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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

HERBERT ALBERTO ALVARENGA,

Defendant and Appellant.

2d Crim. No. B279414
(Super. Ct. No. 2013020538)
(Ventura County)

Herbert Alberto Alvarenga appeals a judgment following conviction of attempted murder, assault with a deadly weapon, street terrorism, first degree residential burglary, infliction of bodily injury upon a child, use and possession of tear gas, battery, and failure to appear while on bail, with findings of benefit to a criminal street gang, personal use of a deadly weapon, and personal infliction of great bodily injury. (Pen. Code, §§ 664, 187, subd. (a), 245, subd. (a)(1), 186.22, subd. (a), 459, 273d, subd. (a), 22810, subds. (a) & (g)(1), 242, 1320.5, 186.22, subd. (b)(1), 12022,

subd. (b)(1), 12022.7, subd. (a).)[1] We modify the judgment to impose and then stay sentence enhancements to counts 2 and 3, but otherwise affirm.

This appeal concerns crimes committed on three occasions by Alvarenga, a longtime member of the Varrio Simi Valley (VSV) criminal street gang. On July 29, 2013, Alvarenga surreptitiously entered his estranged wife's apartment, sprayed pepper spray therein, and assaulted guest Fernando Medina, another VSV gang member. At the time, Medina was sleeping in the master bedroom with Alvarenga's estranged wife and her son. Three months later, Alvarenga and his brother lay in wait for Medina, stabbed him, and beat him with baseball bats. Following Alvarenga's arrest on charges arising from these incidents, he fled on bail and failed to appear at trial. Several months later, authorities located and rearrested him.

Alvarenga raises arguments regarding the trial court's failure to grant a continuance, sufficiency of gang-enhancement evidence, asserted instructional errors, and stay of sentence pursuant to section 654. We find no merit to these arguments.

FACTUAL AND PROCEDURAL HISTORY

Alvarenga and his wife Guiliana had a long term marriage but separated in 2012.[2] The couple had two sons and one daughter. During the marriage, Guiliana complained of domestic violence against her by her husband. In 2006, in response to her call, an investigating police officer saw scratches on Guiliana's

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

[2] We will refer to members of the Alvarenga family by their first names not from disrespect, but to ease the reader's task.

face and a "thumbprint bruise" on her neck. Nevertheless, Guiliana refused to prosecute her husband.

In March 31, 2012, Guiliana leased a second-floor apartment for herself and her three children. Alvarenga lived elsewhere and was not a party to the lease.

On June 21, 2013, Guiliana and her children obtained a restraining order against Alvarenga. Guiliana did not serve Alvarenga with the restraining order, however, and he was not present in court when she obtained the order. She testified that she was pressured by social workers to obtain the restraining order.

During the afternoon of June 28, 2013, Guiliana and her daughter drove to a local supermarket. After Guiliana parked her vehicle, she saw Alvarenga remove the vehicle's battery. She reported the matter to the police and stated during the recorded dispatch telephone call, that she was "tired of getting harassed."

July 29, 2013, Incident
(Counts 4, 5, 6, 7, & 8)

On July 28, 2013, Guiliana held a social gathering in the common area of her apartment building. Medina, a relatively new and younger VSV gang member, was a guest. Medina had the gang tattoos "V" and "S" on his shoulders and "Brown Life" on his chest. Medina spent the night with Guiliana in the master bedroom of her apartment. Guiliana's youngest son was also in the bedroom.

During the early morning, Alvarenga opened the balcony apartment sliding door, walked past his daughter asleep on the sofa, and approached the master bedroom. Guiliana was awakened and frightened by the noise of the balcony door opening. She arose from bed, walked to the closed bedroom door,

and opened it. Immediately, she was confronted by Alvarenga who held a can of pepper spray. He pushed past Guiliana and sprayed the bed. Guiliana shouted for him to stop, pointing out that their son was also in the bed. Alvarenga continued to spray the pepper spray, however, injuring Guiliana, their son, and Medina.

Medina and Alvarenga then began to fight in the bedroom and then in the living room. Alvarenga continued to use the pepper spray, burning his daughter's eyes. Guiliana and her son fled the apartment; Alvarenga ran past them and ordered her not to summon police. Guiliana telephoned the emergency police dispatcher, however, and reported the incident, adding that it was difficult for her to breathe.

Meanwhile, Simi Valley Police Officer Steve Jennings saw Alvarenga run onto the freeway on-ramp. He stopped Alvarenga, whom he recognized. Alvarenga was not wearing a shirt or shoes and was wet. He had cuts on his face and scrapes on his knuckle. Alvarenga's eyes were red and watering and he complained that his eyes burned. Alvarenga carried an identification card issued to "Fernando Medina."

Jennings handcuffed Alvarenga and drove him to Guiliana's apartment. Paramedics were there treating Alvarenga's children; his youngest son and Medina were taken to the hospital. Jennings found a can of pepper spray inside Guiliana's apartment, an open balcony door, and blood on the floors and walls. Trails of blood drops were outside on the stairway. Medina refused to speak with Jennings about the incident. Guiliana informed Jennings that Alvarenga did not reside with her and was not welcome there.

September 28, 2013, Incident
(Counts 1, 2, & 3)

In the early morning of September 28, 2013, Medina picked up his girlfriend, Danitza Jimenez, from her restaurant employment to drive her home. En route, Medina stopped at an apartment building on an errand. As he ascended the apartment stairs, Alvarenga and his brother Fernando "popped up" and ran toward him. The brothers held a knife and baseball bats and chased Medina down the stairs.

The brothers caught Medina in the apartment's carport area. Jimenez saw Medina lying on the ground and Alvarenga kicking and repeatedly stabbing him with a hunting knife. Fernando also was kicking and hitting Medina. Medina and Jimenez shouted for the two men to cease their attack. When the assault finally ended, Jimenez heard Alvarenga warn Medina that "[t]here will be more." Neither Alvarenga nor Fernando shouted their gang name or made gang signs during the assault.

Several residents of the apartment building heard and saw the assault and one man "talking trash" to a man lying on the ground. A resident called for police assistance. The recorded emergency telephone call captured the sounds of a background altercation.

Jimenez also telephoned for police assistance. As she was dialing, Fernando approached her with a sledgehammer and warned her not to call the police or name Medina's assailants. He also attempted to seize her cellular telephone. Jimenez continued the call, however, although she did not name Alvarenga or Fernando. Alvarenga and Fernando left the scene quickly in a sedan driven by Alvarenga.

Jimenez recognized Alvarenga and Fernando because she knew them. Jimenez also knew that Medina, Alvarenga, and Fernando were VSV gang members. Eventually, Jimenez revealed to police officers that Alvarenga and Fernando attacked Medina. At trial, Jimenez stated that she was certain that they were Medina's assailants.

Laboratory DNA analysis of a baseball bat handle found at the scene of the assault was identical to Alvarenga's DNA (one in 160 quadrillion). A review of Alvarenga's cellular telephone records indicated that his telephone was near the scene when Medina was assaulted.

Medina suffered multiple stab wounds and received emergency surgery at a nearby hospital. Later, he was uncooperative with investigating police officers regarding his assailants.

Failure to Appear for Trial
(Count 9)

On May 31, 2014, Alvarenga posted bail and was released from jail. On June 2, 2014, he failed to appear for trial. The trial court issued a $5 million bench warrant for his arrest. On September 5, 2014, police officers located Alvarenga in Simi Valley. After a pursuit, he was rearrested.

Evidence Regarding VSV Criminal Street Gang

In July 2010, Alvarenga and brother Fernando were involved in an altercation with other street gang members at a Simi Valley bar. One participant had yelled "fuck Simi." Although the brothers suffered physical injuries, they refused to complain to authorities.

Simi Valley Police Officer Vincent Allegra responded to Guiliana's police emergency call regarding the Alvarenga

brothers' injuries. Allegra, a previous gang enforcement officer, knew the brothers as VSV street gang members. Allegra was not surprised that the brothers would not cooperate with his investigation because, based upon his experience, he knew that gang members prefer "to take care of [matters] later on their own."

In 2000, Allegra spoke with Fernando who admitted that he was "a gangster" who directed "younger guys what to do." Alvarenga admitted to a different gang enforcement officer that his gang moniker was "Smurf." On several occasions, that officer saw Alvarenga's vehicle parked near the residences of known VSV gang members.

In 2006, Alvarenga informed Simi Valley Police Officer James Wismar that he claimed VSV gang membership when encountering rival gangs. In 2008, Alvarenga registered as a gang member on two occasions with the Simi Valley Police Department, listing his moniker as "Mr. Smurf." Alvarenga also signed his driver's license as "Mr. Smurf."

Simi Valley Police Officer Frank Mika testified as the prosecution criminal street gang expert witness. He stated that VSV and West Side Locos were the primary gangs in Simi Valley. Mika opined that "respect" was an important value within a gang or between different gangs – "It's all about respect." He stated that to walk away from an insult shows disrespect to the gang member's own gang. Mika also explained that gang members do not cooperate with law enforcement for fear of being subject to violent retribution.

Mika testified that the commission of violent crimes increased a gang's reputation and power, particularly if the crime was committed in a public area. The "ultimate disrespect"

committed by a gang member is to have a sexual relationship with an older gang member's wife. This violation could result in a violent crime against the younger gang member. Mika opined that the determination whether a crime was gang-related rests on a "case-to-case" basis. Mika concluded that the attempted murder of Medina in a carport was gang-related, but not the pepper-spray incident in Guiliana's apartment.

Mika opined that in 2013, VSV had 15 to 20 members, whose primary activities were assault with a deadly weapon, battery, attempted murder, and murder, among other crimes. He testified concerning three predicate crimes by VSV gang members. Mika knew many VSV gang members and had personally investigated their crimes. He knew Alvarenga and Fernando and opined that they were active VSV gang members at the time of the crimes committed herein. Mika also knew Medina and opined that he too was an active VSV gang member. Mika testified that Alvarenga did not have gang-related tattoos and did not wear gang-related clothing. Alvarenga had registered as a gang member, however, and had been involved in gang-related crimes.

Medina did not testify at trial. Guiliana testified and contradicted earlier statements she made to investigating police officers. She stated at trial that Alvarenga lived in the apartment with her and their children, he occasionally entered through the sliding glass door, and she possessed and sprayed the pepper spray during the July 29, 2013, incident.

The jury convicted Alvarenga of attempted murder, assault with a deadly weapon, street terrorism, first degree residential burglary, infliction of physical punishment on a child, use of tear gas, possession of tear gas, battery, and failure to appear while

on bail. (§§ 664, 187, subd. (a), 245, subd. (a)(1), 186.22, subd. (a), 459, 273d, subd. (a), 22810, subd. (g)(1), 22810, subd. (a), 242, 1320.5.) The jury also found that Alvarenga committed the attempted murder and assault crimes to benefit a criminal street gang, personally inflicted great bodily injury upon his victim, and personally used a deadly and dangerous weapon. (§§ 186.22, subd. (b)(1), 12022.7, subd. (a), 12022, subd. (b)(1).)

The trial court sentenced Alvarenga to a prison term of 24 years 4 months, which included seven years for the attempted murder count, plus 10 years for the criminal street gang enhancement, three years for the great bodily injury enhancement, and one year for the personal weapon use enhancement, totaling 21 years for that count. The court sentenced him with a combination of subordinate consecutive sentences, concurrent sentences, and stayed sentences regarding the remaining eight counts. The court also imposed a $5,000 restitution fine, a $5,000 parole revocation restitution fine (suspended), a $360 court security assessment, a $270 criminal conviction assessment; ordered victim restitution; and awarded Alvarenga 1,202 days of presentence custody credit. (§§ 1202.4, subd. (a), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Alvarenga appeals and contends that: 1) the trial court abused its discretion by denying him a continuance; 2) insufficient evidence supports the gang-enhancement finding; 3) the trial court erred by not instructing sua sponte with attempted voluntary manslaughter; 4) the trial court erred by refusing his instruction regarding the crime of trespass; and, 5) the trial court erred by not staying sentence pursuant to section 654 for count 6, the unlawful use of tear gas.

DISCUSSION

I.

Alvarenga argues that the trial court abused its discretion by denying his request for a continuance to find a gang expert witness after his expert witness belatedly declined to testify. Alvarenga asserts that the ruling denied his federal and state constitutional rights to a defense, due process of law, a fair trial, and the effective assistance of counsel. He contends that the error is reversible per se or reversible pursuant to *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].

Following the prosecution's case-in-chief and the testimony of 32 witnesses, Alvarenga requested a continuance for several days to find a gang expert witness. Alvarenga explained that the expert witness that he had expected to testify, Frank Bresslinger, left a message stating that he "would be uncomfortable testifying" and "didn't want to be involved." Alvarenga had not subpoenaed Bresslinger, but expected him to appear and opine that the attempted murder and assault of Medina were not gang-related crimes. The prosecutor objected to a continuance beyond one court day.

Alvarenga's counsel then stated, "I'm still like scrambling now to find somebody. And I don't necessarily know that I'm going to be able to find somebody now. . . . From the People's [gang expert] witness, I think I got what I wanted out of him."

The trial court acknowledged Alvarenga's right to present a defense but found that any prejudice to Alvarenga was minimal. The court noted that the prosecution gang expert witness provided Alvarenga with the factual foundation to make the common sense argument that the attempted murder and assault of Medina were not gang-related crimes. The court also stated

that the jury had been informed that the trial would be concluded soon and the court wished to avoid hurried or pressured deliberations.

A party requesting a continuance must establish good cause therefor. (§ 1050, subd. (e).) "To establish good cause for a continuance, defendant [has] the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [11 L.Ed.2d 921, 931].) The party challenging a ruling regarding a continuance bears the burden of establishing an abuse of discretion. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1181, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) An order denying a continuance is seldom successfully attacked. (*Ibid.*)

The trial court did not abuse its discretion by denying the motion to continue trial. Alvarenga did not establish that an expert witness existed who was willing to offer relevant testimony within a reasonable time. (*People v. Howard*, *supra*, 1 Cal.4th 1132, 1171.) "Instead, defendant could only offer the prospect of further delay while he searched." (*Ibid.*) Also, Alvarenga was not diligent in securing Bresslinger's appearance. (*Ibid.*)

Moreover, any prejudice to Alvarenga was minimal. Alvaranga presented the defense that the violent crimes against

Medina were jealous acts of revenge rather than gang-related crimes. When requesting the continuance, he conceded that he "got what I wanted" from the prosecution gang expert. Under the circumstances, Alvarenga's constitutional rights were not impaired. (*People v. Howard*, *supra*, 1 Cal.4th 1132, 1171-1172.)

II.

Alvarenga contends that insufficient evidence exists that he committed attempted murder and assault with a deadly weapon with the specific intent to benefit a criminal street gang. (§ 186.22, subd. (b)(1).) He asserts that he had but a personal motive of retaliation against Medina for Medina's sexual relationship with Guiliana. Alvarenga points out that expert witness Mika was not aware of similar circumstances involving a younger gang member's sexual relationship with an older gang member's wife. Alvarenga adds that neither he nor Fernando wore gang-related clothing or shouted gang names during the crimes.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Brooks* (2017) 3 Cal.5th 1, 57; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*Johnson*, at p. 988.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact"].) We must accept

logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar*, at p. 60.) Moreover, the testimony of a single witness is sufficient to prove a fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

The sufficiency of evidence in a particular case depends upon the factual circumstances in that case. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) A finding of sufficiency in one case does not suggest that weaker factual circumstances in another case will not support a conviction. (*Ibid.*) In our review, we focus upon the evidence that was presented, rather than evidence that might have been but was not presented. (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

Sufficient evidence and all reasonable inferences therefrom support the gang enhancement finding. Alvarenga committed the attempted murder and assault with a deadly weapon crimes three months following the pepper-spray incident. He and Fernando, also a VSV gang member, lay in wait for Medina, surprised him, and brutally assaulted him in the public carport area of an apartment building. Medina's sexual relationship with Guiliana was an act of "ultimate disrespect" to a more senior gang member according to expert witness Mika. (*People v. Williams* (2016) 1 Cal.5th 1166, 1200 [expert may testify concerning generalized information to assist jurors in understanding case-specific facts]; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 53 [subject matter of criminal street gang culture

within purview of expert witness].) Medina was a younger VSV gang member, having joined VSV several years before. Alvarenga and Fernando acted in full view of Jimenez, whom they knew, and within earshot and view of residents of the apartment building. It is a reasonable inference from the evidence that they also acted with a purpose to intimidate the community. Indeed, Fernando threatened Jimenez with a sledgehammer when she telephoned for police assistance. Jimenez testified at trial that she left the state within days because she was "terrified." Moreover, Mika testified that VSV's criminal activities included attempted murder, murder, and assault, among other crimes. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930 ["It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a . . . finding on a gang allegation"].) Although another reasonable inference may be drawn from the evidence, we do not substitute our inference for that drawn by the trier of fact.

III.

Alvarenga argues that the trial court erred by not instructing sua sponte concerning the lesser included offense of attempted voluntary manslaughter. (§ 192, subd. (a).) He asserts that the evidence supports a finding of attempted murder committed in the heat of passion caused by Medina's ongoing affair with Guiliana. Alvarenga contends that the error violated his state and federal constitutional rights to due process of law, to present a defense, to a jury trial, and to a fair trial.

In criminal cases, the trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary to the jury's understanding of the case. (*People v.*

Nelson (2016) 1 Cal.5th 513, 538; *People v. Enraca* (2012) 53 Cal.4th 735, 758.) The evidence necessary to support a lesser included offense instruction must be substantial evidence from which reasonable jurors could conclude that the facts underlying the instruction exist. (*Ibid.*) The substantial evidence requirement is not satisfied by any evidence, no matter how weak, but evidence from which a jury could conclude that the lesser offense, but not the greater, was committed. (*Nelson*, at p. 538.) We independently review whether the trial court should have instructed concerning a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that . . . is however predominantly legal. As such it should be examined without deference." (*Ibid.*) Doubts regarding the sufficiency of evidence to warrant a lesser included offense instruction, however, must be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

The crime of murder may be reduced to voluntary manslaughter if the victim engaged in provocative conduct sufficient to cause an ordinary person with an average disposition to act in the heat of passion, i.e., rashly or without due deliberation and reflection. (*People v. Enraca*, *supra*, 53 Cal.4th 735, 759; *People v. Gutierrez* (2009) 45 Cal.4th 789, 826 ["'The provocation must be such that an average, sober person would be so inflamed that he or he would lose reason and judgment'"].) "Heat of passion" is a state of mind created by legally sufficient provocation causing a person to act not from rational thought, but from an unconsidered reaction to the provocation. (*People v. Nelson*, *supra*, 1 Cal.5th 513, 539 [legally sufficient provocation

eclipses reflection and causes a person to act without deliberation or judgment]; *People v. Beltran* (2013) 56 Cal.4th 935, 942 [a person who acts without reflection in response to adequate provocation does not act with the mental state required for murder].) "'Adequate provocation and heat of passion must be affirmatively demonstrated.'" (*Gutierrez*, at p. 826.) It is not sufficient that a person is provoked and then later kills. (*Nelson*, at p. 539.)

The heat of passion element of voluntary manslaughter has an objective and a subjective component. (*People v. Enraca*, *supra*, 53 Cal.4th 735, 759.) "Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Ibid.*) Subjectively, the accused must be shown to have killed while under the actual influence of a strong passion induced by such provocation. (*Ibid.*)

The trial court was not required to instruct regarding attempted voluntary manslaughter because there was no evidence that Alvarenga attempted to murder Medina in the heat of passion. (*People v. Thomas* (2012) 53 Cal.4th 771, 813 [lesser included offense instruction not required where there is no evidence that offense is less than that charged].) Alvarenga committed the crime together with his gang member brother. Armed with a hunting knife and baseball bats, they lay in wait at night at the apartment building for Medina. The crime occurred nearly three months following the pepper-spray incident at Guiliana's apartment. "[I]t is insufficient that one is provoked and later kills. If sufficient time has elapsed for one's passions to 'cool off' and for judgment to be restored, [there is] no mitigation for a subsequent killing." (*People v. Beltran*, *supra*, 56 Cal.4th

935, 951.) Moreover, although Jimenez learned of Medina's affair following the attempted murder, this evidence does not indicate that the affair was ongoing or that Alvarenga knew or believed it to be ongoing. Alvarenga points to no evidence indicating that the affair was ongoing or that Alvarenga believed it to be so.

IV.

Alvarenga contends that the trial court erred by refusing his trespass instruction as a lesser included offense of burglary pursuant to the accusatory pleading test. (§§ 602.5, 459; CALCRIM No. 2931; *People v. Waidla*, *supra*, 22 Cal.4th 690, 733.) He asserts that the error denied him due process of law and the right to a jury trial pursuant to the federal and state constitutions.

Trespass is not a lesser included offense to burglary according to a comparison of the legal elements of each crime. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343 [trespass is a lesser related offense, not a lesser included offense, of burglary].) This is so because burglary can be committed without committing any form of criminal trespass. (*People v. Birks* (1998) 19 Cal.4th 108, 118, fn. 8.) One can enter a residence with permission but harbor an intent to commit a felony therein. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 369.)

The crime of trespass also was not a lesser included offense pursuant to the pleading (third amended information) filed against Alvarenga. The pleading alleged that Alvarenga "did unlawfully enter an inhabited . . . portion of a building . . . with the intent to commit larceny and any felony." Our Supreme Court rejected a similar argument in dictum in *People v. Birks*, *supra*, 19 Cal.4th 108, 118, footnote 8. At best, trespass is a

lesser related offense to burglary. (*People v. Foster*, *supra*, 50 Cal.4th 1301, 1343.)

The trial court did not err by refusing the trespass instruction. A defendant has no right to instruction on a lesser related offense, even if he requests the instruction and substantial evidence supports it. (*People v. Jennings* (2010) 50 Cal.4th 616, 668.) "California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties." (*Ibid.*) There is also no federal constitutional right of a defendant to compel instruction on a lesser related offense. (*People v. Foster*, *supra*, 50 Cal.4th 1301, 1344: *People v. Wolfe* (2018) 20 Cal.App.5th 673, 688 [general rule].) Here the prosecutor did not agree to the trespass instruction.

In any event, Alvarenga was not prejudiced pursuant to any standard of review. The jury found that he possessed and unlawfully used tear gas once he entered Guiliana's apartment (counts 6 & 7); it rejected Guiliana's testimony that it was she who sprayed everyone inside the apartment. There is no substantial evidence that Alvarenga committed only the lesser offense of trespass but not the greater offense of burglary.

V.

Alvarenga argues that the trial court erred by not staying sentence pursuant to section 654 for the unlawful use of tear gas, count 6. (§ 22810, subd. (g)(1).) He asserts that his use of tear gas was an indivisible transaction with the infliction of bodily injury upon a child, count 5. (§ 273d, subd. (a).)

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Analysis of a section 654 claim rests upon well-settled principles. (*People v. Corpening* (2016) 2 Cal.5th 307, 311, fn. 2.) The statutory reference to "act or omission" may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. (*Id.* at p. 311.) Where the facts are undisputed, application of section 654 raises a question of law that we review de novo. (*Id.* at p. 312.)

Whether a course of criminal conduct is divisible giving rise to more than one act within the meaning of section 654 depends upon the actor's intent and objective. (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) If the offenses were incident to one objective, the defendant may be punished for any of the offenses but not for more than one. (*Ibid.*) "Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*Ibid.*) Moreover, the "temporal proximity" of the offenses is insufficient by itself to establish the finding of a single objective. (*Ibid.*)

It has long been the law that multiple punishment is permissible where a single act of violence injures multiple persons. (*People v. McFarland* (1989) 47 Cal.3d 798, 803.) A person who acts with the intent to harm more than one person or by means likely to cause harm to several persons bears greater culpability, thus precluding application of section 654. (*Ibid.*)

Here the trial court expressly declined to stay sentence for count 6, the use of tear gas. The use of tear gas harmed Guiliana, Medina, and the three children asleep in the apartment. Alvarenga persisted in spraying the tear gas in the obvious

presence of his children. Medina and the youngest child received hospital treatment; the other two children were treated at the apartment by paramedics. Alvarenga injured more than one victim and thus multiple punishment was proper. (*People v. McFarland*, *supra*, 47 Cal.3d 798, 803.) The trial court did not err.

VI.

The Attorney General points out that the trial court failed to impose and stay the personal weapon use and great bodily injury enhancements attached to counts 2 (assault with a deadly weapon) and 3 (street terrorism). (§§ 12022.7, subd. (a), 12022, subd. (b)(1); 654.) The court's failure to impose and stay the mandatory enhancements when it imposed and stayed sentence for counts 2 and 3 was error. (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 616 ["Section 654 applies when the aspect of a sentence enhancement punishes the exact criminal conduct for which a defendant has been separately convicted and sentenced"].) Accordingly, we modify the judgment to impose and then stay the mandatory sentence enhancements to counts 2 and 3. (§ 654.)

We modify the judgment to impose a section 12022.7, subdivision (a) enhancement to counts 2 and 3, and a section 12022, subdivision (b)(1) enhancement to count 3. These enhancements are then stayed pursuant to section 654. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J. TANGEMAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

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