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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN E. MILLER,

Defendant and Appellant.

B231587

(Los Angeles County
Super. Ct. No. KA091184)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Bruce F. Marrs, Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette and Lance E. Winters, Assistant Attorneys General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Allen E. Miller guilty of resisting arrest and he was sentenced to three years in state prison. Miller contends on appeal that his statements during a custodial interrogation should not have been admitted at trial because he was not informed of his *Miranda*¹ rights before making them. We find the statements were properly admitted for impeachment purposes and affirm the judgment.

FACTS

By information dated September 24, 2010, Miller was charged with resisting an executive officer (Pen. Code, § 69),² attempted firearm removal (§ 148, subd. (d)) and escape by persons in custody by force or violence (§ 4532, subd. (b)(2)). He pleaded not guilty.

At trial, the prosecution presented testimony that Miller appeared in Department 5 of the El Monte courthouse on June 14, 2010, for a hearing regarding a probation violation. Because Miller had repeatedly failed to complete the anger management classes that were a condition of his probation, the judge asked David Misch, a Los Angeles County Sheriff's Deputy assigned to his courtroom, to remand Miller into custody.

Misch testified that when he grabbed Miller's left wrist with his left hand to take him into custody, Miller moved away from him. Misch then reached underneath Miller's left arm and said, "no, come here." At that point, Miller spun around to face Misch and grabbed Misch's left wrist. Misch pulled him facedown on to the floor and straddled him. Miller turned over and began to swing at Misch with his right hand, which was free. Misch hit Miller in the face approximately three times in an effort to subdue him. Miller responded, "Fuck you," when Misch requested he give him his right hand to be handcuffed and continued to struggle. Misch then felt a tapping on his right leg belt area. When he saw that the strap on his gun holster had come undone and that Miller's right hand was reaching up to the gun, Misch immediately let go of Miller's left hand, grabbed

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

² All further section references are to the Penal Code.

Miller's right hand off his holster, and administered the department-approved carotid restraint maneuver.

Misch testified that Miller never lost consciousness and continued to struggle until several other deputies came to his aid. Misch also testified that he had worked as a police officer for 20 years, some of which he served at the jail ward of the Los Angeles County Medical Center. While there, he personally dealt with people in custody who had seizures and he did not believe Miller was having a seizure at the time of the struggle.

In his defense, Miller presented testimony from his doctor of 28 years that he has suffered epileptic seizures all of his life. Miller suffers approximately five seizures a year, including grand mal seizures, which involve loss of consciousness and intense shaking, as well as petit mal seizures, which involve confusion, loss of conversation and incoherence but no shaking. Miller's doctor testified that petit mal seizures often quickly subside. Miller's mother testified that Miller is 45 years old and has always lived with her in their home in Rosemead, California. She has witnessed many of Miller's seizures. She stated that Miller sometimes had "travelling seizures" where he would walk around the house during a seizure and pick things up and set them down, but not know what he was doing. Miller's mother drove him to the hearing that day because he did not have a driver's license. She testified that he was nervous and did not have anything to eat that day. She also testified that in her experience, he will fight if he is being held down during a seizure.

Miller testified on his own behalf and denied trying to resist arrest. When the judge ordered him to be remanded into custody, he said he only turned around to give his mother his paperwork, glasses, cell phone, keys, wallet and bus pass. According to Miller, "the next thing that I know is that I'm being pulled back and then I'm going down to the ground, and then I come to at the hospital." Miller testified that he did not remember reaching for Misch's gun but that it would be "pretty dumb" "trying to reach for a gun and trying to shoot using a gun because I don't even trust myself for shaving." Miller testified that he did not remember anything happening after he was pulled down to

the ground by Misch including giving an interview to anyone before he arrived at the hospital. Miller testified that he had forgotten to take his medication that day.

On rebuttal, the People presented testimony from Sergeant Gordon Crowl, who testified that he interviewed Miller immediately following the incident “[s]trictly for administrative purposes, when force is used by a deputy, to insure that the force was reasonable.” Miller was not given any *Miranda* warnings. During the interview, which was recorded, Miller told Crowl that “four deputies kicked my ass.” When Crowl asked him whether he resisted in any way, Miller said he didn’t know but “[he] could have.” Miller did not mention having a seizure during the interview and it did not appear to Crowl that Miller recently had a seizure. Crowl testified that Miller appeared coherent and was not confused. Crowl’s interview with Miller lasted about five minutes and occurred two or three minutes after the incident in Department 5.

After his interview with Crowl, Miller was transported to the Greater El Monte Hospital to determine the extent of his injuries. There, a doctor examined him and cleared him to be booked.

The jury found Miller guilty of resisting an executive officer but were hopelessly deadlocked as to the charge for attempted firearm removal. The trial court declared a mistrial as to that count and dismissed it. Defense counsel’s motion for a judgment of acquittal pursuant to section 1118.1 as to count 3, escape from custody by force or violence, was granted by the trial court. Miller was sentenced to three years in state prison. He timely filed a notice of appeal.

DISCUSSION

Miller contends on appeal that his Fifth Amendment rights were violated when his interview with Crowl was admitted into evidence despite the fact that he had not been provided any *Miranda* warnings and had not waived such rights. While we agree that Miller’s statements to Crowl could not be admitted as part of the People’s case-in-chief, we find they were properly admitted for impeachment purposes on rebuttal. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1194 (*Peevy*).)

Peevy held that a statement deliberately obtained in violation of *Miranda* safeguards, but otherwise voluntary, is admissible for impeachment purposes. The high court explained in *Peevy* that excluding statements taken in violation of the *Miranda* rule both to prove guilt and for impeachment would give unfair advantage to testifying defendants, and provide little additional deterrence of police misconduct. In particular, “ ‘[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.’ ” (*Peevy, supra*, 17 Cal.4th at p. 1194, quoting *Harris v. New York* (1971) 401 U.S. 222, 226.)

Miller argues that *Peevy* does not apply since his “statements were not appropriate to be introduced as impeachment because they were not inconsistent, did not directly contradict his prior statements, and because there was no reasonable basis to think that he was untruthful.” He contends “the general rule is that the testimony of a witness indicating that he does not remember an event is not inconsistent with a prior statement describing the event—inconsistency in effect, rather than contradiction in exact terms, is the test for admitting a witness’ prior statement as a prior inconsistent statement.” Miller’s reliance on *People v. Hovarter* (2008) 44 Cal.4th 983, 1008-1009, and *People v. Ledesma* (2006) 39 Cal.4th 641 to support this argument is misplaced as neither address the admissibility of statements taken in violation of *Miranda* for impeachment purposes. Instead, they both address whether prior inconsistent statements can override hearsay objections.

Here, there is no dispute that Miller’s statements to Crowl were voluntary. Accordingly, his interview with Crowl is admissible under *Peevy* to impeach his testimony that he suffered an epileptic seizure and could not remember any of the events leading up to his arrival at the hospital. In short, Miller testified that he was not conscious during or after his struggle with Misch. His statements to Crowl directly contradict that testimony. They tended to prove that Miller was conscious during and after the incident and knew what had happened. The statements were properly admitted in rebuttal to the defense case. As a result, we need not address Miller’s alternative

argument that he received ineffective assistance of counsel when his trial counsel failed to file a motion to suppress on *Miranda* grounds. (*People v. Memro* (1995) 11 Cal.4th 786, 834.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.