

28 N.Y.3d 355
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
James MILLER, Appellant.

Dec. 22, 2016.

Synopsis

Background: Defendant was convicted in the Supreme Court, Bronx County, Peter J. Benitez, J., of manslaughter in the first degree. Defendant appealed. The Supreme Court, Appellate Division, 122 A.D.3d 492, 996 N.Y.S.2d 273 affirmed. Defendant was granted leave to appeal.

[Holding:] The Court of Appeals of New York, Pigott, J., held that trial court abused its discretion when it precluded questioning of potential jurors during voir dire on the issue of involuntary confessions and refused to make its own inquiry of the potential jurors on the issue.

Reversed and new trial ordered.

West Headnotes (3)

[1] Jury

☞ Discretion of court

The judge presiding necessarily has broad discretion to control and restrict the scope of voir dire examination.

1 Cases that cite this headnote

[2] Jury

☞ Extent of examination

Any restriction imposed on voir dire must afford counsel a fair opportunity to question prospective jurors about relevant matters. McKinney's CPL § 270.15(1)(c).

1 Cases that cite this headnote

[3] Jury

☞ Examination of Juror

Trial court abused its discretion when it precluded questioning of potential jurors during voir dire on the issue of involuntary confessions and refused to make its own inquiry of the potential jurors on the issue, where the ability of jurors to follow the law and disregard an involuntary confession went to the heart of determining whether those jurors could be impartial and afford defendant a fair trial, as defendant premised his defense on the involuntariness of his inculpatory statements. McKinney's CPL § 270.15(1)(c).

2 Cases that cite this headnote

Attorneys and Law Firms

***337 Alston & Bird LLP (Daniella P. Main of counsel) and Richard M. Greenberg, Office of the Appellate Defender, New York City (Margaret E. Knight of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington and Nancy Killian of counsel), for respondent.

OPINION OF THE COURT

PIGOTT, J.

**62 *357 The central issue in this appeal is whether the trial court abused its discretion in prohibiting defense counsel from questioning prospective jurors with respect to their views on involuntary confessions. Because the trial court precluded all inquiry on this topic and did so based, in part, on the prosecution's uncertainty of whether they were going to introduce defendant's inculpatory statements at trial, we conclude that the trial court abused its discretion. Defendant is therefore entitled to a new trial.

Defendant was charged with, among other things, murder in connection with the shooting death of William Richardson. Defendant gave both a verbal and written statement to the police admitting his involvement in the

shooting. He stated that on the day of the incident, Richardson approached him asking about a missing cell phone. Sometime thereafter, while defendant was sitting on the steps of an apartment building, Richardson approached defendant and threatened him with an ice pick. Defendant pulled out a gun and shot at Richardson as Richardson fled. The People's case, in addition to the inculpatory statements, included two eyewitnesses to the crime.

Prior to the commencement of jury selection, defense counsel asked if he, or the court, could inform prospective jurors that there are certain rules related to the use of statements attributed to defendants. Defense counsel explained,

"I'd like to be able to wean out jurors who will never accept that. There are rules that apply to the use of [involuntary] statements. And I'm afraid if somebody who's going to be a juror and say well, you know, if he confessed or if **63 ***338 he said he did it, that's the end of the story for me."

The prosecution responded that they were uncertain as to whether they were going to introduce defendant's statements at trial and asked that no mention of them be made.

The court denied defense counsel's request, concluding that the issue should not be addressed at the jury selection stage. It reasoned that because the prosecution had not yet determined *358 whether they would introduce defendant's statements, questioning the jurors with respect to their views on confessions would improperly invite the jurors to speculate as to the existence of an exculpatory or inculpatory statement in the event no statements were admitted into evidence. The court also concluded that given all the "press about trial verdicts being revisited because of issues about the statements and the circumstances under which the statements were made and whether they were coerced and whether they were truthful," jurors could accept without question the fact that an involuntary statement cannot be considered for any purpose.

At trial, the People introduced the defendant's statements on their direct case. The jury ultimately found defendant not guilty of murder in the second degree and criminal possession of a weapon in the second degree, but guilty of the lesser offense of manslaughter in the first degree. On appeal, defendant argued, among other things, that the trial court committed reversible error when it precluded defense counsel from questioning prospective jurors during voir dire as to their ability to follow and apply the law regarding the use of involuntary statements at trial. The Appellate Division rejected defendant's argument and affirmed his judgment of conviction (122 A.D.3d 492, 996 N.Y.S.2d 273 [1st Dept.2014]). A Judge of this Court granted defendant leave to appeal, and we now reverse.

[1] [2] Criminal Procedure Law § 270.15(1)(c) provides that "[e]ach party shall be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law." The scope of a party's examination of prospective jurors is within the discretion of the trial court (*id.*). Because this is "an area of the law which does not lend itself to the formulation of precise standards or to the fashioning of rigid guidelines ... [t]he Judge presiding necessarily has broad discretion to control and restrict the scope of the *voir dire* examination" (*People v. Boulware*, 29 N.Y.2d 135, 139–140, 324 N.Y.S.2d 30, 272 N.E.2d 538 [1971]). Any restriction imposed on voir dire, however, must afford "counsel a fair opportunity to question prospective jurors about relevant matters" (*People v. Steward*, 17 N.Y.3d 104, 110, 926 N.Y.S.2d 847, 950 N.E.2d 480 [2011] [internal quotation marks and citation omitted]).

[3] Under the circumstances of this case, the trial court abused its discretion when it entirely precluded questioning on the issue of involuntary confessions and refused to make its own inquiry of the potential jurors on the issue. Defense counsel's *359 request to question prospective jurors about their ability to follow the law and disregard an involuntary confession went to the heart of determining whether those jurors could be impartial and afford defendant a fair trial. Indeed, defendant, facing the most serious charge of murder, premised his defense at trial on the involuntariness of his inculpatory statements, which effectively corroborated **64 ***339 the testimony of the two eyewitnesses whose credibility was strenuously assailed by the defense.

Furthermore, the fact that the prosecution had not determined, by the time of jury selection, whether it would use defendant's inculpatory statements at trial should not have resulted in precluding any questioning on the issue altogether, by either the court or defense counsel. * Defense counsel here never sought to place the contents of defendant's statements before the jury. Rather, he sought only to question prospective jurors on their ability to follow and apply the law regarding the prohibited use of an involuntary statement. Moreover, the trial court had other ways to address any potential speculation and prejudice to the prosecution while still safeguarding defendant's right to adequately voir dire the jury. For instance, the court could have instructed the prospective jurors that it did not yet know whether there were any statements that would come in as evidence, but if there were, it was the law that such statements must be disregarded if the jury found them to be involuntary.

Indeed, the court used a similar tactic when questioning the potential jurors about their ability to follow the law regarding the defense of justification.

In light of our determination, we need not address defendant's ineffective assistance of counsel claim.

Accordingly, the order of the Appellate Division should be reversed and a new trial ordered.

Chief Judge DiFIORE and Judges RIVERA, ABDUS-SALAAM, STEIN, FAHEY and GARCIA concur.
Order reversed and a new trial ordered.

All Citations

28 N.Y.3d 355, 68 N.E.3d 61, 45 N.Y.S.3d 336, 2016 N.Y. Slip Op. 08587

Footnotes

* Although the prosecutor did not mention the evidence of the statements during her opening remarks (see *People v. Kurtz*, 51 N.Y.2d 380, 434 N.Y.S.2d 200, 414 N.E.2d 699 [1980]), the record tends to support defendant's view that it was likely the prosecution would introduce defendant's statements at trial. At the time the trial court addressed defense counsel's request to inquire about prospective jurors' views on a justification defense, the prosecution and the court both indicated their understanding that the prosecution intended to introduce defendant's verbal and written statements at trial.

103 A.D.3d 1170
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.

Michael McGREW, Defendant–Appellant.

Feb. 1, 2013.

Synopsis

Background: Defendant was convicted in the County Court, Onondaga County, William D. Walsh, J., of criminal possession of a weapon in the second degree and unlawful possession of marijuana. Defendant appealed.

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

[1] city police detective lacked statutory authorization to stop and question defendant in parking lot located in a town, and

[2] trial court abused its discretion in disallowing peremptory challenge.

Reversed and remitted.

West Headnotes (4)

[1] Arrest

⚡ Officer's authority outside jurisdiction

A city police detective lacked statutory authorization to stop and question defendant in parking lot located in a town, which was outside the boundary of the city. McKinney's CPL § 140.50(1).

Cases that cite this headnote

[2] Jury

⚡ Discretion of court

Trial court's denial of codefendant's counsel's peremptory challenge to a prospective juror amounted to abuse of discretion, in prosecution for criminal possession of a weapon in the second degree and unlawful possession of marijuana; although trial court effectively limited the amount of time within which counsel could exercise their peremptory challenges, counsel did not unduly delay in attempting to exercise the challenge, and the right to exercise a peremptory challenge was substantial right.

2 Cases that cite this headnote

[3] Jury

⚡ Peremptory Challenges

The right to exercise a peremptory challenge against a specific prospective juror is a substantial right.

2 Cases that cite this headnote

[4] Indictment and Information

⚡ Variance Between Allegations and Proof

Indictment and Information

⚡ Objections on ground of variance

The right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable.

Cases that cite this headnote

Attorneys and Law Firms

****562** Frank H. Hiscock Legal Aid Society, Syracuse (Piotr Banasiak of Counsel), for Defendant–Appellant.

Michael McGrew, defendant-appellant pro se.

William J. Fitzpatrick, District Attorney, Syracuse (James P. Maxwell of Counsel), for Respondent.

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND MARTOCHE, JJ.

Opinion

*1170 MEMORANDUM:

On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05), defendant contends that reversal is warranted because the police officer who stopped both defendant and his codefendant prior to their arrest lacked the statutory authority to do so. We agree, and conclude that County Court therefore erred in refusing to suppress the physical evidence obtained as a result of that illegal stop.

The subject stop occurred in a college parking lot in the Town of DeWitt at approximately 7:30 p.m. on December 28, 2008. A City of Syracuse police detective assigned to a security detail for an athletic event at the college saw codefendant approach the foyer of its gymnasium. According to the detective, codefendant then turned around and started walking back in the direction from which he came. The detective followed codefendant in his police car, and observed codefendant approach a parked sedan. Codefendant opened the front passenger-side door of the sedan, leaned in, leaned back out, closed the door and proceeded back toward the gymnasium.

*1171 At that point, the detective exited his police vehicle and asked to speak to codefendant, who, according to the detective, smelled of burnt marihuana. Defendant emerged from the car several seconds later and stopped walking when the detective asked to speak with him. The detective then recognized that defendant had bloodshot eyes and also smelled of burnt marihuana, which defendant and codefendant admitted to having smoked. After his partner arrived on the scene, the detective looked into the car with a flashlight to make sure no one else was in that vehicle. He saw a small baggie containing a leafy substance in the compartment of the driver's side door, which he believed to be marihuana. The detective, who detected an odor of unburned marihuana around the car, then asked codefendant and defendant for consent to search that vehicle. Consent was granted, and the ensuing search revealed a loaded revolver on the floor in front of the passenger seat. The detective then called the DeWitt police to effect a formal arrest of defendant and codefendant, and the gun and the marihuana were subsequently seized from the vehicle. The

parties thereafter stipulated that the events in question occurred more than 100 **563 yards from the boundary line of the City of Syracuse.

[1] Pursuant to CPL 140.50(1), “a police officer may [under certain circumstances] stop a person in a public place located *within the geographical area of such officer's employment* ” (emphasis added), the relevant “geographical area” in this case being the City of Syracuse (CPL 1.20 [34–a] [b]). We thus conclude that, under these circumstances, the detective lacked statutory authorization to stop and question defendant in the Town of DeWitt (*see People v. Howard*, 115 A.D.2d 321, 321, 496 N.Y.S.2d 711; *Brewster v. City of New York*, 111 A.D.2d 892, 893, 490 N.Y.S.2d 601). Moreover, on these facts, the detective's violation of CPL 140.50(1) requires suppression of the evidence derived therefrom, i.e., the gun and the marihuana seized from the car (*see People v. Greene*, 9 N.Y.3d 277, 280–281, 849 N.Y.S.2d 461, 879 N.E.2d 1280). We thus grant that part of defendant's omnibus motion seeking suppression of that physical evidence, dismiss the indictment, and remit the matter to County Court for further proceedings pursuant to CPL 470.45.

As an alternative ground for reversal, defendant contends that the court abused its discretion in rejecting defense counsel's peremptory challenge to a prospective juror. This contention is properly before us (*see* CPL 470.05 [2]; *cf. People v. Buckley*, 75 N.Y.2d 843, 846, 552 N.Y.S.2d 912, 552 N.E.2d 160), and we conclude that it too has merit.

[2] At the outset of jury selection, the court told the attorneys for both defendant and codefendant that they would have a total of 15 peremptory challenges, with seven challenges allocated to defendant *1172 and eight to codefendant. Then, consistent with *People v. Alston*, 88 N.Y.2d 519, 524–529, 647 N.Y.S.2d 142, 670 N.E.2d 426, the court determined that the parties could exercise peremptory challenges only to the number of jurors necessary to seat a twelve-person venire. Put differently, the court indicated that the parties would consider prospective jurors in groups of equivalent size to the number of seats to be filled on the jury, and that peremptory challenges would be exercised with respect to each such group.

After the prosecutor exercised his peremptory challenges with respect to the first group of prospective jurors, the court turned to the defenses' peremptory challenges, and told codefendant's counsel that "this is a combination. Both of you have to agree." Codefendant's attorney indicated that he had talked with defendant's attorney "about most of these," and proceeded to exercise four peremptory challenges.

The foregoing peremptory challenges were shared with defendant, and the court did not ask defense counsel about peremptory challenges before proceeding to the next group of seven prospective jurors under consideration. With respect to that group of prospective jurors, the prosecutor had exercised one peremptory challenge and codefendant's attorney had exercised two such challenges before defendant's attorney indicated that "we," i.e., defendant's attorney and codefendant's attorney, "need to talk a second." After an off-the-record discussion, codefendant's attorney indicated that "we're going to exercise one more peremptory challenge," and proceeded to do so. The court then swore the eight jurors that had been selected by that point, and thereupon recessed for lunch.

Following lunch, the court conducted the voir dire of the next group of prospective jurors. At the end of that questioning, defendant's attorney indicated that he and codefendant's attorney "have to share" the juror questionnaires, and that "[i]f one of **564 us objects to the exercise of peremptory, that person is seated, so we are debating between ourselves which kind of makes it a little bit more complicated." The court eventually entertained challenges to a group of four prospective jurors, at which time the prosecutor exercised one peremptory challenge and codefendant's attorney exercised two. Once again, defendant's attorney did not personally exercise any peremptory challenges.

At that point, there were three jurors left to be selected, and the prosecutor and codefendant's attorney used one and two peremptory challenges, respectively, on the group of three prospective jurors before them. Another group of three prospective jurors was brought before the parties, and codefendant's attorney *1173 exercised a peremptory challenge with respect to one such prospective juror, and asked, "How many do I have left[?]" The court, apparently speaking to defendant's attorney, stated that "[y]ou're keeping track," and defendant's

attorney indicated that there were four remaining defense peremptory challenges, which the court reduced to three in view of the challenge to the subject prospective juror.

Codefendant's attorney then attempted to challenge another prospective juror, who was not part of the group then under consideration. The court refused to accept the challenge, noting that the particular prospective juror at issue was not part of the subject group. The court thereafter seated the two remaining prospective jurors in that group of three.

With one juror remaining to be seated, the court instructed the attorneys to use any challenges with respect to that new prospective juror. On the prompt of defendant's attorney, codefendant's attorney challenged the sole prospective juror in that group, and defendant's attorney then inquired whether one of the prospective jurors from the previous group of three prospective jurors had been seated. The clerk answered affirmatively, and codefendant's attorney complained that "we did not want [that prospective juror]." The court ignored the further complaint of codefendant's attorney that the court was proceeding "too fast" through jury selection, and denied the request of codefendant's attorney to strike the juror at issue. A 12th juror was subsequently seated, and codefendant's attorney then objected to the presence of the juror at issue on the jury on the ground that proceedings were "just going too fast, I couldn't hear." The court noted the objection before swearing the remaining jurors. The record reflects that approximately one minute passed between the time at which the juror at issue was seated and the time at which the jury was sworn.

[3] Under these circumstances, "we can detect no discernable interference or undue delay caused by [the] momentary oversight [of the attorneys for defendant and codefendant] that would justify [the court's] hasty refusal to entertain [their] challenge. Accordingly, we conclude that the court's denial of the challenge was an abuse of discretion (*see generally People v. Steward*, 17 N.Y.3d 104, 926 N.Y.S.2d 847, 950 N.E.2d 480 [trial court's limitation on time given for voir dire held an abuse of discretion]) and, because the right to exercise a peremptory challenge against a specific prospective juror is a 'substantial right' (*People v. Hamlin*, 9 A.D.2d 173, 174, 192 N.Y.S.2d 870), reversal is mandated" (*People v. Jabot*, 93 A.D.3d 1079, 1081–1082, 941 N.Y.S.2d 311).

We now turn to defendant's remaining contentions. We reject *1174 defendant's contentions that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. His challenge to the legal sufficiency **565 of the evidence is preserved with respect to the conviction of criminal possession of a weapon in the second degree, but not with respect to the conviction of unlawful possession of marihuana (*see People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919). In any event, defendant's challenge lacks merit (*see generally People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

[4] Defendant further contends that reversal is required because he may have been convicted upon a theory not charged in the indictment. "Preservation is not required inasmuch as '[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable' " (*People v. Bradford*, 61 A.D.3d 1419, 1420–1421, 877 N.Y.S.2d 586, *affd.* 15 N.Y.3d 329, 910 N.Y.S.2d 771, 937 N.E.2d 528; *see People v. Boykins*, 85 A.D.3d 1554, 1555, 924 N.Y.S.2d 711, *lv.*


denied 17 N.Y.3d 814, 929 N.Y.S.2d 802, 954 N.E.2d 93). Nevertheless, we reject that contention. "It is well established that a defendant cannot be convicted of a crime based on evidence of an 'uncharged theory' " (*People v. Gunther*, 67 A.D.3d 1477, 1478, 888 N.Y.S.2d 842, quoting *People v. Grega*, 72 N.Y.2d 489, 496, 534 N.Y.S.2d 647, 531 N.E.2d 279), but here, " 'defendant received the requisite fair notice of the accusations against him' " (*People v. Abeel*, 67 A.D.3d 1408, 1410, 888 N.Y.S.2d 696), and the indictment did not limit the People to a particular theory of possession at trial.

In view of our determination, we do not address defendant's remaining contentions raised in his main and pro se supplemental briefs.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking suppression of physical evidence is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for further proceedings pursuant to CPL 470.45.

All Citations

103 A.D.3d 1170, 958 N.Y.S.2d 561, 2013 N.Y. Slip Op. 00637

 KeyCite Red Flag - Severe Negative Treatment
Order Reversed by People v. Brown, N.Y., December 20, 2016
126 A.D.3d 516
Supreme Court, Appellate Division,
First Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
James BROWN, Defendant–Appellant.

March 17, 2015.

Synopsis

Background: Defendant was convicted in the Supreme Court, New York County, Ruth Pickholz, J., of first-degree robbery. Defendant appealed.

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

[1] People's notice of readiness tolled the statutory speedy trial clock;

[2] evidence supported finding that hypodermic needle was “dangerous instrument” for purposes of conviction of first-degree robbery;

[3] victim had an independent source for his identification of defendant as perpetrator; and

[4] trial court properly denied defendant's request for an in-court lineup.

Affirmed.

West Headnotes (5)

[1] **Criminal Law**
↔ Computation

A post-certificate assertion that the People are not ready for trial does not, by itself, vitiate a previously filed certificate of readiness.

13 Cases that cite this headnote

[2] **Criminal Law**
↔ Computation

There was no evidence that the People's certificate of readiness did not accurately reflect the People's position at the time it was filed and served, and thus the notice of readiness tolled the statutory speedy trial clock for defendant, even though the People subsequently stated that they were not ready. McKinney's CPL § 30.30.

15 Cases that cite this headnote

[3] **Robbery**
↔ Degrees;armed robbery

Evidence that defendant threatened victim with hypodermic needle during robbery was sufficient to support conclusion that hypodermic needle was readily capable of causing serious physical injury, which supported finding that needle was “dangerous instrument” for purposes of conviction of first-degree robbery, where jury could have found that needle was capable of causing serious puncture wounds or transmitting any harmful disease. McKinney's Penal Law § 160.15(3).

Cases that cite this headnote

[4] **Criminal Law**
↔ Hearing, necessity and conduct;findings
Record supported trial court's finding that robbery victim had an independent source for his identification of defendant as perpetrator; victim viewed defendant face-to-face before and during the crime, on the street and in the store, and over an extended period of time, and gave a description that matched defendant's actual appearance.

Cases that cite this headnote

[5] **Criminal Law**
↔ Identification of accused

Trial court in prosecution for first degree robbery did not improvidently exercise its discretion in denying defendant's request for an in-court lineup, where victims were able to make reliable in-court identifications without a lineup.

Cases that cite this headnote

Attorneys and Law Firms

****20** Robert DiDio & Associates, Kew Gardens (Danielle Muscatello of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

GONZALEZ, P.J., FRIEDMAN, ANDRIAS, GISCHE, KAPNICK, JJ.

Opinion

***516** Judgment, Supreme Court, New York County (Gregory Carro, J. at speedy trial motion, suppression hearings and first trial; Ruth Pickholz, J., at second trial), rendered September 12, 2008, as amended November 7, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 22 years to life, unanimously affirmed.

In denying defendant's speedy trial motion, the trial court excluded the period from July 17, 2007, when the People served and filed an off-calendar certificate of readiness, until August 8, 2007, when they announced that they were not ready for trial. Because the court found this 22 day excludable period to be dispositive of defendant's speedy trial claim, it did not rule on other periods claimed by the People to be excludable.

Defendant argues that pursuant to ***517** *People v. Sibblies*, 22 N.Y.3d 1174, 985 N.Y.S.2d 474, 8 N.E.3d 852 (2014), the court should have inquired further or conducted a hearing as to why the People were not ready on August 8, so that it could determine whether the previously filed certificate of readiness was illusory. Under the particular circumstances of this case, we find this argument unavailing.

In *Sibblies*, after filing an off calendar certificate of readiness on February 22, 2007, the People requested the medical records of the victim. At the next court date on March 28, 2007, the People stated that they were not ready to proceed because they were “continuing to investigate and [were] awaiting [the assault victim's] medical records” (22 N.Y.3d at 1180, 985 N.Y.S.2d 474, 8 N.E.3d 852). In a plurality opinion, the Court of Appeals, based on different rationales, agreed that the People's off calendar certificate of readiness was illusory on the record before them.

****21** The three judge concurrence by Chief Judge Lippman “would hold that, if challenged, the People must demonstrate that some exceptional fact or circumstance arose after their declaration of readiness so as to render them presently not ready for trial” at the next court appearance after filing the certificate (22 N.Y.3d at 1178, 985 N.Y.S.2d 474, 8 N.E.3d 852). Chief Judge Lippman found that the People's desire to strengthen their case did not satisfy this requirement.

The three judge concurrence by Judge Graffeo “would decide th[e] case on a narrower basis” (22 N.Y.3d at 1179, 985 N.Y.S.2d 474, 8 N.E.3d 852). While recognizing established precedent that the requirement of actual readiness under CPL 30.30 “will be met unless there is ‘proof that the readiness statement did not accurately reflect the People's position’ ” (*id.* at 1180, 985 N.Y.S.2d 474, 8 N.E.3d 852, quoting *People v. Carter*, 91 N.Y.2d 795, 799, 676 N.Y.S.2d 523, 699 N.E.2d 35 [1998]) and that “there is a presumption that a statement of readiness is truthful and accurate” (22 N.Y.3d at 1180, 985 N.Y.S.2d 474, 8 N.E.3d 852), Judge Graffeo found the statement of readiness “illusory” because “[t]he People initially declared that they were ready for trial on February 22 but within days sought copies of the injured officer's medical records,” admitted at the next calendar call that they “were not in fact ready to proceed because they were continuing their investigation” and that they “needed to examine the medical records to decide if they would pursue introduction of the records into evidence at trial”, and then “gave no explanation for the change in circumstances between the initial statement of readiness and the[ir] subsequent admission that the[y] ... were not ready to proceed without the medical records” (22 N.Y.3d at 1181, 985 N.Y.S.2d 474, 8 N.E.3d 852).

[1] Following analogous precedent pertaining to plurality opinions by the United States Supreme Court, we apply the narrower approach of Judge Graffeo, which leaves intact well- *518 settled law that a post-certificate assertion that the People are not ready does not, by itself, vitiate the previously filed certificate of readiness (*see Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 [1977]) [“when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”] [internal quotation marks omitted]; *see also For the People Theatres of N.Y., Inc. v. City of New York*, 6 N.Y.3d 63, 79, 810 N.Y.S.2d 381, 843 N.E.2d 1121 [2005]).

The record shows that on July 9, 2007, the court stated that “defense counsel is currently on trial” and asked the prosecution about alternative dates. The prosecutor responded, “7/23 is good. The week of 7/30 is bad.” The court adjourned the case to August 8, 2007. On July 17, the People filed and served the certificate of readiness.

On August 8, the prosecutor stated that the People were not ready for trial. The court noted that defense counsel was on trial and defendant voiced his dissatisfaction and requested new counsel. Noting that defense counsel was “very busy” and that he had been “on trial [the] last time” as well, the court granted defendant's request for new counsel and declared that, because of defendant's multiple requests for new counsel, his speedy trial time would stop running.

On the speedy trial motion, defendant's new counsel argued that even if the certificate of readiness had been filed and served properly on July 17, it was illusory because **22 the People were not actually ready on the next court date. The court disagreed, stating that this was not a case where the People filed their certificate even though their witnesses were not ready. The court then denied defense counsel's request for a hearing.

[2] On this record, unlike, *Sibblies*, there is no “proof that the readiness statement did not accurately reflect the People's position,” so as to render the prior statement of readiness illusory (*Sibblies*, 22 N.Y.3d at 1180, 985 N.Y.S.2d 474 [Graffeo, J., concurring] [internal quotation marks omitted]). Rather, defense counsel merely speculated that the certificate of readiness was

illusory because the People announced that they were not ready at the next court appearance after it was filed, which is insufficient to rebut the presumption that the certificate of readiness was accurate and truthful (*see e.g. People v. Acosta*, 249 A.D.2d 161, 161–162, 674 N.Y.S.2d 2 [1st Dept.1998]) [the defendant did not submit evidence to contradict court's findings and failed to demonstrate that the People's readiness statements were illusory], *lv. denied* 92 N.Y.2d 892, 680 N.Y.S.2d 56, 702 N.E.2d 841 [1998]).

*519 Indeed, the record supports an inference that the People made an initial strategic decision to proceed, if necessary, with a minimal prima facie case. At the calendar call on July 9, the prosecutor stated that July 23 was “good” for the People for hearing and trial. The filing of the certificate of readiness on July 17 was consistent with that statement. In contrast, in *Sibblies*, the People sought the injured officer's medical records within days of filing the certificate and admitted at the next court appearance that they were not ready to proceed without them. Thus, the prosecutor was required to explain the change in circumstances because if the People needed the medical records to be ready on March 28, then they could not have been ready on February 22 when the certificate of readiness was filed.

[3] Defendant's conviction for first-degree robbery under Penal Law § 160.15(3) is supported by legally sufficient evidence and is not against the weight of the evidence. There is no reason to disturb the jury's determination that the hypodermic needle used to threaten one victim during the robbery was a dangerous instrument under PL § 10.00(13) (*see People v. Nelson*, 215 A.D.2d 782, 627 N.Y.S.2d 412 [2d Dept.1995]). Contrary to defendant's contention that some showing of actual injury was required, the needle may be a dangerous instrument, “regardless of the level of injury actually inflicted” (*Matter of Markquel S.*, 93 A.D.3d 505, 506, 940 N.Y.S.2d 247 [1st Dept.2012], *lv. denied* 19 N.Y.3d 806, 2012 WL 2380912 [2012]; *see also People v. Molnar*, 234 A.D.2d 988, 652 N.Y.S.2d 186 [4th Dept.1996], *lv. denied* 89 N.Y.2d 1038, 659 N.Y.S.2d 869, 681 N.E.2d 1316 [1997]). Even if the needle was uncontaminated and was threatened to be used by the non-HIV positive defendant, the jury could have found that it was capable of causing serious puncture wounds or transmitting any harmful disease.

[4] Since defendant did not request a second independent source hearing for one of the victims, his claim that

the court should have conducted a de novo hearing is unpreserved and we decline to review it in the interest of justice (*see* CPL 470.05[2]). As an alternative holding, we find it to be without merit. The trial court's finding that the victim had an independent source for his identification is amply supported in the record. The victim viewed defendant face-to-face before and during the crime, on the street and in the store, and over an extended period of time, and gave a description that matched defendant's actual appearance. While he testified at the first ****23** trial that he was sure that he had correctly identified defendant in court because he had previously identified him in a lineup, which caused a mistrial, that testimony did not serve to negate his ***520** prior unequivocal testimony at the independent source hearing that he had an independent recollection of defendant from the crime itself.

[5] The court did not improvidently exercise its discretion in denying defendant's request for an in-court lineup (*see* *People v. Benjamin*, 155 A.D.2d 375, 548 N.Y.S.2d 6 [1st Dept.1989] *lv. denied* 75 N.Y.2d 867, 553 N.Y.S.2d 298, 552 N.E.2d 877 [1990]). The record demonstrates that the victims were able to make reliable in-court identifications without a lineup. Their consistent accounts of the robbery showed that they both had a good opportunity to view the robber's face at close range. Moreover, one victim never viewed any pretrial identification procedure, so his in-court identification could only have been based on his recollection from the night of the crime (*see* *People v. Brooks*, 39 A.D.3d 428, 834 N.Y.S.2d 527 [1st Dept.2007], *lv. denied* 9 N.Y.3d 873, 842 N.Y.S.2d 785, 874 N.E.2d 752 [2007]).

Defendant's claim that the court unduly limited the time for his questioning during voir dire is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit. Unlike *People v. Steward*, 17 N.Y.3d 104, 926 N.Y.S.2d 847, 950 N.E.2d 480 (2011), the facts of this case did not suggest a need to explore possible juror biases beyond the inquiry already performed by the court.

Defendant's claim that the court improperly prevented his counsel from asking jurors "whether the HIV allegations might affect their ability to deliberate fairly" is unpreserved and we decline to review it in the interest of justice. Nor did defense counsel complain that the court's inquiries were insufficient to properly assess whether the

prospective jurors could be fair. As an alternative holding, we find that the court adequately explored the issue with the jurors (*see e.g. People v. Dinkins*, 278 A.D.2d 43, 717 N.Y.S.2d 167 [1st Dept.2000], *lv. denied* 96 N.Y.2d 828, 729 N.Y.S.2d 448, 754 N.E.2d 208 [2001]), and the fact that the jury ultimately acquitted defendant of one of the alleged robberies involving the needle showed that the jurors were able to be fair.

Defendant's general objection failed to preserve a challenge to the procedure employed by the court in resolving his *Batson* application (*see* *People v. Richardson*, 100 N.Y.2d 847, 853, 767 N.Y.S.2d 384, 799 N.E.2d 607 [2003]; *People v. McLeod*, 281 A.D.2d 325, 722 N.Y.S.2d 507 [1st Dept.2001], *lv. denied* 96 N.Y.2d 899, 730 N.Y.S.2d 796, 756 N.E.2d 84 [2001]), and we decline to review it in the interest of justice. As an alternative holding we find that even if the court's *Batson* analysis was "less than ideal" (*People v. Smocum*, 99 N.Y.2d 418, 421, 757 N.Y.S.2d 239, 786 N.E.2d 1275 [2003]), the court did not prevent defendant from making a particularized objection. Furthermore, the court's finding that the prosecutor had given neutral, i.e., non-pretextual, grounds for the challenges, is supported by the record ***521** (*see e.g. People v. Montalvo*, 293 A.D.2d 380, 381, 740 N.Y.S.2d 609 [1st Dept.2002], *lv. denied* 98 N.Y.2d 699, 747 N.Y.S.2d 418, 776 N.E.2d 7 [2002]).

Defendant's claim that the trial court failed to instruct the jury to consider the evidence separately with respect to each robbery and that the prosecutor commingled the evidence on summation, thereby depriving him of due process and a fair trial is unpreserved, since he did not object to the prosecutor's summation, and he did not request or object to the absence of a "no commingling" charge (*see* *People v. Harris*, 29 A.D.3d 387, 813 N.Y.S.2d 904 [1st Dept.2006] *lv. denied* 7 N.Y.3d 757, 819 N.Y.S.2d 882, 853 N.E.2d 253 [2006]). We decline to review the claim in the interest of justice. As an alternative holding, we find that the court's charge as a whole "indicate[s] the independent nature of the crimes and the jury's obligation to consider them separately" (*People v. Goodfriend*, 64 N.Y.2d 695, 697, 485 N.Y.S.2d 519, 474 N.E.2d 1187 [1984]). Even though the prosecutor argued during summation that there were similarities between the two crimes, the jury acquitted defendant of one the two robberies, showing that jury was able to distinguish the evidence presented as to each incident (*see generally* *People v. Santana*, 27 A.D.3d 308, 310, 815 N.Y.S.2d 26

[1st Dept.2006], *lv. denied* 7 N.Y.3d 794, 821 N.Y.S.2d 824, 854 N.E.2d 1288 [2006]).

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