| **People v Davis** |
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| 2008 NY Slip Op 33749(U) |
| August 6, 2008 |
| County Court, Westchester County |
| Docket Number: 07-1077 |
| Judge: James W. Hubert |
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COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

CARLOS JEAN-BAPTISTE a/k/a "C.J."
LLOYD BRAHAM; **WARREN DAVIS** a/k/a "STONE"
ANDREW CREWE a/k/a "KILLER"

Defendants.

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**DECISION & ORDER**

Ind. No. 07-1077



Hubert, J.

On May 16, 2008, defendant Warren Davis was convicted after a four-week dual-jury trial (with co-defendant Lloyd Braham) of two counts of murder in the second degree, six counts of robbery in the first degree, three counts of burglary in the first degree, and one count of criminal possession of a weapon in the second degree. The trial evidence established that on June 29, 2007, the defendants went to the apartment of Michael Brett at 138 West 4th Street in Mount Vernon, New York, and robbed him and others at gun point. Defendant Baptiste later admitted that he shot and killed Brett during the course of the robbery and burglary. The evidence at trial included, *inter alia*, the testimony of two surviving victims, as well as the testimony of police officers, forensic scientists, and medical examiners. In a video-taped statement and in sworn testimony before the grand jury, all admitted into evidence, Davis admitted that he knew that several of the co-defendants were planning a robbery at the Brett residence, that he and one other person had a gun, that he went with the co-defendants to the scene, and that they all drove to and from the area in a Green Lincoln navigator and dropped the guns off elsewhere after the crime.

The defendant now moves pursuant to Criminal Procedure Law § 330.30 (1) to set aside the verdict on the grounds that (1) the Court erred by allowing "his jury" to hear the trial testimony of Lloyd Braham because the two defenses were antagonistic; (2) there was juror misconduct; and (3) the prosecutor asked improper and prejudicial questions during her cross-examination, and served as an unsworn witness. For the reasons set forth below, the defendant's motion is denied.

**Discussion**

The basis for vacating a jury verdict prior to sentencing is strictly circumscribed by CPL § 330.30. CPL § 330.30 (1) provides that "[a]t 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 . . .[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." It is well-settled that this Court is limited to deciding matters of law that have been preserved and that would require reversal of the conviction when appealed.

Davis argues that the Court should not have allowed his jury to hear the testimony of Lloyd Braham because his defense was antagonistic to Davis' defense. The defendant's sole argument is that Braham testified that he left the crime scene with Davis, but Davis testified that he (Davis) walked away from the scene alone. This claim is not persuasive.

As part of the defendant's pre-trial omnibus motion, he moved for a severance from each of his co-defendants based on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The motion was denied as pre-mature pending resolution of the admissibility of

each of the defendants' statements. Having ruled that each of the four defendant's statements was admissible, this Court resolved the *Bruton* problem by ordering a partial severance. Two juries were impaneled to hear the evidence against Davis and Braham, and each defendant's jury was removed from the courtroom when the other defendant's statements were introduced. Neither defendant argued that the defenses were antagonistic to one another, although both defendants were given the opportunity to raise this issue and offer proof in support thereof.

Following the People's direct case, each defendant indicated that he wished to testify. The court determined, over the defendants' objections, that both juries could properly hear each defendants' testimony because (1) counsel failed to elaborate or demonstrate how the defendants positions were antagonistic to each other, or how one defendant could essentially become a second prosecutor; and (2) the reason for a partial severance under *Bruton* was no longer applicable since each defendant would have the right of confrontation.

In order to effectuate a severance on the grounds of antagonistic defenses, the movant must first demonstrate by "concrete evidence" that the defendants' positions are antagonistic to one another. *See People v. Bornholdt*, 33 N.Y.2d 75, 350 N.Y.S.2d 369 (1973); *People v. Martin*, 154 A.D.2d 554, 546 N.Y.S.2d 394 (2nd Dep't 1989); *People v. Larkin*, 135 A.D.2d 834, 523 N.Y.S.2d 131 (2d Dep't 1987). At trial, counsel for Davis first made general claims that if both juries were allowed to hear each other's testimony, it would put them in a situation where "they feel that perhaps they cannot take the stand" because "certain statements are inconsistent with each other." Counsel further argued that he should be given the opportunity to exclude his jury during the co-defendant's testimony, and sought to waive the jury's presence so that he didn't have to participate in "someone else's trial." Later, counsel for Davis argued that there

was a "possibility" that Braham may suggest an alibi defense, although counsel for Braham refused to "preview his client's testimony." Counsel for Davis stated "I cannot tell you what Lloyd Braham's defense is going to be. I can only tell you that I have a good faith belief that there is a possibility that that could be."

Davis' failure to fully articulate any antagonistic defenses between Braham and Davis prevented the Court from assessing the "strategies and evidence as forecast by the parties." *Mahboubian*, 74 N.Y.2d 174, 544 N.Y.S.2d 769 (1989). When the possibility of one defendant testifying in a manner antagonistic to another defendant is merely colorable or speculative, the court has discretion to deny the severance motion. *People v. Bornholdt*, 33 N.Y.2d 75, 350 N.Y.S.2d 369 (1973); *People v. Johnson*, 124 A.D.2d 1063, 508 N.Y.S.2d 728 (4th Dep't 1986). A defendant is not entitled to severance because he has a better chance of an acquittal in separate trials, or because part of his defense conflicts with that of a codefendant. Not surprisingly, Braham offered no alibi defense at trial, nor was there any substantial conflict between Braham and Davis' testimony at trial.

Since each defendant testified at trial, the reasons for partial severance under *Bruton* were no longer at issue. In *Bruton*, the Supreme Court held that the admission of a confession made by one defendant, who does not testify, and which contains references implicating his codefendant, violates the latter's right of cross-examination under the confrontation clause. The court noted that there is a substantial risk that the jury, even with limiting instructions, may consider the implicating references in determining the codefendant's guilt. Unless the implicating references can be effectively deleted, the statement is not admissible unless separate trials are had.

The crux of *Bruton*, however, was the inability of the implicated defendant to cross-examine his codefendant as to the content of the statement, since the codefendant did not take the stand and testify at the trial. In the present case, defendant Davis, whose statements tended to implicate Braham in the commission of the crime, did take the stand and testified as to the contents of the statements he had made and the circumstances under which he made them. Thus, there was no reason to exclude Braham's jury from the proceedings. *People v. Griffin*, 48 N.Y.2d 998, 425 N.Y.S.2d 547 (1980)(no error was committed in denying defendant's motion to sever; any objection based on *Bruton* was obviated when the codefendant testified); *People v. Anthony*, 24 N.Y.2d 696, 301 N.Y.S.2d 961 (1969)("the evil sought to be obviated by *Bruton* is not present where the codefendant who made the statement takes the stand and thereby provides the defendant with the opportunity to exercise his Sixth Amendment right to confrontation"); *People v. Halstead*, 180 A.D.2d 818 (2d Dep't 1992)(trial court did not improvidently exercise its discretion in denying defendant's motion for severance made upon ground that codefendant made a statement inculpating the defendant because the codefendant testified at trial); *People v. Levine*, 174 A.D.2d 757, 571 N.Y.S.2d 795 (2d Dep't 1991)(defendant's right of confrontation was not infringed by admission of codefendant's confession since the codefendant took the stand at trial); *People v. Cuesta*, 177 A.D.2d 639, 576 N.Y.S.2d 342 (2d Dep't 1991)(defendant failed to establish that there was a "significant danger" that a conflict between the defenses offered by the defendant and the codefendant would lead the jury to infer the defendant's guilt; any prejudice to defendant was mitigated because codefendant took the stand, thereby preserving defendant's right to confrontation and to cross-examine him). Thus, contrary to Davis' argument, the Court's decision not to exclude "his jury" during the testimony of co-defendant Lloyd

Braham was not improper.

Davis also moves to set aside the verdict pursuant to CPL § 330.30 (2) on the grounds that improper conduct by a juror occurred during trial that affected a substantial right of the defendant. The defendant argues that instead of relying on the Court's legal instructions, the jury relied on a fellow juror's interpretation of the law because he was an attorney. In support of this argument, the defendant attached a sworn statement by one juror, and several unsworn letters written by a second juror. For the reasons discussed below, there is no basis for the Court to set aside the verdict on this ground.

CPL § 330.30 (2) provides that, after a guilty verdict is rendered, but before the sentence is imposed, the court may set aside the verdict "if 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 the verdict."

However, it is firmly established under federal and state law in New York that absent special circumstances, a jury verdict cannot be impeached by affidavits or testimony of the jurors after the verdict has been returned. *People v. De Lucia*, 20 N.Y.2d 275, 282 N.Y.S.2d 526 (1967). Thus, absent exceptional circumstances, the court may not rely on jurors' post-trial affidavits to explore the jury's deliberative process and impeach the jury's verdict. *See People v. Redd*, 164 A.D.2d 34, 37, 561 N.Y.S.2d 439 (1st Dep't 1990)(threats by the foreperson, who repeatedly shouted and screamed obscenities and threatened to throw another juror out the window insufficient to set aside jury's verdict); *People v. Liguori*, 149 A.D.2d 624, 626, 540 N.Y.S.2d 291 (2d Dep't 1989), *lv. den.* 74 N.Y.2d 813, 546 N.Y.S.2d 570 (1989)(statements that

a juror voted guilty because he capitulated to pressure exerted on him by jurors not sufficient to upset a verdict); *People v. Maddox*, 139 A.D.2d 597, 598, 527 N.Y.S.2d 89 (2d Dep't 1988), *lv. den.* 2 N.Y.2d 862, 532 N.Y.S.2d 512 (1988)(allegations of personal attacks, harassment and intimidation by fellow juror resulting in complaining juror capitulating to a verdict are insufficient to impeach the verdict); *People v. Jacobson*, 109 Misc.2d 204, 440 N.Y.S.2d 458 (Sup. Ct. Bronx Co. 1981)(allegations that jurors threw chairs and shouted obscenities insufficient to upset the jury's verdict).

This long-standing rule, based on public policy considerations, is intended to secure the privacy and secrecy of jury deliberations, to ensure "frankness and freedom of discussion and conference," and to protect the finality and integrity of a verdict and maintain the viability of the jury as a decision-making body. *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915). "If all verdicts were assailable, the courts would be caught in a never ending litigation spiral and all notions of finality of judgment would be disregarded." *People v. Redd*, 164 A.D.2d 34, 37 *citing People v. DeLucia*, 20 N.Y.2d 275.

The issues raised by the unsworn letters submitted by the defendant are not properly before the Court on this motion because they do not contain sworn allegations of fact. Even if the Court were to consider them, however, it would find that no facts set forth in these letters provide a basis to set aside the jury's verdict. The central focus of the letters is the manner in which the jury reached its verdict, including the tenor and dynamics of the deliberative process, and essentially amount to belated misgivings about the verdict. However, the jurors were individually polled at the conclusion of the case and they each affirmed their guilty verdict in open court, without reservation. No juror gave any indication that the verdict was not freely his

or her own. In short, nothing in the letters rises to the level of an "extraordinary circumstance" that warrants an inquiry into the deliberative process of the jury. *People v Rodriguez*, 71 N.Y.2d 214, 218 n. 1, 524 N.Y.S.2d 422 (1988) ("the required assiduous protection of the secrecy and sanctity of the jury's deliberative process counsels that such a hearing not be undertaken except in extraordinary circumstances"); *People v. Carthrens*, 171 A.D.2d 387, 392, 577 N.Y.S.2d 249 (1st Dep't 1991)(inquiry into the deliberative process for the purpose of impeaching a verdict should not be undertaken except in extraordinary circumstances).

The Court also finds the sworn allegations contained in the statement by a another juror to be insufficient to set aside the verdict or even warrant a hearing. That juror states that based on statements made by another juror, who was an attorney, concerning the law applicable to the case, the jury came back with a guilty verdict. However, no judicial inquiry is permitted into the jury deliberative process to determine if the court's instructions were properly followed. In any jury trial, there is always some danger that jurors will misunderstand the law or consider improper factors in reaching their verdict, but whether or not the jury misunderstood the charge of the court is not a question to be reexamined after the verdict has been rendered. "A jury has an obligation to follow the law as it is given by the trial court, but it is a peculiar facet of the jury institution that once a verdict is rendered, no judicial inquiry is permitted into the jury's deliberative process to determine if in fact the court's instructions were properly followed." *United States v. D'Angelo*, 598 F.2d 1002, 1003 (5th Cir. 1979), *quoting Sparf v. United States*, 156 U.S. 51, 80, 39 L. Ed. 343, 15 S. Ct. 273 (1895), *quoting Com. v. Anthes*, 5 Gray 185 (1855). Moreover, Davis' jury requested re-instruction from the Court on several point of law during

deliberations and was so instructed by the Court. For all of these reasons, Davis' motion to set aside the verdict pursuant to CPL § 330.30 (2) is denied.

Finally, the defendant argues that the verdict should be set aside based on improper and prejudicial questions posed by the assistant district attorney assigned to the case. The defendant asserts that, *inter alia*, while cross-examining the defendant, the prosecutor asked questions that permitted the jury to infer that Davis had been involved in other robberies and another homicide. With respect to the question asked by the prosecutor: "Didn't you tell her the day after this robbery that you had gone to do a jooks with those guys," the Court notes that the question was not objected to at trial, and in any event the defendant answered "no" and the prosecutor moved on to another question. Contrary to the defendant's argument, no inference from the question and answer could reasonably be drawn to mean that the defendant had committed previous robberies. Similarly, no inference that the defendant had participated in another homicide could reasonably have been drawn from the prosecutor's question: "Isn't it true that the only time your lawyer left the room was when we were speaking about a different homicide case that you had knowledge of?" The defendant, testifying under oath in direct contradiction to his sworn testimony before the grand jury, stated on direct examination that his statements before the grand jury were coerced by his prior attorney and by the prosecutor. The alleged improper question complained of was proferred on cross-examination in the context of confronting the defendant with these and other inconsistencies.

The Court has considered the remaining arguments raised by Davis and finds them to be without merit. *See people v. Barrow*, 19 A.D.3d 189, 796 N.Y.S.2d 600 (1st Dep't 2005), *rearg.*

*den.* 2005 N.Y. App. Div. LEXIS 11488 (1st Dep't 2005), *lv. den.* 6 N.Y.3d 809, 812 N.Y.S.2d 449 (2006)(trial prosecutor did not become unsworn witness through testimony that he participated in witness interviews when he did not express his personal belief or opinion about the witness' testimony, and since his conduct was not a material issue in the trial). In short, the prosecutor did not improperly cross-examined the defendant as to the inconsistencies between his multiple statements to the police, the grand jury, and at trial to impeach his credibility. Accordingly, the defendant's motion is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 6, 2008

James W. Hubert
County Court Judge

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