Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33545
C/kmb

_____AD3d_____ Argued - December 8, 2011

MARK C. DILLON, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS, JJ.

2009-06395 DECISION & ORDER

The People, etc., respondent,
v David Ramos, appellant.

(Ind. No. 1262/08)

Lynn W. L. Fahey, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Victor Barall, and Kaye Scholer LLP [Julie B. Du Pont], of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Firetog, J.), rendered June 5, 2009, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and a new trial is ordered.

Contrary to the People's contention, the defendant's claim regarding the denial of his application pursuant to *Batson v Kentucky* (476 US 79) is preserved for appellate review (*see People v Davis*, 253 AD2d 634, 635; *cf. People v Smocum*, 99 NY2d 418, 423; *People v James*, 99 NY2d 264, 272; *cf. People v Lugo*, 69 AD3d 654, 654; *People v Patterson*, 40 AD3d 659, 659; *People v Reeder*, 221 AD2d 666, 667). Furthermore, once the court ordered the prosecutor to set forth the reasons for his peremptory challenges, it effectively found that a prima facie case of discrimination had been established (*see People v Brown*, 193 AD2d 611). Moreover, contrary to the People's contention, the court did not revisit the issue of whether the defendant had established a prima facie case. Thus, the sufficiency of the prima facie showing became moot (*see People v Hecker*, 15 NY3d 625, 652, *cert denied sub nom. Black v New York*, _____US_____, 131 S Ct 2117 [2011]). The prosecutor offered no explanation for his use of peremptory challenges on two of the five Hispanic

prospective jurors at issue and, therefore, the Supreme Court should have granted the defendant's *Batson* application (*see People v Allen*, 86 NY2d 101, 109; *People v Brown*, 193 AD2d at 612). Accordingly, the defendant is entitled to a new trial.

In light of the foregoing determination, we need not reach the defendant's claim that the sentence imposed was excessive (*see generally People v Thornton*, 236 AD2d 430, 431).

DILLON, J.P., BALKIN, LEVENTHAL and CHAMBERS, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court