SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 22-00760

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 19, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and four counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) and, in appeal No. 2, he was convicted following the same jury trial of murder in the second degree (§ 125.25 [1]). Those charges arose from three separate shooting incidents that occurred on July 26, 2018, July 27, 2018, and August 16, 2018, each of which involved defendant being driven to the scene of the shooting in the same vehicle by the same person.

Contrary to defendant's contention in both appeals, defendant implicitly waived his rights under *People v Antommarchi* (80 NY2d 247 [1992], *rearg denied* 81 NY2d 759 [1992]) during jury selection "when, after hearing [County Court prior to jury selection] say that he was 'welcome to attend' the bench conferences, he chose not to do so" (*People v Flinn*, 22 NY3d 599, 601 [2014], *rearg denied* 23 NY3d 940 [2014]; *see People v Hymes*, 174 AD3d 1295, 1296 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]). In addition, it was not improper for the court to further advise defendant that, should he choose to attend bench conferences, he would be accompanied by court officers. "Trial courts must retain appropriate discretion to control their courtrooms and trial proceedings generally," including "decisions pertaining to courtroom security" (*People v Gamble*, 18 NY3d 386, 396-397 [2012],

rearg denied 19 NY3d 833 [2012] [internal quotation marks omitted], quoting *People v Vargas*, 88 NY2d 363, 377 [1996]), and the court here gave a curative instruction at defendant's request, advising the jury not to draw any inferences based on defendant's custodial status, which was sufficient to minimize any potential prejudice to defendant (*see People v Harvey*, 100 AD3d 1451, 1451 [4th Dept 2012], *lv denied* 21 NY3d 943 [2013]; *see also People v Diaz*, 163 AD3d 110, 119 [3d Dept 2018], *lv denied* 32 NY3d 1110 [2018]).

Contrary to defendant's further contention in both appeals, the court did not abuse its discretion in refusing to sever the charges relating to the July 26, 2018, and July 27, 2018, shootings from the charges relating to the August 16, 2018, shooting. The counts were properly joined pursuant to CPL 200.20 (2) (b), and the court therefore "lacked statutory authority to grant defendant's [severance] motion" (*People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021] [internal quotation marks omitted]).

Defendant also contends in both appeals that the verdict is against the weight of the evidence because, inter alia, the testimony of his accomplice was incredible as a matter of law. We reject that contention. The People "produced corroborative evidence sufficient to connect defendant to the commission of the offense[s]" (*People v Reome*, 15 NY3d 188, 195 [2010]), including an additional eyewitness in the first incident and identification testimony of a separate witness from surveillance video in the second incident. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and according great deference to the factfinder's resolution of credibility issues (*see People v Ptak*, 37 AD3d 1081, 1082 [4th Dept 2007], *lv denied* 8 NY3d 949 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Additionally, contrary to defendant's contention in both appeals, we conclude that the sentences are not unduly harsh or severe.

We have reviewed defendant's remaining contentions in both appeals and conclude that they do not warrant modification or reversal of the judgments. We note, however, with respect to appeal No. 1, that the certificate of conviction and the uniform sentence and commitment form contain several errors regarding the criminal possession of a weapon in the second degree counts in the consolidated indictment of which defendant was found guilty. Those documents must therefore be amended to reflect that, under count 3 of the consolidated indictment, defendant was convicted of that offense under Penal Law § 265.03 (1) (b) and that, under counts 2, 4, and 9 of the consolidated indictment, defendant was convicted of that offense under Penal Law § 265.03 (3). In addition, those documents must be further amended to reflect that the sentence of incarceration imposed on the conviction of count 3 of the consolidated indictment is to be served concurrently with the remaining sentences, and that the remaining sentences of incarceration are to be served consecutively to each

other.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court