992) (stating that where by its nature the lost evidence cannot be evaluated by a fact finder, a due process violation will not be found in the absence of a showing of bad faith). However, he argues this court should adopt a broader definition of bad faith, which we decline to do.

V. Ineffective-Assistance-of-Counsel Claim.

Herron also contends trial counsel was ineffective in failing to object to the reasonable doubt instruction given.[3] Herron's reasonable doubt instruction claim is raised in the context of an ineffective-assistance-of-counsel claim. As such, he

[3] The jury was instructed as follows:

> The burden is on the State to prove (name of defendant) guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

must establish: (1) trial counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Barnes*, 791 N.W.2d 817, 822 (Iowa 2010). A defendant's inability to prove either element is fatal to the claim. *State v. Graves*, 668 N.W.2d 860, 867 (Iowa 2003). Counsel has no duty to raise a meritless issue. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009).

Herron cannot establish his ineffective assistance claim because our supreme court has expressly approved a jury instruction similar to the one given. *See State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). In *McFarland*, the supreme court stated the instruction was adequate because it "set out an objective standard for measuring the jurors' doubts. It was not deficient for failing to provide more than one standard." 287 N.W.2d at 163.

Herron contends current Iowa Criminal Jury Instruction No. 100.10[4] "more accurately and fully instructs the jury as to the burden of proof necessary to

[4] In March 2009, Iowa Criminal Jury Instruction 100.10, quoted below, was approved by the Board of Governors of The Iowa State Bar Association.

> The burden is on the State to prove (name of defendant) guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.
>
> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

convict a defendant." He argues that trial counsel should have objected to the reasonable instruction given and proposed the new model instruction. This argument does not contend that the instruction given was an incorrect statement of the law.

A trial court is not required to use any particular language in instructing the jury. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). There is no error so long as the choice of words does not result in an incorrect statement of law or omit a matter essential for the jury's consideration. *Id.*; *see also State v. Morrison*, 368 N.W.2d 173, 175 (Iowa 1985) ("If an instruction correctly states the applicable law it will be deemed proper even though an alternative wording is possible."). The instruction given was an adequate explanation of reasonable doubt. Because the jury was instructed according to the law, trial counsel had no duty to object.

VI. Sentencing.

Finally, Herron challenges the district court's imposition of consecutive sentences. Our supreme court has quite recently summarized the appropriate scope of review of the district court's sentencing discretion:

> We review the district court's sentence for an abuse of discretion. An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. Our rules of criminal procedure require a sentencing judge to state the reasons for a particular sentence on the record. This requirement includes giving reasons for imposing consecutive sentences. "Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action."

State v. Barnes, 791 N.W.2d 817, 827 (Iowa 2010) (citations omitted).

Here, the trial court stated:

> In determining what sentence the Court should pronounce for this defendant, I've considered the nature and circumstances of these crimes. I've considered the need to provide a sentence that provides the maximum protection for the community from further crimes by this defendant. The Court has considered what sentence would provide the defendant with maximum opportunities for rehabilitation.
>
> The Court has considered the information presented in the Presentence Investigation Report, including the victim impact statements, including the defendant's prior criminal history. The court has considered the facts that these were separate crimes. One of them might have been a mistake, but I'm sure the people who had their home broken into and were held at gunpoint didn't much care it was a mistake in the address or not. They were still held at gunpoint for a time by the defendant and possibly others as found by the jury.
>
> The Court has taken into account the same factors in determining whether sentences should run consecutively or concurrently. Probation, obviously, would not be appropriate. The Court considered the recommendations of the Presentence Investigation Report.
>
> In taking into account all of these factors, the Court hereby sentences the defendant to a maximum term of incarceration not to exceed 25 years on each count. For Count I, there's a mandatory minimum term of incarceration of 70 percent which must be served. The Court orders the defendant to serve Counts I and II concurrently and Count III consecutive to that sentence, for a total sentence of 50 years.

The district court considered the relevant statutory factors, *see* Iowa Code § 901.5, specifically referenced the two separate burglaries, *see id.* § 901.8, and imposed consecutive sentences. The court's reasons for ordering consecutive sentences were clearly expressed in its overall explanation for the sentence it imposed. We find no abuse of discretion. *See Barnes*, 791 N.W.2d at 827–28.

VII. Conclusion.

The district court did not err in denying defendant's motion to suppress identification testimony because it was allegedly tainted by an impermissibly suggestive on-the-scene identification. Substantial evidence that defendant was

the perpetrator and was armed with a dangerous weapon was presented to sustain the convictions. The district court did not err in refusing to submit defendant's proposed instructions on eyewitness identification and spoliation. Trial counsel was not ineffective in failing to object to the reasonable doubt jury instruction given. The trial court did not abuse its discretion in imposing consecutive sentences. We therefore affirm.

AFFIRMED.