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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TIWALOLA OLADIJI SHOYINKA, Defendant and Appellant.	B264623 (Los Angeles County Super. Ct. No. SAO89787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed.

Erik Harper, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan S. Pithey and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tiwalola Oladiji Shoyinka appeals from a judgment of conviction entered after a jury found him guilty of first degree burglary (Pen. Code, § 459[1]) and misdemeanor prowling (§ 647, subd. (h)). The trial court sentenced Shoyinka to the middle term of four years in state prison for the burglary and stayed the sentence on the misdemeanor (§ 654). On appeal, Shoyinka contends the trial court committed prejudicial error in instructing the jury that it could convict him of burglary based on an intent to commit rape when there was insufficient evidence that he had any such intent. We agree that this instruction was erroneous. However, we conclude that the error was not prejudicial because the court also instructed the jury that it could convict Shoyinka of burglary on the basis that he intended to commit indecent exposure. The evidence supporting Shoyinka's burglary conviction on that alternative basis was sufficiently strong that it is not reasonably probable the verdict would have been different had the court omitted the erroneous instruction on intent to commit rape. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

Shoyinka was charged by information with first degree burglary (§ 459) and misdemeanor prowling (§ 647, subd. (h)).[2]

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

[2] A third count in the amended information, indecent exposure (§ 314, subd. 1), was dismissed on the People's motion after the trial court refused to allow the prosecutor to amend the information to allege attempted indecent exposure.

B. *The Evidence at Trial*[3]

1. *The Incident Leading to the Charged Offense*

At about 8:30 p.m. on February 9, 2015, Hali Resnick and Christen Heiden drove to the townhouse of their friend, Christina Massa-Moniz, in Venice. Resnick and Heiden parked their vehicle in Massa-Moniz's carport. As they walked to the front of the townhouse, Resnick and Heiden saw Shoyinka approaching them; his face was covered by what appeared to be a hat. Feeling uncomfortable, Resnick and Heiden tried to open the front door of the townhouse, but it was locked. Resnick and Heiden then returned to the carport to try to get into the townhouse through the back door. They yelled for Massa-Moniz to open the back door, and she did so, letting them into a small vestibule. Resnick and Heiden told Massa-Moniz that someone was following them. Massa-Moniz closed the back door, but she did not lock it.

Shoyinka entered the vestibule through the unlocked back door and closed the door behind him. The vestibule was well lit. Shoyinka's face now was uncovered. He leered at Resnick, Heiden, and Massa-Moniz, with a "strange menacing grin." Shoyinka was standing very close to them. He was holding a cellphone in one hand, and his other hand was "rummaging" around in his pants. He moved toward the three women. They were fearful of what Shoyinka might do to them. Resnick thought that rape was "a possibility." The three women ran out of the vestibule through the back door to the carport and headed toward the street, screaming for help. Shoyinka looked out the

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[3] Shoyinka did not testify or offer any witnesses or evidence on his behalf.

door as they fled. He then stood in the doorway and untied the drawstring of his pants. Resnick called 911.

Daniel Anderson, who had been jogging nearby when the women screamed for help, went over to the carport, where Shoyinka was standing. Anderson saw that Shoyinka's hands were moving inside his pants, and that he was grinning. Anderson asked Shoyinka if he was lost or needed help. Shoyinka did not respond and then walked away.

Shoyinka returned to the front of the townhouse a couple of minutes later. The three women saw him. They ran into the townhouse through the front door and locked it. They called 911 again. From the window, they saw Shoyinka cross the street, stand on the corner, and continue to move his hands in his pants while looking in their direction. After about 10 minutes, Shoyinka started to walk away. Police officers arrived; the three women pointed him out to the officers.

2. *Evidence of Shoyinka's Prior Uncharged Indecent Exposure*

In April 2011, Ashley Hahn went to the Santa Monica library every afternoon to study for an exam. She saw Shoyinka at the library almost every day. He sat near her several times and often stared at her. On April 10, 2011, in order to avoid Shoyinka, Hahn went to a different floor of the library than the floor where she normally sat. Shoyinka found her, however, and sat on the ground about four feet from her. He then got up and walked around the area where she was sitting, with his hand touching his crotch. He went behind a bookshelf, where she could still see him. She testified that "his pants were halfway down, and he was holding with his both hands his erect penis and

smiling at me." Shoyinka made eye contact with Hahn and appeared to be happy that she saw him. Shoyinka was not charged in connection with this incident of indecent exposure.[4]

C. *The Jury Instructions*

At the jury instruction conference, the trial court stated that it intended to instruct the jury that it could convict Shoyinka of burglary based on the theory that he intended to commit indecent exposure when he entered Massa-Moniz's townhouse. This was the lone theory of burglary that the prosecutor had articulated in her opening statement. At the jury instruction conference, however, the prosecutor requested that the trial court "add as an alternative theory also rape." The prosecutor stated this request was based on Resnick's testimony that, when she was in the vestibule of Massa-Moniz's townhouse, she feared that Shoyinka might commit rape. Shoyinka's counsel objected to the prosecutor's request, stating that there was no evidence that Shoyinka intended to commit rape; "the assumptions of the victims," he said, were not evidence of any such intent. Shoyinka's counsel also objected on the ground that an instruction on rape was inflammatory and prejudicial because of the negative connotation of the word "rape."

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[4] Shoyinka objected to the admission of Hahn's testimony regarding Shoyinka's previous uncharged offense on the grounds it was irrelevant and prejudicial. The trial court overruled the objection, finding Hahn's testimony to be relevant to Shoyinka's intent with respect to the charged offense in this case and more probative than prejudicial. (Evid. Code, §§ 350, 352.) Shoyinka raises no claim of error on appeal with respect to the admission of this testimony.

The court overruled the objection and decided to instruct on intent to commit rape as an alternative theory for burglary. The court stated "that rape is certainly a possible intent here raised by this particular evidence in this case. And actually in order to accomplish a rape, one has to take actions that would probably make him liable for indecent exposure also. There may be some subtle difference in intent, I suppose, theoretically. Even if I'm wrong, I'm not very wrong. I don't think there's any prejudice. . . . I think it's pretty obvious. It's supported by this factual scenario. Knowing nothing else, if a person enters behind the women, has a leer on his face, closes the door behind him, he goes for his pants, I think you've got to suspect rape. So I'm going to give it."

Prior to closing arguments, the court instructed the jury that to find Shoyinka guilty of burglary, the jury must find that the People proved beyond a reasonable doubt he entered a building with the intent "to commit indecent exposure or forcible rape." (CALCRIM No. 1700.) The court's instructions also defined indecent exposure and forcible rape. Additionally, the court instructed the jury that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." (CALCRIM No. 200.)

D. *The Verdict and Sentencing*

The jury began deliberations just after 2:00 p.m. on May 13, 2015, and it was excused for the evening at 4:00 p.m. Deliberations resumed at 9:00 a.m. the following day. At about

11:30 a.m., the jury sent a note to the trial court stating that it could not reach a verdict as to the burglary count and was deadlocked at 11 to 1 in favor of conviction on that count. The court instructed the jury pursuant to CALCRIM No. 3550 and told them to continue their deliberations after lunch. The jury resumed deliberations at 1:30 p.m. and reached a verdict at 1:50 p.m.

The jury found Shoyinka guilty of first degree burglary and misdemeanor prowling. The court sentenced him to state prison for the middle term of four years for the first degree burglary. It sentenced him to six months in county jail for prowling but stayed the sentence pursuant to section 654.

DISCUSSION

A. *The Trial Court Erred in Instructing the Jury That It Could Convict Shoyinka of Burglary Based on an Intent To Commit Rape*

The trial court has the duty to instruct the jury "'on the general principles of law relevant to the issues raised by the evidence. [Citations.]'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) The court also "'has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." [Citation.]'" (*People v. Alexander* (2010) 49 Cal.4th 846, 920-921.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

Burglary is the unlawful entry into a building accompanied by the intent to commit larceny or any felony. (§ 459; *People v. Yarbrough* (2012) 54 Cal.4th 889, 892.) The trial court instructed the jury that it could convict Shoyinka of burglary if the People proved beyond a reasonable doubt that he entered a building (Massa-Moniz's townhouse) with the intent to commit either indecent exposure or forcible rape.[5]

We agree with Shoyinka that there was an insufficient evidentiary basis for the instruction that the jury could convict Shoyinka of burglary on the theory that he entered Massa-Moniz's townhouse with the intent to commit rape. In assessing whether a defendant intended to commit rape in an encounter with his victim, the jury "'may draw inferences from his conduct, including any words . . . spoken.' [Citation.]" (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597.) Here, the record shows that Shoyinka made no attempt to use force against Resnick, Heiden and Massa-Moniz or to prevent them from leaving the townhouse. And when they fled the townhouse, he did not follow them. Nor did Shoyinka verbally threaten the women. Indeed, he said nothing to them. Similarly, in the uncharged incident of indecent exposure in front of Hahn at the Santa Monica library, Shoyinka did not attempt to force himself on Hahn or say anything to her.

Resnick's testimony that she was fearful that Shoyinka might commit rape is immaterial. What matters is what Shoyinka himself intended, not what Resnick thought he might

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[5] Forcible rape is a felony. Indecent exposure is a felony if the exposure occurs after the defendant enters an inhabited dwelling without consent. (§ 314.)

be intending. (See *People v. Greene* (1973) 34 Cal.App.3d 622, 651 [victim's fears that the defendant might rape her "can only be material insofar as they are manifested to the accused and throw light on his acts and intent. 'It is the state of mind of the defendant, not of the victim, which is in issue'"].)

That Shoyinka had his hand in his pants while standing in front of the women in the vestibule of Massa-Moniz's townhouse and then again while standing outside the townhouse from locations where the women could see him tended to show that he entered the townhouse with intent to commit incident exposure. It does not show that he entered with the intent to commit rape. (See *People v. Earle* (2009) 172 Cal.App.4th 372, 393 [the "defendant's commission of an indecent exposure simply could not show, without more, a motive to commit rape—except . . . through the undemonstrated premise that one who commits indecent exposure also wants, needs, or wishes to commit rape" (italics omitted)]; *People v. Cortez* (1970) 13 Cal.App.3d 317, 326 [courts recognize "a distinction . . . between the intent to rape, and lewdness, indecency and lasciviousness either alone or accompanied by an intent to seduce"].)

The People rely heavily on *People v. Moody* (1976) 59 Cal.App.3d 357, but it does not support the instruction that the jury could convict Shoyinka of burglary on the basis of an intent to commit rape. In *Moody*, the defendant entered "a dwelling house, at night after all the doors had been locked and when discovered he had his arms outstretched toward the intended victim, a 15-year-old girl who was dressed only in a nightgown." (*Id.* at p. 363.) The Court of Appeal held that, based on those facts, "the jury could have concluded and there was substantial evidence to support a finding that [the] appellant had either

entered the house with an intent to commit theft or to commit rape." (*Ibid*.) By contrast to the defendant in *Moody*, Shoyinka made no movement towards the women in the vestibule of the townhouse.

In sum, the evidence indicates that Shoyinka entered the townhouse with the intent to do no more than act in a lewd manner in front of his victims. The trial court erred in instructing the jury that it could convict Shoyinka of burglary on the basis of an intent to commit rape.

B. *The Instructional Error Was Harmless*

"Instructional error is subject to harmless error review." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) When, as here, an asserted instructional error is based on state law, we will reverse the conviction on the grounds of prejudice if it is reasonably probable the defendant would have obtained a more favorable result absent the error. (*Ibid*; see *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)[6] When reviewing the effect of challenged instructions for prejudice, "[w]e consider the instructions as a whole as well as the entire record of trial,

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[6] Shoyinka suggests that the standard for federal constitutional error, harmless beyond a reasonable doubt, applies here. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Shoyinka is incorrect. The federal standard applies "[w]hen the jury is 'misinstructed on an element of the offense . . . .'" (*People v. Wilkins* (2013) 56 Cal.4th 333, 348; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1245.) When the jury is instructed on a theory unsupported by the evidence, however, the error is one of state law, and the *Watson* harmless error standard applies. (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 214; *Falaniko*, *supra*, at p. 1245.)

including the arguments of counsel. [Citation.]" (*People v. McPheeters* (2013) 218 Cal.App.4th 124, 132; accord, *People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Jaspar* (2002) 98 Cal.App.4th 99, 111.) Additionally, where the trial court instructs the jury to disregard any instructions it finds to be inapplicable, we may presume the jury followed this instruction and ignored the inapplicable instructions. (*People v. Holloway* (2004) 33 Cal.4th 96, 152-153.)

We do not believe it is reasonably probable that Shoyinka would have been acquitted of burglary if the court had omitted the erroneous instruction on intent to commit rape. The evidence as to Shoyinka's intent to commit indecent exposure was ample. Hahn's testimony was that, in the incident of uncharged misconduct four years earlier, Shoyinka made his presence known to her, stared at her, began touching himself, and then moved to a more secluded spot, where she could still see him, exposed himself and masturbated. Similarly in this case, Shoyinka entered Massa-Moniz's vestibule and approached her, Resnick and Heiden. He made sure the women could see his face and he leered or grinned at them. He had his hand in his pants, touching himself. After the three women fled, Shoyinka stood in the doorway and untied the drawstring of his pants. When Anderson confronted, him he walked away. He returned, however, and stationed himself on the street where the women could see him and continued to move his hand in his pants while looking in their direction. Notwithstanding the four-year interval, the strong parallels between the uncharged and charged incidents support the conclusion that Shoyinka intended to expose himself to Massa-Moniz, Resnick and Heiden, just as he had done to Hahn.

Shoyinka argues that in giving the erroneous instruction on intent to commit rape "based on the victims' suspicions, fears, and intangible feelings, the trial court permitted the jury to believe that this case was potentially more serious and violent than the facts demonstrate." He claims the error is "particularly problematic" because the jury already may have viewed him "as a kind of freak, a pariah, a 'pervert'" (*People v. Earle*, *supra*, 172 Cal.App.4th at p. 401).

We disagree. The possibility that the instruction on intent to commit rape inflamed the jury was minimized by the prosecutor's closing argument, which only fleetingly mentioned the concept of convicting Shoyinka of burglary on that basis. (See *People v. Crandell* (1988) 46 Cal.3d 833, 872-873 [trial court error in giving initial aggressor self-defense instruction did not "sidetrack[]" the jury and thus was nonprejudicial, because the instruction "did not figure in the closing arguments"]; cf. *People v. Diaz* (2014) 227 Cal.App.4th 362, 365 [trial court's error in permitting jury to view certain videos was prejudicial because, inter alia, "the prosecutor repeatedly refer[red] to the videos during closing argument"].) And in his closing argument, Shoyinka's counsel took pains to steer the jury clear of intent to commit rape, pointing out the lack of evidence to support a conviction of burglary on that basis.

The trial court's instructions as a whole also cushioned the impact of the erroneous instruction on intent to commit rape. In particular, the court instructed the jury to disregard any instructions it finds to be inapplicable. Inasmuch as the prosecutor barely referred to intent to commit rape in her closing argument, and defense counsel argued there was insufficient evidence of intent to commit rape, it is fair to presume the jury

followed the court's instruction and disregarded the instruction on intent to commit rape. (*People v. Holloway*, *supra*, 33 Cal.4th at pp. 152-153.)

This is not to say that a prosecutor always can cure prejudice arising from a request for an erroneous instruction that is granted by not talking about the instruction in closing argument, or that the court always can cure such prejudice by surrounding the erroneous instruction with proper instructions.[7] On the facts of this case, however, the prosecutor's de-emphasis of intent to commit rape as a basis to convict Shoyinka of burglary and the full set of correct instructions the court gave, when combined with the compelling evidence supporting Shoyinka's conviction of burglary on the alternative basis of intent to commit indecent exposure, curbed the potential for prejudice stemming from the erroneous instruction.

Finally, Shoyinka claims prejudice based on the length of the jury's deliberations and its initial deadlock. According to Shoyinka, these factors indicate that "[t]he jury clearly saw this as a close case. . . . Given the closeness, it is reasonable that the improper instruction o[n] rape tipped the balance in favor of finding [him] guilty." On the record before us, we do not infer from the jury's actions that it considered the case close.

The jury deliberated for just short of five hours. Even if this constitutes a lengthy deliberation, it does not show that the case was close. "Instead, we find that the length of the

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[7] And certainly a trial court cannot excuse its giving of an erroneous instruction by deeming (as the court did here) the instruction to be nonprejudicial. The court should not give an erroneous instruction, even if it believes the error will cause no harm.

deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." (*People v. Walker* (1995) 31 Cal.App.4th 432, 439.) Supreme Court decisions in which the length of the jury's deliberations was deemed an indicator that the case was close are of little utility to Shoyinka's prejudice claim. In *People v. Woodard* (1979) 23 Cal.3d 329, the Supreme Court stated that the jury's six hours of deliberations was evidence that the defendant's guilt was "far from open and shut." (*Id*. at p. 341.) But the court did not infer the case was close from the length of deliberations alone: the court also emphasized that there was "sharply conflicting evidence" of the defendant's guilt stemming from diverging testimony on whether the defendant actually was the perpetrator. (*Ibid*.) Based on both the length of deliberations and weaknesses in the prosecution's case, the court found prejudicial error arising from the trial court's ruling allowing improper impeachment by the prosecutor of a witness who testified that defendant was not the perpetrator. (*Ibid*.) Similarly, in finding prejudice arising from erroneous evidentiary rulings in *People v. Cardenas* (1982) 31 Cal.3d 897, 907, the Supreme Court inferred the case was close based not just on the fact the jury deliberated for 12 hours, but also on the overall record, which showed that "[t]he prosecution's case against [the defendant] was not overwhelming." (*Ibid*.) Because the evidence of Shoyinka's guilt was strong, an inference that the jury considered the case close based on the length of its deliberations, "in the absence of more concrete" support for that conclusion, "would amount to sheer speculation on our part." (*Walker*, *supra*, at p. 439.)

Likewise, that the jury initially was deadlocked does not mean the case was close. (See *People v. Simon* (1995) 9 Cal.4th 493, 501-502 ["acquittal and deadlock on some counts does not itself establish the case was close with respect to the counts on which [the defendant] was convicted"].) In any event, the deadlock did not last very long: shortly after the jury resumed deliberations following the announcement of the deadlock, it found Shoyinka guilty.

In sum, it is not reasonably probable that the jury would have acquitted Shoyinka of burglary had it been instructed on entry with intent to commit indecent exposure only. (*People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 214.)

DISPOSITION

The judgment is affirmed.

SMALL, J.*

We concur:

ZELON, Acting P. J. SEGAL, J.

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