Filed 5/29/12 P. v. Miller CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FRANK MILLER, Defendant and Appellant.	B230153 (Los Angeles County Super. Ct. No. SA073582)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dabney, Judge. Affirmed.

Gideon Margolis, 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, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Frank Miller appeals from a judgment which sentences him to 90 years to life in state prison for two counts of robbery and one count of commercial burglary. On appeal, he contends the trial court abused its discretion when it precluded counsel from asking hypothetical questions of his expert witness, refused to reopen the case for additional testimony, and failed to more fully sanitize his prior convictions for armed robbery. We affirm the judgment.

FACTS

I. Albertson's Robbery

Shortly before 9:00 p.m. on February 3, 2010, David Calleros was cleaning out his checkstand at Albertson's supermarket on Venice Boulevard when someone approached him. Calleros asked if he could help him. The person demanded Calleros hand him the money from the register while brandishing a gun. Calleros complied and put the money in a bag.

From a photographic lineup on March 12, 2010, Calleros identified Miller as the robber, but wrote on the card that the photograph "looked like" the person who robbed him and he was "not 100 percent sure." Calleros later identified Miller in a live line-up on May 26, 2010. At trial, Calleros testified that Miller "looks familiar" but "it's been a long time." The jury also viewed surveillance video and still photographs of the robbery.

II. Trader Joe's Robbery

On February 11, 2010, Rodolfo Enriquez was counting money in the office at the Trader Joe's market on National and Westwood Boulevard at approximately 1:45 p.m. when someone walked in and grabbed a "good amount" of money from his hand. The office was only separated from the store by a five foot high counter, which allowed Enriquez to see the store from the office. Enriquez initially thought "it was somebody playing around" so he held on to the money and turned around to ask, "What are you doing?" When he realized he did not know the person and felt a gun pressed against him, he let go of the money. Some of it fell to the floor. The robber picked up the money and walked out the door. Approximately $3300 in $100, $50 and $20 denominations was

taken. Kelly Ramsey, who had been standing near the office at the time of the robbery, left to call 911.

Victor Montalvo, the store manager, was standing outside the back of the store when Ramsey ran up to tell him that they were being robbed. Montalvo immediately ran to the front of the store and saw the robber walk out. He gave chase but stopped when the robber brandished a gun. Montalvo watched as he got into a white Honda driven by a woman. As the car sped away, Montalvo entered the license plate number into his mobile phone and called the police.

At approximately 2:00 p.m., Officer Stephen Dolan with the Los Angeles Police Department was traveling on the 10 freeway when he heard a radio broadcast that provided a description of the Honda, the license plate and the suspects. He saw a vehicle matching the description a few minutes later and followed it to a gas station. Miller got out and walked into the gas station but then attempted to flee when he saw the officer. He was apprehended nearby by Officer Dolan and arrested. No weapons were found on him. When officers searched the area, they found a leather coat similar to the one Miller had been wearing with $1,090 in it in $20, $50, and $100 bills. Miller also had 61 $20 bills and three $100 bills in his pocket in addition to $4.75. Altogether, approximately $2,600 was recovered. A search of the car revealed a knife and a toy gun with an orange tip.

Montalvo identified Miller and the woman in a show up about 30 or 40 minutes after the robbery. Enriquez identified Miller a few hours later and stated he was 95 percent sure that he was the robber.

III. Trial and Sentence

In an information filed on July 2, 2010, Miller was charged with second degree commercial burglary of Trader Joe's market (count 1; Pen. Code, § 459),[1] second degree robbery of Rodolfo Enriquez (count 2; § 211), and second degree robbery of David Calleros (count 6; § 211). It was alleged that as to count 1, Miller personally used a

[1] All further section references are to the Penal Code unless otherwise specified.

firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a). As to counts 2 and 6, it was alleged that Miller personally used a firearm within the meaning of section 12022.53, subdivision (b). It was further alleged that Miller suffered four prior strikes, four prior convictions of a serious felony and six prior convictions. (§§ 1170.12, subds. (a)-(b); 667, subds. (b)-(i), 667.5, subd. (a)(1).)

At trial, the prosecution presented evidence of the robberies as described above. The defense presented testimony from Dr. Mitchell Eisen, an expert on eyewitness identification. Dr. Eisen testified that human memory of an event is not accurate because people remember the major features of an event but "fill in the gaps" using inferences which may be mistaken. Dr. Eisen also testified that certain things affect memory. For example, Dr. Eisen testified that error rates are higher when people are asked to identify someone from a different race. False identification is also much higher in show-up conditions in comparison to multi-person lineups. Dr. Eisen described "experimenter bias" in which the experimenter might unconsciously communicate the "right" answer. As a result, relevant scientific literature recommends that the person administering line-up identifications remain unaware of the identity of the suspect. Dr. Eisen stated that people also tend to stick to their identifications over time.

According to Dr. Eisen, trauma adversely affects people's ability to remember information because their attention is narrowed to what is important to them. In a situation where a witness is faced with a weapon, he may experience "weapon focus" where he focuses on the weapon and does not remember what the person holding the weapon looks like.

Miller testified on his own behalf. He denied committing either of the robberies. He explained he had approximately $2,200 in cash on him at the time he was arrested because he was on his way to buy a used car for his daughter-in-law. She had given him the money from her income tax return check. He denied that he tried to run when he was detained by police. He had hurt his foot the previous day. He denied knowing the woman in the white Honda and said he did not have a gun. Miller also testified that he was not at Albertsons on the day Calleros was robbed though he could not recall where

he was. He admitted that he had previously been convicted of two robberies, a commercial burglary and being a felon in possession of a firearm.

The jury found Miller guilty on all three counts and found the allegations to be true. After a bifurcated trial, Miller waived his right to a jury trial on the prior convictions and the trial court found Miller's six section 667.5, subdivision (b) priors not true, four strike priors true, and two serious felony priors true. Miller was sentenced to two consecutive 45-years to life sentences for counts 2 and 6 for a total of 90 years to life in state prison. A 45 year to life sentence was imposed and stayed for count 1 pursuant to section 654. The trial court also ordered Miller to pay various fines and fees. Miller timely appealed.

DISCUSSION

I. Miller Has Failed To Demonstrate Prejudice In The Trial Court's Denial of His Request to Ask the Eyewitness Expert Hypothetical Questions

After Dr. Eisen had testified extensively about memory and what factors affect it, defense counsel attempted to present him with a hypothetical question based on the facts of this case.

> "Q Assume that there are some – If I could give you some sort of a hypothetical—
>
> "The Court: You can't.
>
> "[Defense Counsel]: I am not allowed to give a hypothetical?
>
> "The Court: No. He is here to talk about the general principals. So if you've a specific issue or area you want him to enlighten people on, then you may, but we're not going to feed him facts from this case and have him render an opinion, and that would be the only basis of relevance of having the hypothetical.
>
> "It's for the jury to decide, based on what they've heard from the witnesses, and, also, factor in what Doctor Eisen is telling him about what the literature tells us about what they have learned about eye witness identification in general, so I just want [to] make sure we don't—we keep

those lines completely clear: he is here to talk about the general principals in the field, studies that show the kind [of] factors that effect eye witness identification, accuracy of it. He talked about a number of factors already. It will be up to the jury to then factor those in with what they heard about the identifications in this case and draw the conclusion. But he will not render an opinion, he is not allowed, so the hypothetical is not relevant.

"[Defense counsel]: That's the court's objection.

"The Court: That is the court controlling the proceedings, which I am bound to do."

During cross-examination, Dr. Eisen confirmed that "it's up to the jury in this case to decide whether or not they can evaluate the evidence" and that he was "not instructing the jury on how to use any evidence, [he was] just describing what's known in [his] area about what you are questioning me about."

Miller contends the trial court deprived him of his constitutional right to present a complete defense when it rejected his trial counsel's attempt to ask a hypothetical question. He contends "such questions would have assisted the jury by identifying and quantifying each of the various factors that affected the accuracy of the witnesses' identification of appellant." This was particularly important, in Miller's view, with respect to the Albertson's robbery because it rested solely on David Calleros's identification.

"[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion[.]" (*People v. McDonald* (1984) 37 Cal.3d 351, 377 (*McDonald*), disapproved on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Evidence Code section 801 provides that "[i]f a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

"(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

> "(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

An expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. (*People v. Boyette* (2002) 29 Cal.4th 381, 449.) "Such a hypothetical question must be rooted in facts shown by the evidence, however." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) "A hypothetical question . . . may be 'framed upon any theory which can be deduced' from *any* evidence properly admitted at trial, including the assumption of 'any facts within the limits of the evidence,' and a prosecutor may elicit an expert opinion by employing a hypothetical based upon such evidence." (*People v. Sims* (1993) 5 Cal.4th 405, 436, fn. 6.)

Expert opinion is rarely objectionable for invading the province or usurping the function of the jury or otherwise taking over the jury's role. California criminal juries are ordinarily instructed, as was the jury here, that they are the exclusive judges of the believability of a witness and that they are not bound by an expert's opinion, but should give it the weight it deserves based on the underlying reasoning.

We conclude that the trial court improperly precluded defense counsel from asking Dr. Eisen hypothetical questions. It is clear from the caselaw that, in general, an expert may render an opinion from facts given in a hypothetical question. This rule applies equally to experts testifying on eyewitness identification issues. Accordingly, it was error for the trial court to preclude defense counsel from asking *any* hypothetical questions.

We are not persuaded by the People's argument that the trial court had broad discretion to prevent all such questions. The cases cited by the People do not support their argument and are distinguishable in any event. The court in *McDonald* expressly noted that no opinion testimony, whether based on hypothetical facts or not, was at issue

in that case. (*McDonald, supra,* 37 Cal.3d at p. 367, fn.12.) In *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1050, the trial court properly denied defense counsel's request to present testimony about a mock lineup experiment conducted by the expert which showed the lineup was not neutral. In *People v. Sandoval* (1994) 30 Cal.App.4th 1288, the expert was not permitted to testify whether particular lineups in the case were fair or unfair. The court held that the "similarity in appearance of members of a lineup, relevant to the weight to be accorded an identification, is completely within the task of the trier of fact to resolve. On this point, as the trial judge noted, the witness was no more expert than any juror, and his opinion was thus properly excluded." (*Id.* at p. 1298.) None of these cases address the issue of a blanket prohibition against hypothetical questions to an expert.

Despite our conclusion that the trial court erred in precluding hypothetical questions, Miller has failed to create a record establishing prejudice. With limited exceptions not applicable here, a claim that evidence was wrongly excluded cannot be raised on appeal absent an offer of proof in the trial court. Evidence Code section 354 provides that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination." Section 354 serves two important purposes where an appellant complains that questions he asked of his own witness at trial were wrongly disallowed. First, the offer of proof requirement gives the trial court an opportunity to change its ruling. Second, even when the question is relevant on its face, the appellate court must know the substance or content of the answer in order to assess prejudice. This requirement is met only where the wording or context of the question makes the expected answer clear, or

where the proponent of the evidence makes an offer of proof. (*People v. Whitt* (1990) 51 Cal.3d 620, 648.)

Miller concedes he made no offer of proof at trial as to what hypothetical questions he would have posed to Dr. Eisen or as to Dr. Eisen's proposed testimony in response. As a result, he never gave the trial court an opportunity to reflect on its ruling and change its mind. For purposes of our appellate review, we are likewise thwarted in that there is no record of the proposed questions or testimony for this court to judge the prejudice resulting from exclusion of the questions.

Even aside from the failure of Miller to present a record demonstrating error, the lack of prejudice to him becomes more readily apparent when viewed in context of the evidence admitted at trial. We first note that Miller concedes the prejudice stemming from the denial of all hypothetical questions is only relevant to the Albertson's robbery. And rightfully so, given that Miller was arrested in the getaway vehicle immediately after the Trader Joe's robbery, attempted to flee from police when he saw them, was found to have a large amount of cash in his pockets, and was separately identified as the perpetrator by three Trader Joes employees who saw him at the scene of the robbery.

As to the Albertson's robbery, Miller explains that "if appellant had been permitted to use hypothetical questions in his examination of Dr. Eisen, he would have been able [to] elicit information enumerating the specific factors relevant to Calleros's ability to identify the perpetrator. Dr. Eisen could have testified that given the duration of the encounter of Calleros with the perpetrator and his level of fear and anxiety, the conditions were less than ideal for correct identification." He argues that "because appellant's trial counsel never had an opportunity to actually pose the hypothetical questions to Dr. Eisen, there is no argument that the proposed hypothetical questions were improperly founded on evidence other than that presented to the jury; nor can there be an argument that the proposed questions impermissibly sought to elicit testimony on an ultimate issue in the case."

However, Dr Eisen was given wide latitude to testify about the psychological factors that might affect an eyewitness identification, including the effect of stress, the cross-racial nature of an identification, the "weapon focus effect," and the bias inherent in field identifications. Further, the eyewitness was extensively cross-examined about the accuracy and reliability of his identification. In addition, Dr. Eisen's testimony, as it applied to Calleros's identification, was ably argued by counsel in closing: "That incident probably took place in five seconds or less. The I.D., not the entire incident, the witness told you it took longer. It did take longer. It took longer for him to gather up the money. He is not looking at the individual. It took longer for him to say, 'Can I help you?' It took longer for that person to leave that store, but the actual facial observance was done under stress. It was done quickly. It was done with a gun pointed at him. It was done cross-racially. It was done under stress. It was done under trauma, all of the above, everything that the expert pointed out to you, whether it be common sense or studies, they're all factors which have to be considered in accuracy of I.D. is not here."

Moreover, the jury was instructed about the factors to consider in eyewitness identifications, including: the opportunity of the witness to observe the perpetrator, the effect of stress on the identification, whether the witness and the defendant were of different races, how certain the witness was of the identification, whether the witness changed his mind about an identification or failed to identify the defendant, whether the witness was able to pick the perpetrator out of a group, and a variety of other factors.

Finally, the eyewitness identification was not the only evidence that pointed to Miller as the perpetrator of the Albertson's robbery. Indeed, the jury viewed surveillance video and photographs of appellant committing the robbery.

As a result, we find no prejudice in the denial of the request to ask hypothetical questions of Dr. Eisen.

II. The Trial Court Did Not Abuse Its Discretion When It Refused to Reopen the Case

Miller testified on his own behalf as the last witness for the defense. He denied any involvement in either of the robberies. He explained he had approximately $2,200 in

cash on him at the time he was arrested because he was on his way to buy a used car for his daughter-in-law. She had given him the money from her income tax return check. After Miller's testimony, both parties rested. The trial court then instructed the jury and released them for lunch with closing argument to begin when they reconvened. At 1:30, defense counsel informed the court that Miller's sister came into court during the lunch recess and stated that she was finally able to locate Chavonna Taylor Miller, Miller's daughter-in-law. Both Miller's sister and counsel had unsuccessfully attempted to contact Chavonna prior to trial. According to counsel, Chavonna would confirm Miller's story that she gave him cash to purchase a car. Chavonna was told to come to the court at 1:30 by both Miller's sister and his counsel. Counsel requested the court to wait for her until 2:00 p.m. and then permit the defense to reopen to allow her to testify for 10 minutes. The prosecutor, who had been alerted to the potential testimony, requested a "late discovery" jury instruction if Chavonna were allowed to testify.

The trial court denied Miller's request to reopen, stating the issue was moot since Chavonna was not there and it was past 1:30. The trial court also noted that "[t]his is information that is being turned over at a very late hour, and now in terms of being able to investigate these particular claims . . . the People would not be able to." Chavonna came into court at 2:15, during the People's argument, and brought her tax records with her. The following day, the trial court noted that the jury had already been instructed when Chavonna arrived and "[h]ad we stopped to reopen, it would have given the jury—that somehow this particular witness was so important . . ."

Miller contends the trial court's refusal to reopen and allow Chavonna's testimony denied him his constitutional right to present evidence relevant to his defense theory. To determine whether the trial court has abused its discretion in denying a defense request to reopen, the reviewing court considers the following factors: " '(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.' [Citation.]" (*People v. Jones* (2003) 30 Cal.4th 1084, 1110.)

Applying these factors, we find the trial court did not abuse its discretion. At the time the request to reopen was made, the jury had been instructed and closing arguments were about to begin. Chavonna was not in the courtroom, despite counsel's assurances that she would be. Indeed, there was no guarantee that Chavonna would appear at all. The record does not show she was served with a subpoena though counsel had her address and contact information. Chavonna did not appear in the courtroom until 2:15, 45 minutes after the time counsel asked her to be there. Additionally, Chavonna's proposed testimony would not have been so significant since Miller had testified she gave him the money to buy a car from her tax refund. Miller contends that Chavonna's testimony was more credible, since she was an "impartial" witness. In fact, she was Miller's daughter-in-law, not an impartial witness. There was no abuse of discretion.

III. The Trial Court Properly Sanitized Miller's Prior Convictions

Miller contends the trial court erred by failing to further sanitize his prior convictions. We disagree.

Miller suffered a number of prior convictions. At trial, he requested the trial court "sanitize" his prior convictions, characterizing them as thefts rather than robberies. The trial court refused. The trial court did, however, sanitize his prior convictions to limit impeachment to using the term "robberies" instead of "four counts of armed robbery." In reaching its decision, the trial court explained that "the jury here is perfectly capable of following the court's instructions based on the facts here on balance given the strengths of the facts in this case, [in balancing] potential prejudicial [and] probative value, I am going to allow them to come in as I have indicated. I think it makes a difference to know what kind of theft case we're talking about in judging somebody's veracity."

When counsel again complained that some of the priors were committed 30 years ago, the trial court made clear: "I think the jury is perfectly capable of factoring in the date of those priors in determining what they're going to do with them and the weight they will give them, however, I will note that between 1980 and 1990, there were a number of convictions, over and above just the ones that are in that 969(b) packet, and

that was in fact the period of time where he was the most involved, and had the most frequent contacts with law enforcement." In addition, the trial court excluded priors from 1975 that were robbery cases. When he took the stand, Miller testified that he was convicted of robbery in 1987 and 1990, second degree commercial burglary in 1990, and illegal possession of a firearm by an ex-felon in 1990. We find no abuse of discretion.

Sections 788 and 352 of the Evidence Code govern the admissibility of felony convictions for impeachment. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Evidence Code section 788 permits the prosecution to show a witness has been convicted of a felony to attack his credibility. Evidence Code section 352 gives the trial court broad discretion in assessing whether concerns of undue prejudice, confusion or consumption of time outweigh the probative value of particular evidence. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.) When a discretionary power is statutorily vested in the trial court, its exercise of that discretion " 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

A court may sanitize a witness's prior conviction by allowing the prosecutor to refer to it only in a general manner. The act of sanitizing the prior prevents specific information about the prior conviction from prejudicing the jury. Sanitizing allows some facts of a prior conviction to impeach the witness because to exclude completely a prior would give the witness a " 'false aura of veracity.' " (*People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*), superseded in part by statute as described in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208-209.)

The Supreme Court has established four factors that control the trial court's determination of whether to sanitize a prior: (1) whether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what effect admission would have on a defendant witness's decision to testify. (*Beagle, supra,* 6 Cal.3d at p. 453.) Courts do

not need to follow the *Beagle* factors rigidly. (*People v. Mendoza, supra*, 78 Cal.App.4th at p. 925.)

In light of the *Beagle* guidelines, we conclude the trial court properly sanitized Miller's prior convictions to convictions for robbery rather than armed robbery. Although *Beagle* admonished courts to use convictions for the same crime sparingly, the fact that three of the four prior convictions were for the same offense—robbery and commercial burglary—as the charged crimes does not compel their exclusion. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 66.) This is particularly true when the only other crime admitted—possession of a firearm by an ex-convict—may lead the jury to conclude Miller had otherwise led a " 'legally blameless life.' " (*Beagle, supra*, 6 Cal.3d at p. 453.) Far from having led a legally blameless life, Miller's five-page long criminal history shows he has suffered convictions for various misdemeanors and felonies every few years since he was a juvenile. "No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (*Ibid*.) The trial court properly determined the jury was entitled to know the nature of Miller's prior crimes. Moreover, inclusion of Miller's prior convictions did not deter him from testifying.

Nor can it be said as a matter of law that the convictions were too remote. Miller's most recent convictions occurred in 1990. However, he was incarcerated for a number of years after these convictions; he did not have the same opportunity to commit crimes while in prison. Prior to his incarceration, he had "the most frequent contacts with law enforcement" between 1980 and 1990.

The trial court had broad discretion to balance the potential prejudicial effect with the probative value of admitting Miller's prior convictions into evidence. We do not find that the trial court's decision not to further sanitize Miller's prior convictions was " ' "arbitrary, capricious or patently absurd." ' " (*People v. Jones* (1998) 17 Cal.4th 279, 304.)

IV. Miller was Properly Sentenced On His Prior Serious Felony Convictions

Miller last contends that the trial court erred in sentencing him to two five-year terms for each of his prior serious felonies pursuant to section 667, subdivision (a), on each of his convictions in counts one, two and six. Here, Miller is simply wrong. Because of his prior convictions, Miller was sentenced to indeterminate life terms on each of his convictions pursuant to the Three Strikes law. Section 1170.1, which indicates that an enhancement for a prior serious felony conviction may be added only once to the final sentence regardless of the number of felony offenses, applies only to determinate sentences. In the indeterminate sentencing arena, that prohibition does not apply. When sentencing on indeterminate counts, the trial court *must* impose additional terms for serious felony enhancements as to each count. (*People v. Williams* (2004) 34 Cal.4th 397, 400-405.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.