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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TROY DONAHUE WINSTON ANDERSON, Defendant and Appellant.	2d Crim. No. B230267 (Super. Ct. No. 1295118) (Santa Barbara County)

Troy Donahue Winston Anderson appeals from the judgment entered after a jury convicted him of assault with intent to commit rape during a residential burglary (count 1; Pen. Code, § 220, subd. (b))[1]and first degree residential burglary (count 2; § 459). The trial court sentenced appellant to life with possibility of parole on count 1 and a concurrent six year term on count 2. We reverse with directions to dismiss count 2 for first degree residential burglary because it is a lesser included offense of count 1. (*People v. Dyser* (2012) 202 Cal.App.4th 1015, 1020-1021.) The judgment, as modified, is affirmed.

[1] All statutory references are to the Penal Code.

Facts

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206) the evidence shows that Valerie O. was sexually assaulted in her apartment by a male intruder on February 10, 2009. Valerie awoke at 4:00 in the morning, saw a man standing over her bed, and screamed. The man punched Valerie, jumped on the bed, and covered her mouth with a gloved hand. Valerie bit the man's finger. The man straddled Valerie and groped her breasts. Valerie screamed for help and fought back, kicking a hole in the wall. The man ran down the stairs and out the front door.

Valerie told the police that the intruder wore a rag or scarf (a "do rag") and a baseball cap. The police found the front window ajar and smudges on the glass and footprints outside the window.

Blood droplets were on the bedroom wall, the pillowcase, the bed comforter, and the bed canopy. The police also found a black knit glove on the bed and a blood smear on the front door.

Forensic tests determined that appellant's DNA was on the front door and a pillowcase. A DNA expert testified that appellant was the likely source of the blood on the front door (one in 52 quintillion African-Americans). When Valerie learned about the test results, she told a detective that appellant used to work with her at a shoe store and had been to her home in August or September 2007. Appellant also frequented Q's restaurant/bar where Valerie worked.

In the first trial, appellant testified that he stopped by the apartment and consumed cocaine with Valerie. Appellant denied sexually assaulting Valerie and said that he left after she stole his cocaine and bit his finger. The jury could not reach a unanimous verdict.

In the second trial, the prosecutor had seven rebuttal witnesses ready to testify if appellant took the stand. Appellant elected not to testify. The jury returned a guilty verdict.

Residential Burglary – Lesser Included Offense

Appellant contends, and the Attorney General agrees, that the conviction on count 2 for first degree residential burglary should be reversed because it is a lesser included offense of count 1 - assault with intent to commit rape during a residential burglary. (*People v. Dyser, supra,* 202 Cal.App.4th at p. 1021.) Section 220, subdivision (b) requires that the sexual assault be committed in the commission of a first degree burglary. "'To permit conviction of both the greater and the lesser offense " ' "would be to convict twice of the lesser." ' " [Citation.] There is no reason to permit two convictions for the lesser offense.' [Citation.]" (*People v. Medina* (2007) 41 Cal.4th 685, 702.)

Jury Packet Instructions

Appellant claims that his due process rights were violated because the jury was not provided a written copy of all the jury instructions. Before the jury deliberated, the trial court orally instructed on assault with intent to commit rape during a residential burglary, on the elements of rape and burglary, and on the difference between first and second degree burglary.[2] The instructions defining rape and burglary (CALCRIM 1000, 1700.) were inadvertently left out of the jury packet.

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[2] On count 1 for assault with intent to commit rape during a residential burglary, the trial court gave CALCRIM 890 which stated in pertinent part that "the People must prove that: [¶] 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone and probably result in the application of force to someone; [¶] 4. When the defendant acted, he had the present ability to apply force to a person; [¶] AND [¶] 5. When the defendant acted, he intended to commit Rape. [¶] . . . . . [¶] To decide whether the defendant intended to commit Rape please refer to the instruction which defines the crime."

The jury was also instructed: "[Y]ou must decide whether the People have proved the additional allegation that the defendant committed the crime of Assault With Intent to Commit Rape during the Commission of a Residential Burglary. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant

Appellant claims that any discrepancy between the oral and written instructions (i.e., two missing instructions) is structural error and requires automatic reversal.[3] We reject the argument because a criminal defendant has no federal or state constitutional right to written jury instructions. (*People v. Ochoa* (2001) 26 Cal.4th 398, 447; *People v. Samayoa* (1997) 15 Cal.4th 795, 845.) Section 1093, subdivision (f) states in pertinent part: "Upon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given." An instruction submitted in writing that is orally read to the jury is treated as an instruction in writing. (See § 1127; *People v. Gloria* (1975) 47 Cal.App.3d 1, 6; *People v. Auge* (1945) 69 Cal.App.2d 416, 422; 5 Witkin & Epstein, Cal. Criminal Law (3rd ed 2000) Criminal Trial, § 620, p. 886.)

Assuming, arguendo, that it was error not to furnish the jury a written copy of CALCRIM. 1000, 1700, instructions, the error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Flood* (1998) 18 Cal.4th 470, 490-491.) After the trial court orally instructed the jury, counsel discussed the instructions in final argument. The prosecution argued that appellant's "ultimate intent was to engage in an act of sexual intercourse by force. . . . An act of rape. [¶] Rape is an act of sexual intercourse between a man and a woman, [who are] not married. . . . Of course, in this case Valerie [O.] and Troy Anderson are certainly not married. The woman did not consent. . . . And the act was accomplished by means of force or violence."

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committed a residential burglary by entering an inhabited residence or house, or a room within an inhabited residence or house for the purpose of committing the crime of Rape, a felony; [¶] 2. During the commission of the Residential Burglary the defendant committed the crime of Assault with Intent to Commit Rape. . . [¶] . . . . [¶] To decide whether the defendant intended to commit Rape please refer to the separate instructions that I have given you on those crimes."

[3] Appellant agrees that reversal and dismissal of count 2 for first degree residential burglary moots his claim that the jury should have received a written copy of the burglary instruction.

Defense counsel argued there was no evidence that the intruder intended to rape Valerie. "He never removed any of his clothing, he never removed any of her clothing, or even pulled the covers down, never reaches under the covers, never ordered her to hold still, never told her what his intentions are . . . , never announces . . . his reason for being there."

The failure to provide the jury a written copy of all the instructions was harmless in light of the oral instructions, counsel's closing argument, and the evidence presented. (*People v. Flood, supra,* 18 Cal.4th at p. 836; *People v. Majors* (1998) 18 Cal.4th 385, 410.) The evidence clearly showed that appellant assaulted the victim with the intent to rape her during the commission of a burglary. Appellant claimed there was no forcible entry but burglary "requires only an entry with *the requisite intent*; the entry need not be accomplished by force. [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1060.)

Appellant claims that the jury may have forgotten the legal definition of rape and burglary. Jurors, however, are presumed to understand and follow the instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) The cases cited by appellant are inapposite and involve convictions in which the jury was not orally instructed on the charged offense. (*People of the Territory of Guam v. Marquez* (9th Cir. 1992) 963 F.2d 1311, 1315-1316; *United States v. Noble* (3rd Cir. (1946) 155 F.2d 315, 316-317.)

Nothing in the record suggests that the jurors misunderstood the instructions, misapplied the law, or relied on faulty definitions of rape or burglary. (See e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 674.) "The jury took only [30 minutes] to reach its guilty verdict. No questions were raised regarding any of the instructions, and no request for rereading instructions was made. Thus, the record contains no evidence indicating the jury was confused or misled by the oral instructions given. [Citation.]" (*People v. Danielson* (1992) 3 Cal.4th 691, 711.)

A criminal defendant is entitled to a fair trial, not a perfect trial. "There is no constitutional right to have a physical copy of the jury instructions with the jury

during deliberations. Nor does the statutory requirement underlie or embody a fundamental notion of due process or some other constitutional value. It is a purely statutory requirement." (*People v. Blakely* (1992) 6 Cal.App.4th 1019, 1023.)

Appellant makes no showing that it is reasonably probable that the jury would have reached a more favorable result had it received a written copy of the rape and burglary instructions. (See e.g., *People v. Seaton*, *supra,* 26 Cal.4th at p. 675 [failure to provide jury written set of instructions; harmless error]; *People v. Cooley* (1993) 14 Cal.App.4th 1394, 1399 [same].) The police found an open window, a glove on the bed, and appellant's DNA on the front door and pillowcase. It is undisputed that the intruder jumped on the victim's bed, straddled her, and grabbed her breasts.

The evidence clearly supports the finding that appellant assaulted the victim with the intent to rape during the commission of a burglary. (See e.g., People v. Guerra (2006) 37 Cal.4th 1067, 1130-1131 [intent to rape may be inferred from all the facts and circumstances of the assault]; People v. Holloway (2004) 33 Cal.4th 96, 138 [same].) "It would, indeed, require fantastic speculation on our part to hold that a reasonable jury could have found otherwise." (People v. Odle (1988) 45 Cal.3d 386, 416

Marsden Hearing

Before sentencing, appellant made a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118) to discharge trial counsel. Appellant complained that: (1) he had been offered a lie detector test that he now wanted to take; (2) defense evidence was not presented at trial; (3) counsel failed to subpoena or call defense witnesses; (4) appellant asked counsel to excuse certain prospective jurors that were allowed to remain on the jury panel; (5) counsel did not visit appellant in jail or communicate with appellant prior to trial (6) trial counsel "twisted" the defense and

told the jury something different in opening statement[4], and (7) appellant was being mistreated in jail.

The trial court asked about the lie detector test. Counsel explained that the prosecution offered to dismiss the charges if appellant passed a polygraph test. The offer was communicated to appellant but appellant refused to take the polygraph test. Appellant was angry that the prosecution offered the test on the eve of trial.

With respect to appellant's treatment in jail, counsel spoke to the jail duty officers and filed grievances with jail administrators. Appellant claimed that he was still being mistreated in jail. The trial court directed counsel to work with appellant in preparing a habeas petition.

The trial court carefully listened to appellant and found that "every other claim that you've made has to do with Mr. Owen's [trial counsel] performance during the course of the two trials and that's something that would not and does not prevent him from effectively representing you at a sentencing hearing. [¶] . . . . [¶] I'm going to deny the *Marsden* motion. I've heard nothing that would prevent Mr. Owens from effectively representing you at sentencing."

Appellant said, "I'd like a new trial." The trial court responded: "Based on what I saw during the course of the trial I don't see a basis for a new trial." The court assured appellant that everything trial counsel did and said would be reviewed on appeal. "You're claiming that he didn't adequately represent you during the course of the trial. There's a vehicle for addressing that issue, that vehicle is a habeas corpus petition filed on your behalf by your appellate attorney on appeal."

The trial court continued the sentencing hearing two weeks. At the November 4, 2010 sentence hearing, appellant said that he was still being abused in jail

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[4] Defense counsel anticipated that appellant would testify and gave an opening statement that tracked appellant's testimony in the first trial. When appellant learned that the prosecution intended to call rebuttal witnesses, appellant decided not to testify. The trial court admonished the jury "to decide the case on the actual evidence presented, and [do] not consider as evidence what the attorneys said in their opening statements."

and wanted a new attorney. Appellant complained that "I lost my trial [b]ecause [defense counsel] is an idiot." "[W]hy do you want to send me to prison for rape, or, for attempted rape . . . when I'm, willing to take a lie detector to say that the jurors were wrong[?]" The trial court responded: "Mr. Anderson, you're making the same statement again and again, you made it to me like four or five times. I understand your anger."

Appellant argues that the trial court erred by not conducting an "active inquiry" and probing further. (See e.g., *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367.) Appellant was allowed to voice his complaints and discuss specific instances of counsel's inadequacy. (See e.g., *People v. Jackson* (2009) 45 Cal.4th 662, 688; *People v. Cole* (2004) 33 Cal.4th 1158, 1190.) No more was required. " '[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and deciding whether the allegations have sufficient substance to warrant counsel's replacement.' [Citations.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

Angry about the outcome of the second trial, appellant complained about jury selection, witnesses not called, and something about a photo in his iPhone that would prove his innocence. It was "Monday-morning quarterbacking" and highly suspect given that appellant, in the course of two trials, never complained about counsel's performance. Tactical disagreements between the defendant and his attorney do not constitute an irreconcilable conflict. (*People v. Jackson, supra,* 45 Cal.4th at p. 688; *People v. Cole, supra,* 33 Cal.4th at p. 1192.)

Appellant was also upset that counsel did not visit him in jail or have more time for him. But that is not grounds for appointment of new counsel. " '[T]he number of times [a defendant] sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence.' [Citation.]" (*People v. Hart* (1999) 20 Cal.4th 546, 604.)

Appellant asserts that the gravamen of his complaints concern matters outside the courtroom and the court should have appointed new counsel to better

develop and explain appellant's assertion of inadequate representation. (See e.g., *People v. Stewart* (1985) 171 Cal.App.3d 388, 396.) Where a defendant's claim of ineffective assistance of counsel rests primarily on matters outside the trial court's observation, the court may deny a new trial motion on the ground that the issue of effective assistance of counsel should be raised on appeal or in a habeas proceeding. (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, as in *Cornwell*, the trial court reasonably concluded that the claim of ineffective assistance of counsel should be litigated in a habeas corpus proceeding rather than a motion for new trial. "It is evident in the present case that, after lengthy deliberation, the trial court concluded justice would *not* be expedited by entertaining defendant's claim in a motion for new trial. The basis for this conclusion is readily apparent; the matter would have been delayed for at least six months while substitute counsel examined trial counsel's case records and performed additional investigation concerning witnesses who did not appear at trial and evidence that was not in the record, in order to decide whether to make a motion for new trial." (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 101.)

Conflict Counsel

Appellant argues that the trial court erred in not appointing "conflict counsel" to investigate appellant's claim of ineffective assistance of counsel. In *People v. Sanchez* (2011) 53 Cal.4th 80, our Supreme Court "specifically disapprove[d] of the procedure of appointing substitute or 'conflict' counsel solely to evaluate a defendant's complaint that his attorney acted incompetently. . . " (*Id*., at p. 84.)[5] Trial courts "

[5] The court in *Sanchez* disapproved the cases cited by appellant (*People v. Eastman* (2007) 146 Cal.App.4th 688; *People v. Mejia* (2008) 159 Cal.App.4th 1081; *People v. Mendez* (2008) 161 Cal.App.4th 1362) which incorrectly imply "that a *Marsden* motion can be triggered with something less than a clear indication by a defendant, either personally or through current counsel, that the defendant 'wants a substitute attorney.' [Citation.]" (*People v. Sanchez*, *supra*, 53 Cal.4th at p. 90, fn. 3.)

'should abandon their reliance on counsel specially appointed to do the trial court's job of evaluating the defendant's assertions of incompetence of counsel and deciding the defendant's new trial or plea withdraw motion. [Citation.]' " (*Id*., at p. 89.)

The trial court provided appellant multiple opportunities to air his complaints and permitted counsel to respond. Appellant said that he did not trust counsel but the mere '"lack of trust in, or inability to get along with"' counsel is not sufficient grounds for substitution. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) Appellant claims that the trial court "shut" him down. A criminal defendant, however, is not entitled to keep repeating and renewing complaints that the court has already heard. (*People v. Vera* (2004) 122 Cal.App.4th 970, 980.) Nor is a trial court required to conduct a new *Marsden* hearing each time defendant makes the same accusation. (*People v. Clark* (1992) 3 Cal.4th 41, 104.)

As discussed in *People v. Smith* (1993) 6 Cal.4th 684, a *Marsden* "inquiry is forward-looking." (*Id*., at p. 695.) Where, as here, the *Marsden* motion is made after trial, "the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*. But the decision must always be based on what has happened in the *past."* (*Ibid.*)

Having observed counsel's performance in two trials, the trial court reasonably concluded that appellant's complaints were unfounded. (*People v. Taylor* (2010) 48 Cal.4th 574, 600.) "We cannot see how the appointment of a different attorney would have gained [appellant] a new trial, or could have had any effect on the sentence imposed. . . ." (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Appellant makes no showing that the trial court abused it discretion in denying the *Marsden* motion (see *People v. Earp* (1999) 20 Cal.4th 826, 876), in denying his new trial motion (see *People v. Lewis* (2001) 26 Cal.4th 334, 364), or in not appointing conflict counsel to investigate whether appellant was denied effective assistance of counsel. (*People v. Sanchez, supra,* 53 Cal.4th at p. 84).

Appellant's remaining arguments have been considered and merit no further discussion.

Conclusion

We reverse the conviction on count 2 (first degree residential burglary) with directions to dismiss count 2 for first degree residential burglary as a lesser included offense of count 1. The trial court is directed to prepare an amended abstract of judgment reflecting a term of life in prison with the possibility of parole on count 1 and shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Danalynn Priz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, Jaime L. Fuster, Deputy Attorney General, for Plaintiff and Respondent.