

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0318-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK L. GREENWOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Patrick Greenwood appeals from a judgment convicting him of aggravated battery. Greenwood pled no contest after the trial court denied his two motions to suppress evidence. Greenwood challenges both rulings. We reject his arguments and affirm.

While walking home one evening, Rene and Russell Kluttermann were attacked by Thomas Franks and an unknown assailant who stabbed and seriously injured Rene. The next day, Watertown Police Lieutenant Timothy Roets showed photographs of six men to Russell, who identified Greenwood as the man with Franks. Roets subsequently interviewed Franks, who admitted the attack and identified Greenwood as his accomplice and as the man who stabbed Rene.

On the basis of that information, Roets went to Greenwood's home and arrested him without a warrant. Later, while in police custody and after receiving his *Miranda*¹ warnings, Greenwood confessed. In his suppression motion, Greenwood sought to suppress his inculpatory statement as the product of an illegal arrest, and his identification by Russell Kluttermann as the product of an impermissibly suggestive photographic lineup.

Lieutenant Roets had probable cause to arrest Greenwood. Probable cause consists of facts and circumstances sufficient for a reasonable police officer to believe that the defendant committed or was committing a crime. *State v. Koch*, 175 Wis.2d 684, 701, 499 N.W.2d 152, 161, *cert. denied*, 510 U.S. 880 (1993). Two of the three people who were at the scene of Greenwood's crime had already identified him as the perpetrator, including his accomplice. Given those identifications, Roets had more than sufficient evidence to reasonably believe that Greenwood stabbed Rene Kluttermann.

Greenwood's confession was not tainted by the circumstances of his arrest. The Fourth Amendment prohibits police from effecting a warrantless and

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Payton v. New York*, 445 U.S. 573, 576 (1980). Consequently, at the suppression hearing, the parties litigated whether Roets entered Greenwood's home with consent, and whether he arrested Greenwood in the home or in the hallway outside. However, the fact that the arrest was made with probable cause makes it unnecessary to review the trial court's determination on those issues. An unconstitutional arrest within a home, if made with probable cause, does not render the defendant's continued custody unlawful. *New York v. Harris*, 495 U.S. 14, 18 (1990). Although Greenwood suggests that we need not follow *Harris*, our supreme court stated that "[t]his court, in construing Article I, § 11 of the Wisconsin Constitution, consistently follows the United States Supreme Court's interpretation of the Fourth Amendment." *State v. Morgan*, 197 Wis.2d 200, 207-08, 539 N.W.2d 887, 890-91 (1995). If Greenwood now wants Wisconsin appellate courts to abandon this policy, and enforce a stricter test under the Wisconsin Constitution, he should petition the Wisconsin Supreme Court for that purpose because we are bound by its directives. *State v. Tabor*, 191 Wis.2d 482, 491, 529 N.W.2d 915, 919 (Ct. App. 1995).

Greenwood failed to show that the photographic lineup was impermissibly suggestive. When first shown the six photographs, Russell Kluttermann eliminated two men he knew and then eliminated two more who did not resemble his wife's assailant. Russell then identified Greenwood from the two remaining photographs. Greenwood contends that when only two photographs remained, Roets informed Russell that one of the two was of the perpetrator, thereby creating a substantial likelihood of misidentification. However, Roets testified that before he made any comments about the pictures, Russell stated that one of the remaining two photos was of the perpetrator. At that point Roets asked

him which one. The trial court found that testimony credible, and its credibility determination is not subject to review. *Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Asking a witness which photograph he is referring to, after the witness has volunteered the opinion that one is of the perpetrator, is not an impermissibly suggestive statement under any reasonable view.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

