

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

840

KA 22-01846

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT COLON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II,
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 31, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (two counts), attempted murder in the second degree, assault in the first degree, attempted robbery in the first degree (two counts) and attempted robbery in the second degree.

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, inter alia, murder in the second degree (Penal Law § 125.25 [1]), stemming from a shooting in March 2021, and, inter alia, attempted murder in the second degree (§§ 110.00, 125.25 [1]), stemming from a shooting in April 2021.

Defendant contends that the police lacked probable cause to arrest him following the April 2021 shooting and that Supreme Court erred in refusing to suppress evidence obtained as a result of the arrest. We reject that contention. When police officers arrived at the scene of the April 2021 shooting, an eyewitness reported to them that the shooter had fled in a "red Jeep" that had traveled south on a specific street before immediately turning west on another specific street. An investigator then received a broadcast from a police camera room operator that a red SUV had been involved in the shooting and had been captured on a police surveillance camera at a nearby intersection. The investigator accessed that camera, which was about a block and a half from the shooting and consistent with the path of travel of the shooter's vehicle as described by the eyewitness, and obtained a portion of a video depicting the suspect vehicle, a red and

black Ford Escape, which he then sent to the rest of his department.

At the same time, officers performed a search for any parolees who were on GPS monitoring and were in proximity to the April 2021 shooting. That search revealed that defendant had been in the area but had quickly left, immediately after the shooting. Using defendant's GPS data, the police tracked him until he came to a stop in a driveway. At that location, the police discovered the suspect vehicle and took defendant, who was seated inside, into custody. Based on the GPS and other evidence, including defendant's placement at the scene by means of his GPS ankle monitor, that he left the scene immediately after the shooting, and that he was continuously tracked to and discovered in the vehicle believed to have been used by the shooter, we conclude that the police possessed probable cause to arrest defendant (*see generally People v Neal*, 220 AD3d 1191, 1192 [4th Dept 2023], *lv denied* 41 NY3d 984 [2024]).

Contrary to defendant's contention, under the circumstances of this case, the fact that the vehicle as described by the eyewitness differed in make from that seen on surveillance video does not impact the validity of the arrest (*see generally People v Brujan*, 104 AD3d 481, 481 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *People v Glaze*, 255 AD2d 932, 933 [4th Dept 1998], *lv denied* 93 NY2d 853 [1999]; *Taylor v City of Mount Vernon*, 161 AD2d 631, 632 [2d Dept 1990]). Most notably, the vehicle observed on surveillance video generally matched the described vehicle in color, was in close physical and temporal proximity to the shooting, was traveling consistent with the path of travel described by the eyewitness, and then was continuously tracked from the scene to where it was ultimately found. To the extent that defendant contends that the People could not establish the basis of the knowledge relied upon by arresting officers without calling the camera room operator who reported that a red SUV involved in the shooting had been seen on a nearby surveillance camera, "the People are not obligated to produce any particular witness, provided they sustain their burden of coming forward with evidence showing that there was probable cause for the arrest" (*People v Parris*, 83 NY2d 342, 346 [1994]). In any event, we conclude that the People sufficiently established the basis for that knowledge through the testimony of the officer who obtained the surveillance video and sent the relevant portion to his department as well as the testimony of the officer who responded to the scene and obtained the witness report regarding the shooter's vehicle and path of travel (*see generally People v Moss*, 232 AD3d 1327, 1328 [4th Dept 2024]; *People v Myhand*, 120 AD3d 970, 973 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]). Inasmuch as we conclude that defendant's arrest was lawful, we reject defendant's contention that the court erred in refusing to suppress evidence obtained incident to the lawful arrest (*see Moss*, 232 AD3d at 1328).

We likewise reject defendant's contention that the court erred in admitting in evidence video camera footage from the interior of a store, depicting defendant and his codefendant prior to the March 30 shooting, on the ground that it was not properly authenticated. At trial, the People previously entered in evidence the undisputedly

authenticated videos from the exterior of the store, depicting defendant and codefendant walking toward and leaving it. The footage from the interior of the store temporally fit within the footage from the exterior, reflecting that it was part of an unbroken series of events. Further, the clothing and other attributes of defendant and codefendant were identical in the exterior and interior footage, and codefendant testified that he and defendant had entered that store on the day of the March 30 shooting and identified himself and defendant in still images taken from the exterior footage. Under these circumstances, we conclude that "[t]he totality of the evidence, including the relationship of the [video footage] at issue to other [video footage] that [was] undisputedly authenticated, supported the inference that the [footage] at issue depicted the relevant [events], and any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Houston*, 181 AD3d 477, 478 [1st Dept 2020], *lv denied* 35 NY3d 1027 [2020] [internal quotation marks omitted]). The consistency with the timing of and details depicted in the exterior footage as well as codefendant's identification of himself and defendant in the exterior footage provided sufficient "reasonable inferential linkages" to authenticate the interior video (*People v Patterson*, 93 NY2d 80, 85 [1999]; see generally *People v Goldman*, 35 NY3d 582, 595-596 [2020]).

Contrary to defendant's further contention, opinion testimony from an officer at trial identifying the grip of a handgun protruding from defendant's waistband in a still image did not invade the fact-finding function of the jury. The relevant testimony, which was used to identify the presence of a firearm from a grip only, implicated "the unique characteristics of [the handgun] . . . that called for professional or technical knowledge and was beyond the ken of the typical juror" (*People v Jenkins*, 228 AD3d 782, 783 [2d Dept 2024], *lv denied* 42 NY3d 938 [2024]; see generally *People v Jones*, 224 AD3d 1348, 1351 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).