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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUAN GARCIA, Defendant and Appellant.	B240034 (Los Angeles County Super. Ct. No. KA096009)

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

Phillip I. Bronson, 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, Assistant Attorney General, and Steven D. Matthews, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Juan Garcia appeals from the judgment entered following a jury trial that resulted in his conviction of second degree burglary.[1] His sole contention on appeal is that the trial court prejudicially erred by failing to instruct sua sponte on trespass as a lesser included offense of burglary. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules of appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that Sekou Bunch was in his home on Orange Grove Avenue in Pomona about 9:15 p.m. on November 6, 2011, when he noticed that the motion detectors outside his detached garage had been activated. Going outside to investigate, Bunch saw an unfamiliar bicycle lying on the ground in front of the closed garage door. He also saw that the gate between the house and the garage, which led to a walkway to the rear yard, was open. Bunch went back into the house and told his roommate to call 911 because he suspected someone was on the property. Bunch grabbed his cell phone and also called 911 as he walked back outside. While on the phone with the police dispatcher, Bunch stood on the sidewalk looking toward the house. Bunch saw defendant on the walkway between the house and the garage, about where the side door to the garage was located. Defendant was holding a box that Bunch recognized as one he used to move things around in the garage. As defendant came through the open gate, he appeared startled to see Bunch. Defendant put down the box, picked up the bicycle and rode west on Orange Grove. Bunch described defendant to the dispatcher, who told Bunch that an officer was on the way. Down the street, Bunch saw a police car with its lights flashing. Looking inside the box defendant had dropped, Bunch saw that it

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[1] Defendant was charged by information with burglary (Pen. Code, § 459). (All future undesignated statutory references are to the Penal Code.) Various prior conviction enhancements were also alleged. After the jury found defendant guilty of second degree burglary, the trial court found true the allegation that defendant had suffered one Three Strikes law prior conviction (§ 1170.12, subds. (a)-(d), § 667, subds. (b)-(i)) and served three prior prison terms (§ 667.5, subd. (b)). It sentenced defendant to 9 years in prison. Defendant timely appealed.

contained various items of his personal property which had been in the garage, but not in the box. Bunch noticed that the side door to the garage was open. Bunch kept that door closed, but not locked.

The police officer who responded to the dispatch was driving to Bunch's home when he noticed defendant riding a bicycle west on Orange Grove. The officer stopped defendant, who did not comply with an instruction to sit on the ground. After arguing with the officer, defendant rode away but surrendered after a short pursuit.

DISCUSSION

Defendant contends the trial court erred by failing to instruct the jury sua sponte on trespass as a lesser included offense of burglary. He argues that, notwithstanding the well settled rule that trespass is not a lesser included offense of burglary, we should hold otherwise based on *People v. Waidla* (2000) 22 Cal.4th 690, 731, in which our Supreme Court stated that it was accepting the defendant's argument that trespass was a lesser included offense of burglary under the accusatory pleading test, even if not under the legal elements test, "for purposes of discussion only." The contention is without merit.

"A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged . . . ." (*Waidla*, *supra*, 22 Cal.4th at p. 733.) Trial courts have no duty to instruct on a lesser *related* offense. (*People v. Birks* (1998) 19 Cal.4th 108, 136.) It is well settled that trespass is a lesser *related*, not a lesser *included* offense of burglary. (*People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344 (*Foster*) ["Regardless of defendant's legal and factual theories concerning how his conduct may have constituted trespass, that potential crime nonetheless remains at most a lesser offense related to (but not included in) the offense of burglary."]; *Birks* at p. 118, fn. 8 ["It appears well settled that trespass is not a lesser necessarily included offense of burglary, because burglary, the entry of specified places with intent to steal or commit a felony (§ 459) can be committed without committing any form of criminal trespass (see § 602). [Citations.]"].) Accordingly, trial courts have no

sua sponte duty to instruct on trespass as a lesser included offense of burglary. (*Foster* at p. 1344.)

Here, the trial court instructed the jury on burglary. Defendant did not request a trespass instruction and the trial court did not give one. This was not error.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.