

195 A.D.2d 493, 600 N.Y.S.2d 113
(Cite as: 195 A.D.2d 493, 600 N.Y.S.2d 113)

C

Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., Respondent,
v.
George WILSON, Appellant.
July 6, 1993.

Defendant was convicted in the Supreme Court, Kings County, [Goldstein, J.](#), of murder. Defendant appealed. The Supreme Court, Appellate Division, held that: (1) prosecutor acted in bad faith; (2) court erred in admitting evidence of photographic array; and (3) court erred in permitting witness to testify that he had lied at suppression hearing because he had been threatened by another witness.

Reversed.

West Headnotes

[1] Homicide 203 **1321**

203 Homicide

203XI Questions of Law or Fact

203k1321 k. Murder in General. **Most Cited Cases**

(Formerly 203k268)

Evidence was sufficient for jury in murder prosecution; witness testified that defendant and victim were engaged in altercation just prior to shooting, that witness heard gun shots, and that he then saw defendant run from scene of slaying carrying certain property that had belonged to victim.

[2] Criminal Law 110 **1186.1**

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1185 Reversal

110k1186.1 k. Grounds in General. **Most Cited Cases**

New trial was warranted in murder prosecution where prosecutor acted in bad faith in impeaching her own witness with his prior Grand Jury testimony and court failed to instruct jury that this testimony was to be used for impeachment purposes only, where evidence of photographic array was erroneously admitted, and where court erroneously allowed witness to testify, over objection and without issuing limiting instructions, that he had lied at suppression hearing because he had been threatened by another witness.

[3] Criminal Law 110 **339.9(1)**

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k339.5 Identity of Accused

110k339.9 In-Court Identification in General

110k339.9(1) k. In General. **Most Cited Cases**

Criminal Law 110 **438(3)**

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(3) k. Pictures of Accused or Others; Identification Evidence. **Most Cited Cases**


Although it may have been proper for prosecutor to elicit testimony that witness had previously identified defendant from photographic array, because defendant had opened door to such questioning on cross-examination, it was thereafter improper to allow witness to re-examine photographic array in court and select photograph therefrom, to allow police officer to identify that photograph as photograph of defendant, and to allow photographic array

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to be introduced into evidence at trial.

[4] Criminal Law 110  **343**

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k343 k. Threats and Expressions of Ill
Will. [Most Cited Cases](#)

Criminal Law 110  **673(5)**

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k673 Effect of Admission
110k673(5) k. Limiting Effect of Evid-
ence of Other Offenses. [Most Cited Cases](#)

While it is appropriate to elicit testimony concern-
ing threats made to witness when purpose is to ex-
plain inconsistent statements brought out by de-
fense counsel, when there is no evidence connect-
ing defendant to threat it is error to admit such
testimony in absence of instruction from court lim-
iting relevancy of threat to reasons why witness
made allegedly false statement; in absence of such
instruction, jury is left free to speculate that defend-
ant was responsible for alleged threats to witness.

****113 Joel A. Brenner**, East Northport (**Richard
Langone**, on the brief), for appellant, and appellant
pro se.

Charles J. Hynes, Dist. Atty., Brooklyn (**Roseanne
B. Mackechnie**, **Seth Lieberman**, Dana Robbins,
and Charles D. Day, of counsel, Hannah Kalish, on
the brief), for respondent.

Before **BRACKEN**, J.P., and **ROSENBLATT**,
PIZZUTO and **SANTUCCI**, JJ.

***493 MEMORANDUM BY THE COURT.**

Appeal by the defendant from a judgment of the
Supreme Court, Kings County (G. Goldstein, J.),
rendered June 1, 1989, convicting him of murder in

the second degree, upon a jury verdict, and impos-
ing ****114** sentence. The appeal brings up for re-
view the denial, after a hearing, of that branch of
the defendant's omnibus motion which was to sup-
press identification testimony.

ORDERED that the judgment is reversed, on the
law, and a new trial is ordered. The facts have been
considered and are determined to have been estab-
lished.

***494** Viewing the evidence in the light most favor-
able to the prosecution (*see, People v. Contes*, 60
N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932),
and giving it the benefit of every reasonable infer-
ence to be drawn therefrom (*see, People v. Giuli-
ano*, 65 N.Y.2d 766, 767-768, 492 N.Y.S.2d 939,
482 N.E.2d 557; *People v. Way*, 59 N.Y.2d 361,
365, 465 N.Y.S.2d 853, 452 N.E.2d 1181), we con-
clude that it was legally sufficient to establish the
defendant's guilt of intentional murder. Moreover,
upon the exercise of our factual review power, we
are satisfied that the verdict of guilt was not against
the weight of the evidence (*see, CPL 470.15[5]*).

[1] The evidence established that the defendant shot
the victim during a struggle. The People's main wit-
ness testified that the defendant and the victim were
engaged in an altercation just prior to the shooting.
The witness also testified that he heard gun shots
and that he then saw the defendant run from the
scene of the slaying carrying certain property which
had belonged to the victim. Based on this testimony
and the other evidence produced by the prosecu-
tion, the jury could properly infer that the defendant
acted intentionally in inflicting the fatal wound (*see, People v. Jackson*, 18 N.Y.2d 516, 277
N.Y.S.2d 263, 223 N.E.2d 790; *cf., People v. Pat-
terson*, 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347
N.E.2d 898, *aff'd*, 432 U.S. 197, 97 S.Ct. 2319, 53
L.Ed.2d 281).

[2] However, we conclude that a new trial is war-
ranted for several reasons. First, the prosecutor ac-
ted in bad faith in impeaching her own witness with
his prior Grand Jury testimony. Further, the trial

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court erred in failing to instruct the jury, at the time that the testimony was heard, that it was to be used for impeachment purposes only (*see, People v. Broomfield*, 163 A.D.2d 403, 558 N.Y.S.2d 126; *People v. Magee*, 128 A.D.2d 811, 513 N.Y.S.2d 514; *People v. De Jesus*, 101 A.D.2d 111, 114, 475 N.Y.S.2d 19, *aff'd*, 64 N.Y.2d 1126, 490 N.Y.S.2d 188, 479 N.E.2d 824).

[3] The court also erred in admitting evidence of a photographic array. It may have been proper for the prosecutor to elicit from the witness testimony that he had previously identified the defendant from a photographic array, because the defendant had opened the door to such questioning on cross-examination (*see, People v. Giallombardo*, 128 A.D.2d 547, 548, 512 N.Y.S.2d 481; *People v. Barnes*, 93 A.D.2d 864, 865, 461 N.Y.S.2d 372). However, it was thereafter improper (1) to allow the witness to re-examine the photographic array in court and select a photograph therefrom, (2) to allow a police officer to identify that photograph as a photograph of the defendant, and (3) to allow the photographic array to be introduced into evidence at trial (*see, People v. Jenkins*, 133 A.D.2d 279, 519 N.Y.S.2d 68; *People v. Trowbridge*, 305 N.Y. 471, 113 N.E.2d 841).

[4] It was also error for the court to allow the witness to testify, over objection and without issuing limiting instructions, that *495 he had lied at the suppression hearing because he had been threatened by another witness. While it is appropriate to elicit testimony concerning threats made to a witness when the purpose is to explain inconsistent statements brought out by defense counsel, when, as here, there is no evidence connecting the defendant to a threat, it is error to admit such testimony in the absence of an instruction from the court limiting the relevancy of the threat to the reasons why the witness made the allegedly false statement. In the absence of such an instruction, the jury is left free to speculate that the defendant was responsible for the alleged threats to the witness (*see, People v. Rivera*, 160 A.D.2d 267, 271-72, 553 N.Y.S.2d 707; *People*

v. Leon, 121 A.D.2d 1, 10, 509 N.Y.S.2d 1). It was also error to allow the prosecutor to impeach the defendant's alibi witnesses as to the defendant's whereabouts a year after **115 the shooting. Clearly, this was a collateral matter (*see, Richardson*, Evidence § 491 [Prince 10th ed]).

For the foregoing reasons, the judgment must be reversed and a new trial ordered. The defendant's remaining contentions, including those raised in his supplemental *pro se* brief, are either unpreserved for appellate review or without merit.

N.Y.A.D. 2 Dept.,1993.

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