

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

707

KA 22-00370

PRESENT: WHALEN, P.J., BANNISTER, SMITH, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISAAC ELMORE, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM 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 October 14, 2021. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree (two counts), assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), assault in the second degree (§ 120.05 [2]), and resisting arrest (§ 205.30). The conviction arises from two separate incidents: the first occurring when defendant fired a gun multiple times at three people, with one shot striking a bystander; and the second occurring on a later date when defendant brandished a gun and was arrested by the police.

Defendant's contention that the indictment should be dismissed for a speedy trial violation on the ground that the People's certificate of compliance was invalid and, thus, their statement of readiness illusory, is not preserved for our review "inasmuch as he did not move, in writing, for dismissal on that ground" (*People v Elmore*, 211 AD3d 1536, 1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]; see CPL 210.20 [1] [g]; 210.45 [1]; *People v Gates*, 238 AD2d 729, 731 [3d Dept 1997], *lv denied* 90 NY2d 905 [1997]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Contrary to defendant's contention, County Court did not abuse its discretion in denying his oral requests to be provided with the services of an investigator inasmuch as defendant failed to establish that such services were " 'necessary to his defense' " (*People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; see generally *People v Pike*, 63 AD3d 1692, 1693 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *People v Drumgoole*, 234 AD2d 888, 890 [4th Dept 1996], *lv denied* 89 NY2d 1011 [1997]). We further note that, to the extent defendant contends that the court denied his request for investigative services because of bias against him, defendant has made no showing that the court displayed actual bias (see generally *People v Anderson*, 220 AD3d 1223, 1227 [4th Dept 2023], *lv denied* 42 NY3d 1051 [2024]; *People v Sides*, 215 AD3d 1250, 1252 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]).

Contrary to defendant's contention, the court did not abuse its discretion in denying his request for an adjournment of the trial. It is well settled that " '[t]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*People v Diggins*, 11 NY3d 518, 524 [2008]; see *People v Spears*, 64 NY2d 698, 699-700 [1984]), but in "particular situations, when the protection of fundamental rights has been involved in requests for adjournments," the court's discretion is "more narrowly construed" (*Spears*, 64 NY2d at 700). Even in such situations, however, " '[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Peterkin*, 81 AD3d 1358, 1360 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]). Under the circumstances of this case, we conclude that the court did not abuse its discretion inasmuch as defendant "did not demonstrate that the requested adjournment was necessitated by factors outside his control" (*People v DeValle*, 194 AD3d 1411, 1412 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]), did not establish that the request was not "a delaying tactic" (*People v Fagan*, 12 AD3d 1080, 1081 [4th Dept 2004]), and failed to establish any prejudice that would result (see *People v Migranyan*, 237 AD3d 1109, 1109 [2d Dept 2025], *lv denied* 44 NY3d 983 [2025]).

Defendant's contention that he was denied his right to a public trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution because of alleged problems with the quality of the audio and visual streaming broadcast of his court proceedings in the court's viewing room, which was being used because of the COVID-19 pandemic, is not preserved for our review inasmuch as defendant "did not request a *Hinton* hearing on the issue" (*People v Dozier*, 238 AD3d 1523, 1525 [4th Dept 2025]; see *People v Everson*, 158 AD3d 1119, 1123 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018], *reconsideration denied* 31 NY3d 1147 [2018], *cert denied* 586 US 1198 [2019]; see generally *People v Hinton*, 31 NY2d 71, 73-76 [1972], *cert denied* 410 US 911 [1973]).

Defendant's contention that the evidence is not legally sufficient to support the element of intent with respect to the counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25

[1]) and criminal use of a firearm in the first degree (§ 265.09 [1] [a]) is not preserved inasmuch as his motion for a trial order of dismissal made at the close of proof was not "specifically directed" at the issue (*People v Gray*, 86 NY2d 10, 19 [1995] [internal quotation marks omitted]; see *People v Hines*, 97 NY2d 56, 62 [2001], rearg denied 97 NY2d 678 [2001]). In any event, intent "may be inferred from conduct as well as the surrounding circumstances" (*People v Rouse*, 34 NY3d 269, 274 [2019] [internal quotation marks omitted]), and the evidence that defendant pointed a loaded firearm at three individuals and then fired three shots in their direction " 'supports an inference that, rather than acting recklessly, defendant fired shots with the intent to kill one or more' " of the individuals (*People v Blackshell*, 178 AD3d 1355, 1356 [4th Dept 2019], lv denied 35 NY3d 968 [2020]; see *People v Forsythe*, 230 AD3d 1544, 1545 [4th Dept 2024], lv denied 42 NY3d 1079 [2025]; *People v Brown*, 120 AD3d 954, 956 [4th Dept 2014], lv denied 24 NY3d 1118 [2015]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]) with respect to the shooting incident, and resisting arrest (§ 205.30) as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree (§ 265.03 [3]) with respect to the brandishing incident as charged to the jury (see *Danielson*, 9 NY3d at 349), we conclude that "an acquittal would have been unreasonable . . . , and thus the verdict [with respect to that count] is not against the weight of the evidence" (*People v Weezorak*, 134 AD3d 1590, 1590 [4th Dept 2015], lv denied 27 NY3d 970 [2016] [internal quotation marks omitted]; see *People v Kreutter*, 121 AD3d 1534, 1535-1536 [4th Dept 2014], lv denied 25 NY3d 990 [2015]; see generally *Bleakley*, 69 NY2d at 495).

Defendant's contention that the court erred in not giving an *Allen* charge is not preserved for our review inasmuch as defendant failed to request an *Allen* charge (see CPL 470.05 [2]; *People v Wilmet*, 239 AD3d 1436, 1437 [4th Dept 2025], lv denied 44 NY3d 985 [2025]). In any event, the instruction provided by the court in response to a jury note " 'did not coerce or compel the jury to reach a verdict' " (*People v Afrika*, 278 AD2d 942, 942 [4th Dept 2000]) but, rather, was properly "open ended and encouraging" (*People v Brooks*, 183 AD3d 1231, 1232 [4th Dept 2020], lv denied 35 NY3d 1043 [2020]; see generally *People v Pagan*, 45 NY2d 725, 726-727 [1978]).

Defendant failed to preserve for our review his contention that the United States Supreme Court's holding in *Erlinger v United States* (602 US 821 [2024]) renders his sentencing as a second violent felony offender unconstitutional (see CPL 470.05 [2]; *People v Hernandez*, 43

NY3d 591, 597 [2025]; *see generally People v Finkelstein*, 28 NY3d 345, 348 [2016]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The sentence is not unduly harsh or severe.

Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.