

160 A.D.3d 654
Supreme Court,
Appellate Division, Second Department, New York.

The PEOPLE, etc., respondent,
v.
Sadiq ABDUL WAHAAB, appellant.

2013–09059
|
(Ind. No. 1319/11)
|
Argued—January 23, 2018
|
April 4, 2018

Synopsis

Background: Defendant was convicted in the Supreme Court, Kings County, [Joel Goldberg, J.](#), of burglary in the first degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] defendant's peremptory challenge to white prospective juror was pretextual under [Batson](#);

[2] trial court improperly permitted defendant to be cross-examined about prior robbery conviction which, at that time, was the subject of a pending appeal; and

[3] trial court's [Sandoval](#) error, in permitting this cross-examination was not harmless.

Reversed and remitted.

West Headnotes (5)

[1] Jury

🔑 Peremptory challenges

Defendant's peremptory challenge to white prospective juror at his trial for burglary in the first degree was pretextual under [Batson](#); there was no valid claim that the prospective

juror, who was a documentary filmmaker, would be any more likely to disregard the court's instruction not to perform independent internet research than any other juror.

[Cases that cite this headnote](#)

[2] Witnesses

🔑 Burglary or robbery

Trial court improperly permitted defendant to be cross-examined, at his trial for burglary in the first degree, about a prior robbery conviction which, at that time, was the subject of a pending appeal.

[Cases that cite this headnote](#)

[3] Witnesses

🔑 Former Accusation or Conviction of Crime

Defendants may not be examined about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility.

[Cases that cite this headnote](#)

[4] Criminal Law

🔑 Witnesses

Trial court's [Sandoval](#) error, in permitting defendant to be cross-examined, at his trial for burglary in the first degree, about a prior robbery conviction which, at that time, was the subject of a pending appeal, was not harmless, since the evidence of defendant's guilt was not overwhelming.

[Cases that cite this headnote](#)

[5] Criminal Law

🔑 Witnesses

[Sandoval](#) errors are subject to harmless error analyses.

[Cases that cite this headnote](#)

Attorneys and Law Firms

[Paul Skip Laisure](#), New York, N.Y. (Anna Pervukhin and Kendra Hutchinson of counsel), for appellant.

[Eric Gonzalez](#), District Attorney, Brooklyn, N.Y. ([Leonard Joblove](#), [Sholom J. Twersky](#), and [Rebecca L. Visgaitis](#) of counsel), for respondent.

[MARK C. DILLON](#), J.P., [LEONARD B. AUSTIN](#), [ROBERT J. MILLER](#), [SYLVIA O. HINDS–RADIX](#), JJ.

DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Joel Goldberg, J.), rendered September 9, 2013, convicting him of burglary in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and the matter is remitted to the Supreme Court, Kings County, for a new trial.

[1] In the course of jury selection, the defendant exercised several peremptory challenges to prospective jurors that were contested on the ground that he was attempting to exclude white people from the jury (*see Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *see generally People v. Kern*, 75 N.Y.2d 638, 649–650, 555 N.Y.S.2d 647, 554 N.E.2d 1235). Although the Supreme Court made several determinations regarding various reverse-*Batson* challenges, the defendant, on appeal, argues that the court erred in determining that a challenge to one specific juror was pretextual. Contrary to the defendant's contentions, the record supports the court's determination that defense counsel's proffered reasons for challenging that prospective juror were pretextual because the record does not support any valid claim that the juror, who was a documentary filmmaker, would be any more likely to disregard the court's instruction not to perform independent Internet research than any other juror. Thus, we decline to disturb the court's determination that the challenge was pretextual (*see People v. Hernandez*, 75 N.Y.2d 350, 356, 553 N.Y.S.2d 85, 552 N.E.2d 621, *affd*

sub nom. Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395).

[2] [3] We nevertheless **reverse** the judgment of **conviction** because of an erroneous *Sandoval* ruling made by the Supreme Court (*see People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413). At trial, the court permitted the defendant to be cross-examined about a prior robbery conviction which, at that time, was the subject of a pending appeal (*see People v. Wahhab*, 118 A.D.3d 925, 987 N.Y.S.2d 449). However, the Court of Appeals has held, and the People concede, that defendants may not be examined “about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility” (*People v. Cantave*, 21 N.Y.3d 374, 381, 971 N.Y.S.2d 237, 993 N.E.2d 1257).

[4] [5] *Sandoval* errors are subject to harmless error analyses (*see People v. Grant*, 7 N.Y.3d 421, 424, 823 N.Y.S.2d 757, 857 N.E.2d 52; *People v. Elten*, 23 A.D.3d 577, 578, 804 N.Y.S.2d 255). Here, however, we cannot conclude that the evidence of guilt was overwhelming or that there was no reasonable possibility that the error might have contributed to the conviction (*see People v. Crimmins*, 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. Wallace*, 31 A.D.3d 1041, 1045, 818 N.Y.S.2d 684). Thus, the *Sandoval* ruling cannot be considered harmless (*see People v. Calderon*, 146 A.D.3d 967, 970, 47 N.Y.S.3d 43).

Accordingly, the judgment of conviction must be reversed, and a new trial ordered.

In light of our determination, the defendant's remaining contention, that he was deprived of the effective assistance of counsel, is academic.

[DILLON](#), J.P., [AUSTIN](#), [MILLER](#) and [HINDS–RADIX](#), JJ., concur.

All Citations

160 A.D.3d 654, 73 N.Y.S.3d 604, 2018 N.Y. Slip Op. 02332