



## People v. Johnson

2003 | Cited 0 times | California Court of Appeal | August 26, 2003

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A jury found appellant Ron A. Johnson guilty of conspiracy to commit murder, special circumstances murder, and attempted premeditated murder, and found true numerous special allegations. Appellant was sentenced to a total term of 90 years to life in state prison. On appeal from the judgment, he contends the trial court committed reversible error by allowing the prosecution to reopen its case and by admitting into evidence a hearsay statement. We affirm.

### FACTS

#### Summary of Prosecution Evidence

After being shot at by Pocket Hood Crips gang members, David Greer asked appellant to help him retrieve a gun. Greer and appellant were members of the rival Athens Park Blood gang. On March 11, 2000, accompanied by Brian ("K-down"), they picked up a .45-caliber handgun and some bullets for K-down's .38-caliber handgun. The three men then went to Wilmington Street in Compton. Appellant drove and Greer sat in the front seat, armed with the .45-caliber handgun. K-down was in the back seat, armed with his .38-caliber handgun. Thornell Williams and LaToya Powers were walking on Wilmington Street near 132nd Street. Appellant pulled up to them and Greer yelled: "Fuck Craps," a term of disrespect for Crips. Greer and K-downs fired a total of five shots at Williams and Powers. Williams was seriously injured and Powers was killed.

Shortly after police arrived, an unidentified woman described the shooting and gave a partial license plate of the shooter's car. Only one car, a white Mitsubishi Galant, matched the plate numbers and car description the witness provided.

Around 1:00 a.m. the next morning, police detained appellant following a traffic stop and arrested him after running his car's license plates. Appellant was driving a white Mitsubishi Galant.

Appellant waived his Miranda rights <sup>1</sup> and confessed to participating in the drive-by shooting and later showed police where the guns were hidden.



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### Summary of Defense Evidence

Appellant neither testified nor presented evidence in his defense.

### PROCEDURAL BACKGROUND

Appellant was charged by information with conspiracy to commit murder, murder of LaToya Powers, and attempted premeditated murder of William Thornell.<sup>2</sup> As to the count of murder, special circumstances were alleged appellant killed Powers to further street gang activities and by means of discharging a gun from a vehicle.<sup>3</sup> In connection with all counts, the information alleged appellant personally and intentionally discharged a firearm and the offenses were committed for the benefit of a street gang.<sup>4</sup> Appellant pleaded not guilty. Trial was by jury.

At trial, to prove the street gang special circumstance and enhancement allegations, the prosecution offered into evidence certified copies of "minute orders"<sup>5</sup> showing Anthony Greer<sup>6</sup> and Paul Thomas were each convicted of witness intimidation. A gang expert testified Greer and Thomas were part of the Athens Park Blood gang, whose members commit numerous crimes including witness intimidation for the benefit of the gang.

After both sides rested, defense counsel moved for a judgment of acquittal,<sup>7</sup> arguing the evidence was insufficient to support findings of the street gang special circumstance and enhancements. Specifically, counsel maintained the Greer and Thomas convictions were not predicate offenses within the meaning of Penal Code section 186.22.<sup>8</sup> They occurred after the offenses for which appellant was being tried, and thus did not prove a "pattern of criminal gang activity."<sup>9</sup>

Initially the prosecution contested defense counsel's argument. After researching the issue, the prosecution conceded defense counsel was correct in light of *People v. Godinez*.<sup>10</sup> The prosecution then sought to reopen its case to present evidence of a predicate offense satisfying the statutory definition. Over defense counsel's objection, the court permitted the prosecution to reopen. The prosecution then introduced evidence relating to the 1999 conviction of Arzell Spencer, an Athens Park Blood gang member, for possession for sale of marijuana. The evidence of Greer's and Thomas's convictions for witness intimidation was excluded.

The jury convicted appellant as charged and found true the special circumstances and enhancement allegations.

The court denied appellant's new trial motion and sentenced him to an aggregate term of imprisonment of 90 years to life as follows: a term of 25 years to life for conspiracy to commit murder, enhanced by 25 years to life for gun use and a consecutive term of 15 years to life for murder, enhanced by 25 years to life for gun use.<sup>11</sup> Two concurrent terms of 25 years to life were imposed for the gang enhancements.<sup>12</sup> The court stayed sentencing on the attempted premeditated murder



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conviction under Penal Code section 654.

### DISCUSSION

The prosecution was properly permitted to reopen.

Appellant contends the trial court prejudicially abused its discretion by allowing the prosecution to reopen its case to prove the street gang special circumstance and enhancement allegations. We disagree.

A trial court has broad discretion to permit the reopening of a case for the introduction of additional evidence. This court will overturn the ruling only if it exceeds the bounds of reason or results in a manifest miscarriage of justice.<sup>13</sup> In reviewing the court's discretion the factors to be considered include the stage of the proceedings when the motion was made, the moving party's diligence (or lack thereof) in discovering the new evidence, the prospect the jury would accord the evidence undue emphasis, and the significance of the evidence.<sup>14</sup>

Appellant claims the trial court abused its discretion because: (1) the motion to reopen was made late in the proceedings; (2) the motion was necessitated by the prosecution's "inexcusable ignorance of the law" not by its inadvertence or mistake; (3) and the testimony of a second gang expert following reopening prejudiced the jury against appellant. Relying on *People v. Belton*<sup>15</sup> appellant also asserts the court committed error of constitutional proportions by permitting the prosecution to reopen after defense counsel moved for a judgment of acquittal and stated specific grounds. Appellant's argument is as follows: To ensure the court understood the grounds for the motion, defense counsel explained the inadequacies of the predicate offense evidence, thereby educating the prosecution as to the defects in its case. By affording the prosecution the opportunity to reopen to cure the defects, the court had effectively enlisted defense counsel to assist in the prosecution of appellant, which also lessened the prosecution's burden of proof. As a result, appellant was denied his due process and jury trial rights.

It is well settled the trial court always has discretion to reopen after an acquittal motion if the court is convinced "the failure to present evidence on the issue was a result of 'inadvertence or mistake on the part of the prosecutor and not from an attempt to gain a tactical advantage over [the defendant].' [Citation.]"<sup>16</sup> Regardless of appellant's characterization of the prosecution's conduct, it was clearly a mistake and not an effort to secure a tactical advantage over appellant.<sup>17</sup>

Appellant failed to object to the second gang expert's testimony on the ground of undue prejudice he now asserts on appeal.<sup>18</sup> This evidentiary claim is waived.<sup>19</sup>

Finally, *Belton* does not support appellant's claim he was denied due process and the right to a jury trial. One of the issues in *Belton* was whether a defendant should be compelled to provide a



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statement of grounds in moving for a judgment of acquittal.<sup>20</sup> Our Supreme Court determined a defendant was not required to reveal the grounds of the motion and thereby enlighten the prosecution.<sup>21</sup> But Belton did not hold in electing to provide grounds for the acquittal motion, the defendant becomes constitutionally entitled to preclude the prosecution from reopening its case.

We conclude the trial court acted well within its discretion in permitting the prosecution to reopen its case.

The hearsay statement was properly admitted as an excited utterance.

In the middle of trial, the court held a hearing pursuant to Evidence Code section 402, to determine the admissibility of a witness's hearsay statement to a police officer of a partial license plate number. A woman, who had witnessed the drive-by shooting, related the partial license plate number shortly after the officer's arrival at the scene. The woman refused to identify herself. The prosecution argued the statement qualified as an excited utterance under Evidence Code section 1240.<sup>22</sup> The defense counsel countered there was insufficient foundational evidence the statement was made spontaneously, in the wake of a startling event. The court ruled the statement was admissible under the excited utterance exception to the hearsay rule.

Appellant contends the trial court committed prejudicial error by admitting into evidence the unknown witness's statement. He first argues the foundational elements of an excited utterance were not met. According to appellant, the 25 to 45 minute lapse between the shooting and the witness's statement and her lack of fear while speaking to the officer, indicated her statement was not spontaneous or unreflecting. Appellant also maintains even if the statement were admissible on evidentiary grounds, his constitutional rights were violated. The witness's refusal to identify herself rendered the hearsay statement unreliable, thereby depriving him of his rights to confrontation and due process. And, appellant asserts, because this statement "was the only independent evidence linking" appellant to the shooting, its admission into evidence was reversible error.

The trial court did not abuse its discretion in finding the prosecution established the foundational elements of Evidence Code section 1240, by a preponderance of the evidence. After witnessing a shooting, the passage of 45 minutes is not so great a time interval to dispel the shock or influence of the startling event. Moreover, the officer testified the witness appeared "excited or stressed" when she spoke.<sup>23</sup>

The lack of the witness's identity is of no consequence. Unlike other hearsay exceptions, an excited utterance does not require the declarant to be identified, because its foundational elements guarantee its trustworthiness.<sup>24</sup> Given its inherent reliability, an excited utterance does not violate a defendant's right to confrontation.<sup>25</sup>

In any event, there is no possibility the trial court's evidentiary ruling prejudiced appellant, whether



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harmless error is judged under the state standard for evidentiary rulings, which we believe is applicable here,<sup>26</sup> or the elevated standard, which is required if a ruling completely curtails the right of confrontation.<sup>27</sup> The testimony of the surviving victim, Thornell Williams, was corroborated by appellant's confession.

### DISPOSITION

The judgment is affirmed.

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We concur:

WOODS, J.

MUNOZ (AURELIO), J.<sup>28</sup>

1. Miranda v. Arizona (1966) 384 U.S. 436.
2. Penal Code sections 182, subdivision (a)(1); 187, subdivision (a); 664 and 187, subdivision (a).
3. Penal Code section 190.2, subdivisions (a)(21), (22).
4. Penal Code sections 12022.5, subdivision (a)(1); 12022.53, subdivisions (b), (c), (d), and (e)(1); 186.22, subdivisions (b)(1) and (b)(4).
5. There were also "minute orders" reflecting the sentencing of Greer and Thomas on their convictions.
6. Anthony Greer is David Greer's brother.
7. Penal Code section 1118.1.
8. Penal Code section 186.22, subdivision (b)(1) prescribes certain consequences when crimes are committed "for the benefit of, at the direction of, or in association with any criminal street gang." Penal Code section 186.22, subdivision (f) defines a "criminal street gang" as "any ongoing, organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of [specified criminal offenses], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." According to Penal Code section 186.22, subdivision (e), "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [specified offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior



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offense, and the offenses were committed on separate occasions, or by two or more persons . . . ." (See *People v. Gardeley* (1996) 14 Cal.4th 605, 609- 610.)

9. The record is not entirely clear, but it appears the convictions of Greer and/or Thomas were in March or April 2001. Appellant committed the instant offenses on March 11, 2000.

10. *People v. Godinez* (1993) 17 Cal.App.4th 1363, criticized on other grounds in *People v. Russo* (2001) 25 Cal.4th 1124, 1134.

11. Intentionally and personally discharging a firearm and proximately causing great bodily injury or death under Penal Code section 12022.53, subdivision (d).

12. Penal Code section 186.22, subdivisions (b)(1) and (b)(4).

13. Penal Code section 1094; *People v. Rodriguez* (1984) 152 Cal.App.3d 289, 294.

14. *People v. Marshall* (1996) 13 Cal.4th 799, 836; *People v. Goss* (1992) 7 Cal.App.4th 702, 706.

15. *People v. Belton* (1979) 23 Cal.3d 516 (Belton).

16. *People v. Goss*, *supra*, 7 Cal.App.4th 702, 708.

17. See, e.g., *People v. Goss*, *supra*, 7 Cal.App.4th 702, 705, 707-708; *People v. Ceja* (1988) 205 Cal.App.3d 1296, 1304.

18. Defense counsel only objected to the second gang expert testifying on the ground the prosecution violated the discovery requirements of Penal Code section 1054 et seq. Defense counsel did not seek a continuance but requested the court charge the jury with modified CALJIC No. 2.28 on the prosecution's untimely disclosure of evidence of Arzell Spencer's conviction.

19. Evidence Code section 353; *People v. Mayfield* (1997) 14 Cal.4th 668, 741, 752; *People v. Visciotti* (1992) 2 Cal.4th 1, 51-52.

20. *People v. Belton*, *supra*, 23 Cal.3d 516, 521.

21. *People v. Belton*, *supra*, 23 Cal.3d 516, 521- 523.

22. Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

23. See *People v. Raley* (1992) 2 Cal.4th 870, 893- 894; *People v. Poggi* (1988) 45 Cal.3d 306, 319- 320.



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24. People v. Anthony O. (1992) 5 Cal.App.4th 428, 436.

25. People v. Pensinger (1991) 52 Cal.3d 1210, 1266.

26. People v. Cunningham (2001) 25 Cal.4th 926, 998- 999; People v. Watson (1956) 46 Cal.2d 818, 836.

27. Delaware v. Van Arsdall (1986) 475 U.S. 673, 680; Chapman v. California (1967) 386 U.S. 18, 24.

28. Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

