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

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 Publica- tions
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

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 Evidence of Other Offenses. Most Cited Cases
While it is appropriate to elicit testimony concerning threats made to witness when purpose is to explain inconsistent statements brought out by defense counsel, when there is no evidence connecting defendant to threat it is error to admit such testimony in absence of instruction from court limiting relevancy of threat to reasons why witness made allegedly false statement; in absence of such instruction, jury is left free to speculate that defendant 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 imposing ****114** sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress 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 established.

***494** Viewing the evidence in the light most favorable 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 inference to be drawn therefrom (*see*, *People v. Giuliano*, 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 conclude 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 witness 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 prosecution, 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. Patterson*, 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 warranted for several reasons. First, the prosecutor acted in bad faith in impeaching her own witness with his prior Grand Jury testimony. Further, the trial

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.
People v. Wilson
195 A.D.2d 493, 600 N.Y.S.2d 113

END OF DOCUMENT