**COURT OF APPEALS DECISION DATED AND RELEASED**

March 4, 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.



**NOTICE**

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


**No. 96-1083-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**State of Wisconsin,**

**Plaintiff-Respondent,**

**v.**

**Carl D. Porter,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Carl D. Porter appeals from a judgment entered on a jury verdict convicting him of one count of robbery. *See* § 943.32(1)(b), STATS. On appeal, Porter argues that the pretrial photographic and lineup identification procedures under which the victim identified him were impermissibly suggestive and unreliable and, therefore, inadmissible. We affirm.

According to the evidence at trial, the victim was in the parking lot of a Sam's Club when she was robbed. She described the robber to the Milwaukee County Police as a black male in his twenties, approximately 6'4" tall and 160 pounds. Witnesses gave police the license number of the car from which they thought the robber came. The auto was registered to Porter. The victim was aware of this. Later that evening, a police officer went to the victim's home to have her view a photo array of possible suspects. The police officer told the victim that he had used the license plate number of a car observed at the scene in coming up with a possible suspect. The victim picked Porter's photo as that of the robber. The officer then told the victim that she had picked out the car's owner.

Porter was arrested and placed in a lineup with four other individuals. The victim identified Porter as the robber. During trial and over defense objection, the trial court admitted evidence of the photo-array and lineup identifications. The trial court agreed to reconsider its pretrial refusal to suppress the identifications upon request of defense counsel, but Porter did not seek reconsideration.[1]

The test of whether a witness's photographic or lineup identification of a defendant is admissible has two parts. ***Powell v. State***, 86 Wis.2d 51, 65, 271 N.W.2d 610, 617 (1978). The first inquiry is whether the procedure used during the identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Id.***, 86 Wis.2d at 64, 271 N.W.2d at 616 (citation omitted). The defendant has the burden to establish this element. ***Id.***, 86 Wis.2d at 66, 271 N.W.2d at 617. If the procedure was impermissibly suggestive, the burden shifts to the State to show that, under the "totality of the circumstances," the identification is reliable. ***Id.***

[1] Porter seeks to rely on evidence submitted during the course of the entire trial in support of his argument that the trial court made an improper pretrial ruling refusing to suppress the identifications. He cannot do so. An appellant who claims the trial court erred in issuing a pretrial ruling admitting evidence is limited to using the same evidence and to making the same arguments offered at the pretrial hearing on the admissibility of the evidence unless he or she seeks reconsideration by the trial court based on the additional evidence. *See* ***State v. Bustamante***, 201 Wis.2d 562, 571-573, 549 N.W.2d 746, 749-750 (Ct. App. 1996).

Porter argues that the photo identification was suggestive because only one person in the photo array resembled the victim's description of a 6'4" black male weighing approximately 160 pounds. The photo-array contained five photographs of black males each with slightly varying heights and weights: 6'3" and heavy set; 6'5" and thin (Porter); 6' with a medium build; 6' and heavy set; and 5'10" with a medium build.[2]

Porter has not met his threshold burden of showing that the photo-array was impermissibly suggestive. As to the content of the photographs themselves, while the police are required to conduct a fair and balanced presentation of alternative possibilities for identification, they are not required to conduct a search for people identical in height, weight and age to that of the suspect. *See* ***Powell***, 86 Wis.2d at 67, 271 N.W.2d at 618. Here, the five photographs in the array depict young black men with varying heights and weights, which were close to Porter's described height and weight. Any disparity between Porter's height and weight and the height and weight of the other individuals portrayed falls short of the suggestiveness required for reversal. *See* ***Simmons v. U.S.***, 390 U.S. 377, 384 (1968); *cf.* ***Foster v. California***, 394 U.S. 440, 443 (1969) (ruling that there the "suggestive elements in this identification procedure made it all but inevitable that [the victim] would identify [the accused]"). The trial court did not err in admitting the photo-array identification.

Porter also argues that the trial court erred in refusing to suppress identification evidence that Porter alleges was the result of an unnecessarily suggestive lineup. Again, Porter bases his contention on the differences in height among the participants as well as the way the participants were arranged in the lineup. The lineup photograph, however, does not support Porter's contention. True, Porter was the tallest in the lineup, but he is a very tall man. Due process does not require that clones of the suspect be used as fillers. ***Wright v. State***, 46 Wis.2d 75, 85-86, 175 N.W.2d 646, 651-652 (1970). Further,

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[2] One person did stand out in the photo array because his complexion was noticeably lighter than the other four individuals. This difference, however, does not affect the suggestiveness of the photo array because the victim did not mention complexion when giving the police a description of the robber and, more importantly, Porter was not the individual who stood out. *See* ***People v. Holmes***, 349 N.W.2d 230, 236-237 (Mich. Ct. App. 1984) (if a person other than the defendant stands out in an identification procedure, his presence will not create any impermissible suggestiveness).

all the participants in the lineup were wearing stocking caps making it difficult to assess their actual height and making any height differences less significant. Porter takes issue with the fact that he was placed in the middle of the lineup, arguing that attention was automatically drawn to him. We find no merit to his argument. In ***State v. Johnson***, 306 So.2d 724, 726 (La. 1975), the Louisiana Supreme Court noted: "A defendant's position in a lineup, be it first, last or somewhere in between, is not in and of itself suggestive. Before such a contention can be found to be meritorious, facts demonstrating the suggestive nature of the lineup position must be presented." Here, Porter has not pointed to any facts tending to show suggestive police methods in the positioning of the lineup. The lineup identification was properly admitted.

Because the photographic and lineup identifications were not impermissibly suggestive, we need not reach the issue of whether they or the in-court identifications were otherwise reliable under the totality of the circumstances. *See* ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 210 (1981).

*By the Court.*—Judgment affirmed.

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