COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 13, 1997

NOTICE

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. 96-2969-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN M. ALBRECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County: EDWARD R. BRUNNER, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. John Albrecht appeals his conviction for robbery by use of force, as a party to the crime, having had a trial by jury and received a six-year prison term. Albrecht and his wife robbed an inebriated seventy-nine-year-old man of $600. After Albrecht's wife obtained a ride from the victim, Albrecht used his own car to run the victim's car off the road, and his wife then

grabbed the victim's cash. On appeal, Albrecht raises these arguments: (1) the out-of-court photo array the police constructed wrongly failed to fit the victim's description of the robber; (2) the trial court wrongly gave the jury a circumstantial evidence instruction; and (3) trial counsel was ineffective in several respects, which warrants a new trial in the interest of justice. We reject these arguments and therefore affirm his conviction.

Albrecht argues that the police should have based the photo array on the victim's description alone. We disagree. The police may construct the photo array on whatever evidence they had of the crime and offender; adherence to the eyewitness' description is not critical. *See, e.g.,* ***State v. McGee***, 52 Wis.2d 736, 742-43, 190 N.W.2d 893, 896-97 (1971). Impermissible suggestiveness may arise in several ways. *See* ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 201 (1981). It does not arise, however, by virtue of limitations on the viewer's ability to fully observe the offender at the time of the crime and to accurately describe the offender; such matters pertain only to the viewer's credibility and the independence of the in-court identification. *See* ***McGee***, 52 Wis.2d at 742-43, 190 N.W.2d at 896-97; ***Jones v. State***, 47 Wis.2d 642, 648-52, 178 N.W.2d 42, 45-48 (1970); *see also* ***Zdiarstek v. State***, 53 Wis.2d 420, 427, 192 N.W.2d 833, 836 (1972). Here, the police had other identification evidence besides the victim's description. This formed a good and sufficient basis to construct the photo array.

Albrecht next argues that the trial court improperly gave a circumstantial evidence jury instruction. This argument lacks merit. The jury instructions must reflect the evidence. *See* ***Hampton v. State***, 92 Wis.2d 450, 464, 285 N.W.2d 868, 875 (1979). If the prosecution relies almost exclusively on direct evidence, the trial court should not give a circumstantial evidence instruction. *See* ***State v. Isham***, 70 Wis.2d 718, 732, 235 N.W.2d 506, 514 (1975).

Here, however, the trial produced a large amount of circumstantial evidence concerning the issue of identification. Much of it came from witnesses who had seen Albrecht, his wife, and the victim in a tavern before the incident. Another witness saw Albrecht's car at the robbery scene, the victim identified Albrecht's wife as a co-perpetrator, and she admitted on the witness stand that she had pleaded no contest to the robbery. This evidence helped identify Albrecht as the offender and fully justified the trial court's circumstantial evidence instruction.

Last, Albrecht argues that trial counsel provided him ineffective representation in several respects, which Albrecht states warrants a new trial in the interest of justice. *See* ***State v. Speese***, 191 Wis.2d 205, 227, 528 N.W.2d 63, 72 (Ct. App. 1995). Many of these pertain to Albrecht's unsuccessful attempt to suppress the photo array identification. We have upheld the photo array, and these derivative arguments therefore also have no merit. Some ineffective counsel claims challenge pretrial discovery; Albrecht, however, does not demonstrate how this prejudiced his defense, and these arguments therefore lack merit. Finally, Albrecht states that trial counsel wrongly failed to object to the circumstantial evidence instruction. We have already ruled that the instruction was proper, and this derivative argument therefore also lacks merit. In short, Albrecht received a full and fair trial.

By the Court.—Judgment affirmed.

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