P. v. Fells  
03/30/10

**P. v. Fells**

Filed 3/25/10 P. v. Fells CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

|  |  |
| --- | --- |
| THE PEOPLE,  Plaintiff and Respondent,  v.  EDWARD CHARLES FELLS,  Defendant and Appellant. | 2d Crim. No. B208505  (Super. Ct. No. TA085309)  (Los Angeles County) |

Edward Charles Fells appeals the judgment following his conviction for [first degree murder](http://www.mcmillanlaw.com/) (Pen. Code,  187/189)**[[1]](https://www.fearnotlaw.com/wsnkb/articles/p_v_fells-34979.html" \l "_ftn1" \o ")** and attempted premeditated murder ( 664/187). The jury found true allegations that he personally discharged a firearm causing death and great bodily injury ( 12022.53, subds. (b), (c) & (d)), committed the offenses for the benefit of a street gang ( 186.22, subd. (b)(1)(B)), and served two prior prison terms ( 667.5, subd. (b)). He claims the [trial court](http://www.fearnotlaw.com/) erred in the admission of evidence, denial of a motion for mistrial and motion to appoint counsel, and failure to rule on a motion for new trial. He also claims error in the computation of presentence custody credits. We will order a correction in presentence credits. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

On the morning of June 10, 2006, Deshawn Leslie, Ozzie Davis, and Davion Harvey went to a gas station to buy cigars. While at the gas station, they saw Fells across the street. Fells drove away. Leslie, Davis and Harvey were all members of the criminal street gang known as the "Tree Top" Piru gang. Fells was a member of a rival gang known as the "Fruit Farm" Piru gang.

Leslie, Davis and Harvey began walking down a street which was within the territory of the Tree Top gang. Fells approached, pointed a semiautomatic handgun, and fired 15 rounds at the three men. Davis was killed and Leslie was seriously wounded by the gunfire. Harvey escaped injury by ducking behind a car. Harvey, who was armed with a revolver, pulled out his gun and fired at Fells as Fells ran away.

Initially, Leslie refused to cooperate with the police, fearing gang retaliation. A few days after the shooting, however, Leslie identified Fells as his assailant and the person who shot Davis. Leslie had known Fells for many years when their respective gangs were friendly. Leslie also told police that he and Harvey had been involved in another gang shooting approximately one month after the charged offenses, and that Harvey had been shot and killed in yet another gang-related shooting shortly thereafter.

One week prior to the November 8, 2006, preliminary hearing, Leslie received several telephone calls threatening to kill him and his family if he "snitched" on Fells. On the day of the preliminary hearing, Fells placed two telephone calls to

leaders of both the Tree Top and Fruit Town gangs during which they discussed unsuccessful attempts to convince Leslie not to testify at the hearing and, later, condemning Leslie for his testimony that Fells was the shooter. At trial, Leslie invoked his Fifth Amendment right to remain silent and his preliminary hearing testimony was read into the record.

Testifying on his own behalf, Fells denied shooting Davis or Leslie, denied knowing Leslie or Harvey but admitted he was acquainted with Davis. Fells testified that he did not tell anyone to threaten Leslie before his preliminary hearing or at any time.

A gang expert testified that Fells was a member of the Fruit Town Piru gang, and discussed the extensive criminal activities of members of that gang which included murder, drive-by shootings, and armed robbery. The expert testified that the Fruit Town gang and the Tree Top gang to which Leslie, Davis and Harvey belonged were rivals. He also testified that gang members retaliated against rival gangs through violence but never by "snitching" to the police or testifying in court against a member of a rival gang. A gang member who "snitches" to the police about another gang member, even a member of a rival gang, is in danger of being killed.

After a jury trial, Fells was convicted of the murder of Ozzie Davis, the premeditated attempted murder of Deshawn Leslie, and the jury found true allegations of all the charged enhancements. The trial court sentenced Fells to a total of 90 years to life, consisting of consecutive terms of 25 years to life for the murder plus 25 years to life for discharging a firearm causing death, 15 years to life for the attempted murder plus 25 years to life for discharging a firearm causing great bodily injury. The other enhancements were dismissed.

DISCUSSION

*No Error in Evidentiary Rulings*

1. *Admission of Telephone Conversations*

Fells contends the trial court abused its discretion and violated his constitutional right to a fair trial by admitting evidence of the two telephone calls he made to fellow gang members on the day of his preliminary hearing. He claims the probative value of the evidence was substantially outweighed by its prejudicial effect. (Evid. Code,  352.)

All relevant evidence is admissible (Evid. Code,  351), but a trial court has discretion to exclude relevant evidence when its prejudicial effect substantially outweighs its probative value (Evid. Code,  352). Evidentiary rulings are reviewed for abuse of discretion and a trial court's decision will be upheld unless it exceeds the bounds of reason. (E.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Scheid* (1997) 16 Cal.4th 1, 14.) Here, there was no abuse of discretion.

On the day of the preliminary hearing, Fells placed two telephone calls to a leader of the Tree Top gang referred to as G-Wayne, and a leader of the Fruit Town gang referred to as Don Juan. During the first call, Fells stated that he hoped Leslie would change his story and not implicate Fells in the charged offenses. He asked G-Wayne if the gang had an opportunity to "holler" at Leslie. G-Wayne answered that they had talked to Leslie, but that Leslie was protected by the police and could not be approached. During a second call after Leslie had testified, Fells stated that Leslie had identified him as the shooter and complained that such testimony violated gang rules against snitching. Fells said he wanted to retaliate against Leslie.

Fells does not claim the evidence was irrelevant, but argues that its prejudicial effect substantially outweighed any probative value. (Evid. Code,  352.) Fells argues that he did not admit committing the crimes during the telephone conversations, but that his apparent willingness to intimidate witnesses was inflammatory and highly prejudicial.

We conclude that the attempt by Fells to have gang leaders intimidate witness Leslie was highly probative to evaluating the credibility of Leslie and to show consciousness of guilt. Testimony that a witness fears retaliation relates to that witness's credibility and is admissible. (*People v. Malone* (1988) 47 Cal.3d 1, 30.) It is not necessary to show that threats against a witness were made by the defendant personally, or that the witness's fear of retaliation is directly linked to the defendant. (*People v. Guerra, supra,*37 Cal.4th at pp. 1141-1142.) A defendant's willful attempt to suppress evidence is also admissible to prove consciousness of guilt. (*People v. Williams* (1997) 16 Cal.4th 153, 200-201; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) And, the challenged evidence cannot be considered "prejudicial" for purposes of Evidence Code section 352. That section concerns evidence that uniquely tends to evoke an emotional bias against defendant *without* regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Fells also argues that the use of foul language in the telephone conversations was prejudicial. We disagree. "Jurors today are not likely to be shocked by offensive language and any risk of prejudice here was outweighed, as the trial court determined, by the probative value of the evidence." (*People v. Edelbacher, supra,*47 Cal.3d at p. 1009.)

The telephone conversations were also probative of the gang involvement in the case and to establish the [gang enhancement](http://www.mcmillanlaw.com/). Evidence of the defendant's gang affiliation can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to the guilt of the charged crime. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Here, the gang evidence was relevant to show motive and intent. Fells claims the evidence was merely cumulative of the gang expert's testimony, but evidence is not deemed cumulative when it might assist the jury in understanding and evaluating other evidence. (*People v. Scheid, supra,*16 Cal.4th at pp. 14-16.) Additional gang evidence was probative to provide a foundation for the expert's testimony to explain that the offenses were fundamentally gang motivated. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

Fells' claims of federal constitutional error, which are dependent on his state law error, also fail. The application of the rules of evidence, even violation of state evidentiary rules, generally does not rise to the level of federal [constitutional error](http://www.fearnotlaw.com/). (See *People v. Benavides* (2005) 35 Cal.4th 69, 91; *People v. Carter, supra*, 30 Cal.4th at p. 1196.)

2. *Limitation on Cross-Examination*

Fells contends the trial court abused its discretion and abridged his constitutional right to present a defense by preventing police detective Ramirez to testify on cross-examination as to whether Harvey was a suspect in an unrelated homicide. Fells argues that such testimony was probative to impeach Leslie's version of events and to support a self-defense theory. We disagree.

The confrontation clause gives a defendant the right to cross-examine witnesses against him, but only "'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Kentucky v. Stincer* (1987) 482 U.S. 730, 739; see *Davis v. Alaska* (1974) 415 U.S. 308, 318.) Courts may limit cross-examination regarding "collateral credibility issues." (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) There will be a constitutional violation only if a reasonable jury might have received a significantly different impression of the witness's credibility if the excluded cross-examination had been permitted. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

Here, the evidence was of minor probative value, if any, and could have confused the jury and diverted its deliberations into a speculative and collateral issue. There was no basis for a reasonable jury to infer that evidence of unrelated criminal activity by Harvey would impeach the credibility of Leslie, or create any basis for a defense of self-defense. There was no evidence that Fells knew of Harvey's gang affiliation, knew that Harvey had carried a gun, or at any time believed that Harvey posed a threat to him. Also, Fells' defense was not self-defense. He claimed he was not present at the shooting. Also, there was other evidence that Harvey was armed at the time of the offenses and returned fire and that he was involved in another drive-by shooting and had been shot himself in another gang-related incident.

*No Error Regarding a Spectator's Comment to Jurors*

Fells contends that the court abused its discretion, and violated his right to a trial by impartial jurors, when it denied his motion for mistrial following a statement made to jurors by a courtroom spectator. He further contends that the court erred by failing to conduct an adequate inquiry into the incident. We disagree.

Generally, when a juror obtains information about the case apart from the evidence received at trial, there is a rebuttable presumption that the defendant was prejudiced by the possibility of juror bias. (*People v. Nesler* (1997) 16 Cal.4th 561, 578-579.) There is no presumption of prejudice, however, when the subject matter of the communication did not involve the pending case. (*People v. Cobb* (1955) 45 Cal.2d 158, 161; *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1485.) Juror bias exists if the extraneous material is inherently likely to have influenced the jury or if, based on all circumstances, it is substantially likely jurors would be unable to render a verdict based solely upon the evidence. (*Nesler,* at pp. 582-583; *In re Carpenter*(1995) 9 Cal.4th 634, 653.) We accept trial court credibility determinations and findings on questions of fact supported by substantial evidence, but independently determine whether prejudice arose from the juror misconduct. (*Nesler*, at p. 582; *People v. Ault* (2004) 33 Cal.4th 1250, 1263.)

In this case, Juror No. 8 informed the trial court that, while she and Jurors Nos. 2, 9, 10, 11, and alternate 2 were leaving the courthouse, two spectators walked by. One of the spectators stopped and stated to the jurors, "God bless you all." The spectator and his companion then walked away. The court unsuccessfully attempted to identify the spectator and his companion, and there was no information as to whether they had a connection to either the victims, Fells, or any witnesses. When questioned by the court, Juror No. 8 stated that she might be more inclined to vote for acquittal because of the incident regardless of the evidence. She indicated that she believed the statement, "God bless you," indicated the spectator intended to keep an eye on her. She also stated that she was apprehensive because the case involved gangs and witness intimidation. Juror No. 8 was discharged.

The trial court also questioned the other jurors who were present when the remark was made. Juror No. 9 did not hear the remark. Juror No. 11 indicated that the comment surprised and unnerved him but that it would not affect his impartiality. Juror No. 2 said it was "scary" because families of both Fells and the victim attended the trial, but she did not know whether the spectator who made the comment had a relationship with either family. She also stated that the incident would not be a problem for her. Juror No. 10 said he also was nervous because the families attended the trial, but the spectator's comment did not bother him and would not affect his fairness. Alternate Juror No. 2 did not hear the remark.

Fells moved for a mistrial based on the incident. The trial court denied the motion. The court stated that some jurors may have been sensitive to or startled by the spectator's remark, but that such a reaction stemmed from the apprehension and anxiety the jurors felt due to the involvement of gangs in the case. The court stated that the comment was not threatening, was not followed by any other questionable conduct, and did not seriously upset any juror other than Juror No. 8.

Based on this record, there is no reasonable possibility that the spectator's comment was inherently and substantially likely to have influenced the jury, or that there was any misconduct of a nature to show a substantial likelihood of actual bias. The comment by the spectator was minor and insignificant and nothing supports Fells' claim that he was denied an impartial jury.

We also see no merit in the argument by Fells that the trial court should have conducted a more extensive inquiry of the incident. The court's discussion with all the jurors involved was adequate and complete under the circumstances.

*No Error in Denial of Motion for Counsel*

Fells contends the trial court's denial of his request for counsel to assist him in filing a motion for new trial violated his constitutional [rights to counsel](http://www.mcmillanlaw.com/) and a fair trial. We disagree.

When a criminal defendant who has waived his right to counsel and elected to represent himself seeks to revoke that waiver and have counsel appointed, the trial court has discretion to grant or deny the request. (*People v. Lawrence* (2009) 46 Cal.4th 186, 188, 192.) The trial court must base its ruling on the totality of circumstances, including factors such as the defendant's history of substituting counsel, the reasons defendant gave for requesting reappointment of counsel, the stage of the trial court proceeding, any disruption or delay that might reasonably result from granting the request, and the likelihood the defendant would be effective if required to proceed as his or her own attorney. (*Ibid.*; *People v. Gallego* (1990) 52 Cal.3d 115, 163-164.)

In this case, Fells was represented by counsel throughout the trial. After the verdict, counsel prepared and filed a motion for new trial. On the day the motion for new trial was set for hearing, November 29, 2007, Fells made a motion under *Faretta v. California* (1975) 422 U.S. 806 to remove appointed counsel and represent himself. Fells complained that he was dissatisfied with the new trial motion prepared by counsel and filed almost two months earlier, and cited other perceived deficiencies in his trial defense. The trial court granted the *Faretta* motion after explaining the pitfalls of self-representation. (See *People v. Lawrence, supra,* 46 Cal.4th at pp. 195-196.) The court also continued the sentencing hearing. Thereafter, the court continued the sentencing hearing several more times when Fells requested more time to prepare his own motion for new trial.

On May 22, 2008, five months after the *Faretta* motion was granted,Fells requested yet another continuance stating that he had not yet finished his new trial motion. The trial court denied this request and imposed sentence.

There was no abuse of discretion. Fells failed to articulate a compelling reason for revoking his *Faretta* waiver, there was no indication that Fells had made any progress in drafting his own motion for new trial, and his pattern of repeated continuance requests supports the conclusion that his purpose was to delay the proceedings. In addition, Fells could have simply refiled the new trial motion prepared by his counsel several months earlier. "Buyer's remorse may not be an illegitimate reason for wanting to revoke a *Faretta* waiver, but neither is it a compelling one." (*People v. Lawrence, supra,* 46 Cal.4th at p. 195.) The record amply supports the conclusion that Fells was simply trying to manipulate the system.

Fells also claims the trial court should have ruled on the motion for new trial his prior counsel had filed eight months earlier. A defendant has a right, prior to entry of judgment, to move for a new trial on various statutory grounds. ( 1181, 1191.) If a trial court refuses or neglects to hear and determine such a motion, the defendant is entitled to a new trial if that action results in prejudice. (*People v. Braxton* (2004) 34 Cal.4th 798, 817; 1202.) If prejudice cannot be determined from the record, the appellate court may remand for a belated hearing on the motion. (*Braxton,* at pp. 817-820.)

Here, the trial court did not refuse or neglect to hear and determine a motion for new trial. Fells repudiated and withdrew the motion prepared by counsel, insisted that he would prepare his own motion, and repeatedly stated that he was doing so. The trial court gave Fells ample time to prepare a new motion or to refile the previous motion. After its patience had been exhausted in May 2008, the trial court acted properly in denying any further continuances. A trial court has discretion to deny a continuance and its ruling will be disturbed on appeal only if there has been a manifest abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037; *People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126.)

In addition, at the May 22, 2008, sentencing hearing, Fells expressly objected to the proceeding and refused to participate or request a ruling on the earlier new trial motion. By failing to press for a hearing or informing the court that he desired a ruling on the earlier motion, Fells waived the right to raise the issue on appeal. (*People v. Braxton, supra,* 34 Cal.4th at pp. 813-814.)

In any event, defendant was not prejudiced. There is no reasonable probability the trial court would have granted a new trial based on the motion prepared by prior counsel. (*People v. Braxton, supra,* 34 Cal.4th at p. 818.) That motion challenged the trial court's admission of Fells' telephone calls on the day of the preliminary hearing, failure to grant a mistrial due to the trial spectator's comment to jurors, and allowance of evidence of Fells' prior misdemeanors and arrests for purposes of impeachment. Those grounds for new trial lacked substantial merit.

*Presentence Custody Credit*

Fells contends the trial court erred in computing his presentence custody credit. He correctly argues that he is entitled to the number of days in custody including the day of his arrest and the day of sentencing. ( 2900.5; *People v. Smith*(1989) 211 Cal.App.3d 523, 525-527.) Accordingly, the record shows he is entitled to 704 days, seven days more than the 697 days credited by the trial court. Respondent does not contest the applicable law or the 704-day calculation, but argues the claim cannot be considered on appeal because Fells failed to make a request for correction in the trial court. ( 1237.1.)

In *People v. Acosta* (1996) 48 Cal.App.4th 411, 420-427, the court held that the issue of miscalculation of credits may be considered on appeal provided it is not the sole ground for appeal. Later, the Supreme Court stated in dictum that a Court of Appeal also has discretion to decline to consider the issue. (*People v. Mendez*(1999) 19 Cal.4th 1084, 1100-1101.) Here, because there is no dispute over the proper amount of custody credit, we will exercise our discretion to consider the issue, and conclude that Fells is entitled to seven additional days of presentence custody credit for a total of 704 days.

The superior court is directed to prepare and forward to the [Department of Corrections](http://www.fearnotlaw.com/) a modified abstract of judgment reflecting the award to Fells of 704 days of presentence custody credit. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Allen J. Webster, Jr., Judge

Superior Court County of Los Angeles

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Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Robert David Breton, Deputy Attorney General, for Plaintiff and Respondent.

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**[[1]](https://www.fearnotlaw.com/wsnkb/articles/p_v_fells-34979.html" \l "_ftnref1" \o ")** All statutory references are to the Penal Code unless otherwise stated.

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