182 A.D.2d 711, 582 N.Y.S.2d 735
(Cite as: 182 A.D.2d 711, 582 N.Y.S.2d 735)

H

Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., Respondent,
v.
Barry MANUEL, Appellant.
April 13, 1992.

Defendant was convicted in the Supreme Court, Suffolk County, D'Amaro, J., of second-degree murder, first-degree robbery, second-degree robbery, first-degree assault, and first-degree unauthorized use of motor vehicle, and he appealed. The Supreme Court, Appellate Division, held that: (1) joint trial of charges involving three separate robberies was appropriate; (2) prosecutor's proffered race neutral basis for removal of black potential jurors was mere pretext for discrimination; and (3) allowing witness to make in-court identification after participating in tainted line-up identification procedure was reversible error requiring new trial.

Reversed; new trial ordered.

West Headnotes

[1] Criminal Law 110 620(1)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k620 Joint or Separate Trial of Separate Charges
110k620(1) k. In General. Most Cited Cases
Joint trial of three separate robberies, including one robbery-homicide, was justified where crimes occurred within space of 15 days and within same general area and defendant used similarly brutal and cowardly modus operandi in each case. McKinney's CPL § 200.20, subd. 2(b, c).

[2] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
(Formerly 230k33(5.1))
Prosecutor's proffered race neutral basis for removal of black potential jurors was pretextual; having relative who was or had been prosecuted for crime could have been but was not applied to disqualify nonblack jurors.

[3] Criminal Law 110 339.10(3)

110 Criminal Law
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k339.5 Identity of Accused
110k339.10 Effect of Prior Events on Subsequent Identification
110k339.10(3) k. Prior Confrontation in General. Most Cited Cases

Criminal Law 110 1169.1(5)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(5) k. Arrest and Identification, Evidence Relating To. Most Cited Cases
Permitting complaining witness to make in-court identification in robbery and murder prosecution was reversible error requiring new trial in light of showing that witness participated in tainted lineup procedure; in-court identification should not have been permitted except upon showing that witness' ability to recall perpetrator survived taint of lineup.

[4] Criminal Law 110 2040

110 Criminal Law

110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)5 Presentation of Evidence
110k2039 Examination of Witnesses Other Than Accused
110k2040 k. In General. Most Cited Cases
(Formerly 110k706(2))
Prosecutor committed misconduct by repeatedly framing questions in such a way as to render it obvious to jury that source from which questions were drawn was confession given by nontestifying accomplice.

[5] Criminal Law 110 369.1

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.1 k. In General. Most Cited Cases

Criminal Law 110 369.3

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.3 k. In Prosecutions for Homicide. Most Cited Cases
Detective's allusion in robbery and murder prosecution to "eight robberies that maybe we're going to end up charging you with" was reference to inadmissible evidence of uncharged crimes.
****736** Joel A. Brenner, East Northport (**Richard Langone**, on the brief), for appellant.

James M. Catterson, Jr., Dist. Atty., Riverhead (Steven A. Hovani and Mark D. Cohen, of counsel), for respondent.

Before MANGANO, P.J., and BRACKEN, ROSENBLATT and LAWRENCE, JJ.

MEMORANDUM BY THE COURT.

***711** Appeal by the defendant from a judgment of the Supreme Court, Suffolk County (D'Amaro, J.), rendered April 6, 1987, convicting him of murder in the second degree, robbery in the first degree (five counts), robbery in the second degree, assault in the first degree (two counts) and unauthorized use of a motor vehicle in the first degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of certain branches of the defendant's omnibus motion which were to suppress certain identification testimony, and the defendant's statements to law enforcement authorities.

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.

[1] The defendant was convicted of multiple charges in connection with three separate robberies, including one robbery-homicide, all of which occurred within the space of 15 days, and within the same general area. The defendant used a similarly brutal and cowardly modus operandi in each case, and we conclude that the Supreme Court properly determined that the charges arising out of the three transactions should be tried jointly (*see*, CPL 200.20[2] [b], [c]; *People v. Bongarzone*, 69 N.Y.2d 892, 895, 515 N.Y.S.2d 227, 507 N.E.2d 1083; *People v. Beam*, 57 N.Y.2d 241, 455 N.Y.S.2d 575, 441 N.E.2d 1093; ****737***People v. Hunter*, 177 A.D.2d 1015, 578 N.Y.S.2d 34; *People v. Simmons*, 177 A.D.2d 1024, 578 N.Y.S.2d 42; *People v. Matthews*, 175 A.D.2d 24, 573 N.Y.S.2d 157; *People v. Davis*, 156 A.D.2d 969, 970, 550 N.Y.S.2d 759; *People v. Luke*, 155 A.D.2d 890, 547 N.Y.S.2d 724; *People v. McQueen*, 170 A.D.2d 696, 566 N.Y.S.2d 940; *People v. Hainson*, 161 A.D.2d 802, 558 N.Y.S.2d 850; *People v. Bowman*, 155 A.D.2d 606, 547 N.Y.S.2d 425; *People v. Lyde*,

98 A.D.2d 650, 469 N.Y.S.2d 716). However, for the following reasons, we conclude that a new trial must be ordered.

[2] First, we find that a new trial is necessary because the prosecutor exercised his peremptory challenges in a discriminatory manner (*see*, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Hernandez*, 75 N.Y.2d 350, 355, 553 N.Y.S.2d 85, 552 N.E.2d 621, *affd* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395). Although the prosecutor cited a race-neutral basis for his removal of two potential black jurors, the supposedly race-neutral basis asserted by the prosecutor (having a relative who is, or has been, prosecuted for a crime) could have been, but was not applied in order to disqualify several nonblack jurors, one of whom had a relative who was jailed for assault and robbery. Under the totality of the circumstances, we conclude that the nonracial basis advanced in order to justify the exercise of the prosecutor's peremptory challenges to two ***712** potential black jurors was a pretext (*see*, *People v. Hernandez*, *supra*).

[3] A new trial is also necessary because the Supreme Court improperly permitted one of the two complaining witnesses to make an in-court identification. The Supreme Court found that this witness had participated in a tainted lineup identification procedure. Therefore, an in-court identification should not have been permitted except upon a showing that this witness's ability to recall the features of the perpetrator survived the taint of the lineup. However, there was no hearing on this issue, and there was no finding that the witness had such an independent recollection, or that such a recollection could have served as an "independent basis" for a reliable in-court identification. Permitting the witness to make an in-court identification under these circumstances, and over objection, was error (*see*, *People v. Riley*, 70 N.Y.2d 523, 522 N.Y.S.2d 842, 517 N.E.2d 520; *see also*, *People v. Malloy*, 55 N.Y.2d 296, 449 N.Y.S.2d 168, 434 N.E.2d 237, *cert. denied* 459 U.S. 847, 103 S.Ct. 104, 74 L.Ed.2d 93; *People v. Adams*, 53 N.Y.2d 241, 440 N.Y.S.2d 902, 423 N.E.2d 379).

[4] In addition to these errors there was prosecutorial misconduct. During his cross-examination of the defendant, the prosecutor repeatedly framed his questions in such a way as to render it obvious to the jury that the source from which they were drawn was a confession which had been given by an accomplice. Under the circumstances, we view this as an unjustifiable circumvention of the rule prohibiting the admission of a nontestifying codefendant's confession into evidence (*see*, *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476; *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162).

[5] We note that a detective was improperly allowed to allude to "eight robberies that maybe we're going to end up charging you with". Evidence of uncharged crimes was inadmissible and served no purpose other than to demonstrate criminal propensity (*see*, *People v. Allweiss*, 48 N.Y.2d 40, 46, 421 N.Y.S.2d 341, 396 N.E.2d 735; *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286).

The defendant's remaining contentions, including his argument that his confession should have been suppressed, have been examined and found to be without merit.

N.Y.A.D. 2 Dept.,1992.
People v. Manuel
182 A.D.2d 711, 582 N.Y.S.2d 735

END OF DOCUMENT