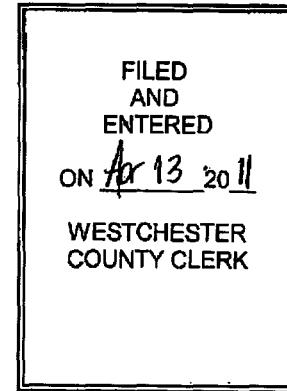


<p><b>People v Brown</b></p>
<p>2011 NY Slip Op 34191(U)</p>
<p>April 13, 2011</p>
<p>Supreme Court, Westchester County</p>
<p>Docket Number: 08-1285</p>
<p>Judge: Albert Lorenzo</p>
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<p>This opinion is uncorrected and not selected for official publication.</p>

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER



-----x  
THE PEOPLE OF THE STATE OF NEW YORK

- against -

CHRISTOPHER BROWN,

Defendant.

-----x  
ALBERT LORENZO, J.:

DECISION & ORDER

Indictment No.: 08-1285  
C.P.L. 330.30(1)(2)

**REED**

APR 13 2011

**TIMOTHY G. IDONI  
COUNTY CLERK  
CTY OF WESTCHESTER**

The defendant was charged with one count of Burglary in the Second Degree in violation of Penal Law §140.25(2), and one count of Criminal Mischief in the Third Degree in violation of Penal Law §145.05(2). On or about April 21, 2009, pre-trial hearings consisting of a Mapp/Huntley/Wade/Sandoval were held before Judge William Wetzel. On or about April 23, 2009 jury selection commenced and was concluded. A jury trial commenced April 27, 2009 and concluded on April 29, 2009. The defendant was found guilty of Burglary in the Second Degree and of Criminal Mischief in the Third Degree. Sentencing was adjourned for June 19, 2009. Defense counsel filed the instant motion to set aside the verdict pursuant to C.P.L. 330.30. The Court finds that the defendant's motion to set aside the verdict pursuant to C.P.L. 330(1) and (2) should be denied for the reasons that follow.

Defendant claims that the guilty verdict should be set aside pursuant to C.P.L. 330(1) and (2) on the grounds that (1) the panel of prospective jurors convened for the trial of the

defendant . . . was not a fair cross section of the community, in that only two out of approximately 45 prospective jurors were African American; and (2) that the sole African American seated as a member of the jury was improperly harassed and coerced during the jury deliberations by the non-African American jurors; (3) the evidence adduced at trial was not legally sufficient to legally make out the elements of Burglary in the Second Degree in that the evidence failed to establish that the defendant entered the dwelling and /or that defendant had the intent to commit a crime therein; and (4) that the judge's Sandoval ruling was predicated on the Assistant District Attorney's misrepresentation that the defendant was a predicate violent felon, which affected his decision to testify at trial, and which affected his exposure on cross-examination at trial.

A) Prospective Jurors- cross section of the community

Defendant claims that panel of prospective jurors was not a fair cross section of the community. The defendants' papers states that he is Afro American and that there were only two Afro American jurors out of 45 jurors in the prospective panel.

C.P.L. 270.10(2) states that "a challenge to the panel must be made before the selection of the jury commences, and if it is not, such challenge is deemed to have been waived. Such challenge must be in writing setting forth the facts constituting the ground of challenge. If such facts are denied by the people, witnesses may be called and examined by either party. All issues of fact and law arising on the challenge must be tried and determined by the court. If a challenge to the panel is allowed, the court must discharge that panel and order another panel of prospective trial jurors returned for the term."

The Court finds that defense counsel did not timely object to the jury panel on April 23,

2009, and did not follow the outlined procedures set forth in C.P.L. 270.10(2), and therefore he has waived his rights to make this challenge and is procedurally barred at this time. See People v. Williams, 256 AD2d 661 (3<sup>rd</sup> Dept. 1998), C.P.L. 210.10(2). While the Court acknowledges reading defense counsel's claims regarding racial percentages, the Sixth Amendment, and systematic exclusion and distinctive groups, defense counsel did not object timely and therefore he waived any challenge to the jury panel and his motion is denied as to this claim. People v. Sloan, 202 AD2d 525, 525 (2<sup>nd</sup> Dept. 1994); and People v. Mitchell, 155 AD2d 695 (2<sup>nd</sup> Dept. 1989). The Court also notes that defense counsel stated in his Reply Affirmation that he did in fact object timely at the bench to the unfair cross-section of the jury, but that Judge Wetzel would not allow him to make a record and object at that time. Defense counsel also states that this claim is "corroborated and supported by the trial transcript." The Court has read the stenographic minutes of the jury selection process and the record is void of any objections by counsel on the record and there is only a "side bar" reflected in the record. Perhaps counsel could have asked to make an object on the record and out of the presence of the jury panel.

Additionally, the Court finds that the defendant failed to set forth facts which support his argument that Afro-Americans were systematically excluded from the jury panel. The fact that on April 22, that the central jury room did not have a prospective panel available and that the case was adjourned for one day is not evidence of systematic exclusion and does not show any "inherent flaw" in the jury selection process. People v. Cowan, 111 AD2d 343 (2<sup>nd</sup> Dept. 1985).

B) Harassment and Coercion Claim

The defendant next argues that "a juror was improperly harassed and coerced into her guilty verdict." (See defense counsel's memorandum of law p. 6). C.P.L. 330.30(2) states that "at any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: that during the trial there occurred, out of the presence of the court, improper conduct by a juror or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of a verdict."

In the instant case, defense counsel argues that the only Afro-American member of the panel seated as juror number four (4) sent out a note stating "I will like to be excused from deliberation, and enter a plea due to uncomfortable circumstances." (See defense papers p 6, Trial Transcript [hereinafter "TT"] p. 501). The juror was then questioned by the court and told that this was part of the process and could be stressful and asked if she could keep deliberating and she responded "yes, I just wanted to know if I could be replaced." After that, the court spoke to the entire panel and addressed the issues generally of deliberating and to listen to others and keep an open mind even though it could be stressful.

After reading the trial transcript, the Court finds that the defendant failed to meet his burden in showing that this event was nothing more than a difficult deliberation process for juror number four, and there was no evidence that she was "coerced and harassed" into a rendering a guilty verdict. Furthermore, not only did the court speak to juror number 4 and ask her if she could continue to deliberate, but after the verdict, the jury, including the juror in question was polled and agreed that she shared in the guilty verdict. The court notes that

"defendants' claim raised no question of outside influence but rather, seeks to impeach the verdict by delving into the tenor of the jury's deliberative process." People v. Karen, 17 AD3d 865 (3<sup>rd</sup> Dept. 2005); People v. Brunson, 66 AD3d 594 (1<sup>st</sup> Dept. 2009); and People v. Brown, 48 NY2d 388 (2<sup>nd</sup> Dept. 1989). In the instant case, the alleged jury misconduct clearly does not rise to a level that would merit a new trial. Accordingly, defendants' motion as to this claim should be denied.

C) Evidence regarding Defendant's entered the Dwelling

Defense counsel claims that the People did not establish that the defendant was guilty of violating Penal Law §140.25(2), Burglary in the Second Degree, the top count which he was found guilty of by the jury, as it was not supported by the weight of the evidence.

The relevant part of C.P.L. 330.30(1) reads as follows: "At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: (1) Any ground appearing in the record which, if raised upon an appeal from the prospective judgement of conviction would require a reversal or modification of the judgement as a matter of law by an appellate court."

In the instant matter, there was nothing regarding defendants' claim of insufficiency preserved in the record. As defendant failed to preserve this argument on the record, it is now procedurally barred. See Fernandez v. Smith, 588 F.Supp2d 480 (2008); People v. Hutchinson, 57 AD3d 565 (2<sup>nd</sup> Dept. 2008); and People v. Stewart, 71 AD3d 797 (2<sup>nd</sup> Dept 2010) .

Additionally, a jury's verdict must be upheld "if there is any valid line of reasoning and

permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfy the proof and burden requirements for every element of the crime charged." People v. Bleakley, 69 NY2d 490 (1987). Important to the trial court's assessment of the jury's decision is the great deference that the appellate courts will give to the trier of fact-finder's opportunity to observe the in-court testimony and ability to weigh the evidence presented. Based upon the court's review, this court cannot say that it would not be possible for any rational trier of fact to have found that all of the essential elements of the crime were met and proven beyond a reasonable doubt. People v. Pirozzi, 237 AD2d 628, 630 (2<sup>nd</sup> Dept. 1997). The Court also reviewed the trial transcript in which the defendant stated that he broke the basement door at the residence in question on February 26, 2008. The Court finds that there is clearly sufficient evidence for the jury to have reasonably found that the defendant admitted breaking the door to the residence, that he could have entered and had intent to commit a crime within the house in question to commit a burglary, notwithstanding all the testimony regarding a small mat and a "moisture test." Accordingly, defendants' motion as to this claim should be denied.

D) The Court's Sandoval Ruling

Lastly, defendant claims that based upon misrepresentation by the People concerning the defendant's status as a predicate violent felony offender in New Jersey, the defendant's decision to testify and his vulnerability during cross-examination resulted in the defendant not getting a fair trial. Furthermore, defense argues that if the Judge had known that the defendant was not a violent predicate felon, he could have facilitated a disposition, and have avoided the trial.

The Court finds that even though the parties and the Court were not aware of the defendant's accurate status, as he was not a violent predicate felon, the defendant was not prejudiced and his motion for a new trial based upon this claim is denied. This Court read the trial transcripts, including the Sandoval hearing and the cross examination of the defendant at trial. The judge's ruling regarding the Sandoval hearing was that if the defendant testified, the People could ask him if he had brought out that he had been convicted in the past of five or more felonies. Defense counsel stated to Judge Wetzel on the record that was "acceptable." The defendant took the stand and was questioned about having committed five of more felonies by the Assistant District Attorney. As per Judge Wetzel's holding, the People were limited in their inquiries and the defendant was not asked any specifics such as the dates, names of the crimes he was convicted of, or any of the underlying facts. Therefore, this Court finds that the Sandoval ruling which was adhered to did not affect the verdict and did it have any effect on the verdict. Additionally, as the parties are all aware, the defendant has not been sentenced yet, so this Court will sentence him according to his correct status as a predicate felon, and not as a violent predicate felon which is separate from the Sandoval issue. As the Judge's Sandoval ruling and the jury verdict cannot have been said to have been affected by the parties reliance on all parties' reliance on a mischaracterization of the defendant's predicate status, the defendant's motion to set aside the verdict is denied in its entirety.

Accordingly, defendants' motion to vacate the judgment of conviction on all grounds

pursuant to CPL §330.30 motion is denied.

Dated: White Plains, New York  
April 13, 2011

  
ALBERT LORENZO  
ACTING SUPREME COURT JUDGE

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