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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. DWAYNE BRIAN BURNS, Defendant and Appellant.	C063603 (Super. Ct. No. 07F3931)

APPEAL from a judgment of the Superior Court of Shasta County, Stephen H. Baker and Cara Beatty, Judges. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French and Brook Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, and IV.

Defendant Dwayne Brian Burns went into someone else's home at around 4:00 in the morning looking for a woman with whom he had a "quasi-romantic" and "quasi-sexual" relationship. When he found her in the bed of one of the residents of the home, he pepper-sprayed two of the residents. Convicted, after two trials, of misdemeanor carrying a loaded firearm and misdemeanor aggravated trespassing (in the first trial) and felony use of tear gas (in the second trial), and sentenced to two years in state prison, defendant appeals.

On appeal, defendant contends that (1) the trial court erred by instructing the jury in the second trial that trespassers have no right to self-defense; (2) the court erred by failing to instruct the jury in the first trial on self-defense as a defense to trespassing and on unanimity; (3) the court erred by instructing the jury in the second trial that defendant committed aggravated trespassing, thus invoking collateral estoppel against defendant; and (4) the prosecutor committed misconduct. We conclude that the trial court erred by applying collateral estoppel but that the error was harmless. In all other respects, there was no error or misconduct.

We affirm.

PROCEDURE

Defendant was charged with felony criminal threats (count 1; Pen. Code, § 422); felony use of tear gas not in self-defense (count 2; Pen. Code, § 12403.7, subd. (g)); misdemeanor carrying a loaded firearm (count 3; Pen. Code, § 12031, subd. (a)(1)); misdemeanor exhibiting a firearm (count 4; Pen. Code, § 417,

subd. (a)(2)); and misdemeanor aggravated trespassing (count 5; Pen. Code, § 602.5, subd. (b)).

Defendant was tried by jury (first trial; Judge Stephen H. Baker, presiding), which convicted him of misdemeanor carrying a loaded firearm and misdemeanor aggravated trespassing but acquitted him of felony criminal threats and misdemeanor exhibiting a firearm. The jury deadlocked on the felony count of using tear gas not in self-defense, ultimately voting seven to five in favor of acquittal. The trial court declared a mistrial as to that count.

Defendant was retried by jury (second trial; Judge Cara Beatty, presiding) on the felony count of using tear gas not in self-defense. The jury convicted defendant on that count.

The trial court (Judge Beatty, presiding) denied probation and sentenced defendant to the middle term of two years in state prison on the felony tear gas count. The court also imposed concurrent one-year terms for the two misdemeanors -- carrying a loaded firearm and aggravated trespassing.

FACTS

The parties agree that the evidence presented in the two trials was similar. For this reason and because defendant makes no assertions concerning the sufficiency of the evidence in either trial, we present the facts without indicating what evidence was produced in each trial, except where noted.

On the evening of May 4, 2007, defendant, who was 42 years old, was at the home of sisters Kelly and Kathy Kelsay, drinking with them until about 10:00 p.m. Kelly, who was 41 years old,

left the home in her mother's green van, and defendant went to his own home. In the first trial, defendant stated that he had romantic or sexual feelings toward Kelly. In the second trial, defendant described his relationship with Kelly as "quasi-romantic" and "quasi-sexual."

Early the next morning, defendant, who had been drinking at home, received a call from Kathy, who stated that Kelly had not returned. Defendant left his home around 3:30 or 4:00 a.m. to look for Kelly. He first went to the home of Kelly's mother but did not find the green van there, and then went to the residence of Jeffrey Kelsay, the nephew of Kelly and Kathy, where he found the van. Defendant testified that he knew where Jeffrey lived because he had taken Kelly there several times.

Jeffrey, who was in his early 20's, lived with two other young men of about the same age -- Christopher Martinez and Shane Fotovat. When defendant arrived at the residence, Kelly was sleeping with Martinez in his room. Defendant claimed he was concerned for Kelly's welfare and the thought that she might be with another man, in his words, "did cross [his] mind."

Defendant pounded on the front door, waking up Jeffrey. When Jeffrey opened the front door, defendant entered the house and began frantically looking around. Jeffrey did not know defendant and did not invite him in. Defendant opened doors, saying Kelly's family was looking for her and that she was "coming with [him]." Martinez heard the commotion and told Kelly to hide.

Jeffrey called his grandmother, Kelly's mother, to ask whether the family was looking for Kelly, as defendant continued opening doors and saying that he was looking for Kelly. Jeffrey told defendant not to open Martinez's door because it would make Martinez mad, but defendant pushed on Martinez's door, trying to open it. Martinez was at the door and opened it slightly to ask, "Who are you?' and say, "Get out of my room." As soon as Martinez said that, Jeffrey told defendant to leave.

Defendant, screaming and yelling and saying Kelly was coming with him, continued to try to get into Martinez's room. So Martinez pushed back and, several times, told defendant to leave. Jeffrey hung up the phone and went to help Martinez.

Defendant took a pepper spray can from his pocket and sprayed Martinez and Jeffrey.

Considering defendant's appellate contentions, we summarize only briefly what happened after defendant pepper sprayed Martinez and Jeffrey.

Martinez picked up a bamboo chair and threw it at defendant, and Martinez and Jeffrey rushed defendant. Hearing the commotion, the other housemate, Fotovat, came out of his room, and the three housemates overpowered defendant, taking him outside and continuing to struggle with him. After defendant was pushed out into the street, he threatened to go get his gun, so the housemates went inside. When a Redding Police Department officer arrived, defendant was standing next to his vehicle. A loaded shotgun was in his vehicle.

Defendant testified that he and Jeffrey had met before the May 5, 2007, incident. When he saw the van Kelly had been driving, he wanted to make sure she was okay. Jeffrey invited him into the house by making a sweeping motion with his arm. Defendant became concerned about Kelly when Jeffrey did not answer his questions about where she was, so he began looking around for her. Martinez opened the door, and defendant inquired whether he had seen Kelly. He said he had not and closed the door. Still more concerned about Kelly because of the response, defendant continued to look for her in the house. Suspicious of Martinez, defendant knocked on his door again and then heard Kelly say, "[W]ho is it?" and saw her naked in bed. Martinez began swearing at defendant and asking who he was and then started swinging at defendant and pushing him. Neither Jeffrey nor Martinez had asked defendant to leave. Both Martinez and Jeffrey started swinging at defendant, so defendant took the pepper spray from his belt and sprayed them.

DISCUSSION

I

Instructions on Self-Defense (Second Trial)

Defendant contends that, during the second trial, the trial court erred by instructing the jury that trespassers have no right to self-defense. We disagree concerning the effect of the instructions. The instructions, read together, properly informed the jury concerning the circumstances under which a trespasser may use force in self-defense. In the body of his argument, defendant makes the additional contention that the

trial court erred by failing to instruct the jury concerning self-defense when he reasonably believed the residents were about to use force against him, rather than already having used force against him. This additional contention is forfeited because it is different from the contention made in the heading. Additionally, there was no error, and any error was harmless.

Whether a jury instruction correctly states the law is determined "under the independent or de novo standard of review." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).) Accordingly, we review de novo whether the instructions were adequate.

"Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.'" (*Ramos, supra,* 163 Cal.App.4th at p. 1088, quoting *People v. Partlow* (1978) 84 Cal.App.3d 540, 558.) "We examine the jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood the challenged instruction in a way that undermined the presumption of innocence or tended to relieve the prosecution of the burden to prove defendant's guilt beyond a reasonable doubt. [Citation.]" (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.) "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399], quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 147 [38 L.Ed.2d 368, 373].) "[T]he jury is presumed to have followed

the instructions it was given." (*People v. James* (2000) 81 Cal.App.4th 1343, 1362.)

The trial court instructed the jury that defendant was guilty of aggravated trespassing. (Whether this was a proper application of collateral estoppel is discussed in part III of this opinion.) The court defined aggravated trespassing, then instructed on two scenarios of self-defense: (1) self-defense if the aggravated trespassing occurred before defendant used pepper spray and (2) self-defense if the aggravated trespassing occurred after defendant used pepper spray. While the challenged instructions are lengthy, a full recitation of the relevant instructions is important to resolve defendant's challenge. The court stated:

"The focus of your inquiry is the moment of the initial use of the pepper spray. Events following the initial use of the pepper spray are not relevant to the elements of the charge of: 'the illegal use of a tear gas, not in self-defense.'

"1. If you find that the crime of trespass occurred at the time of entry, or anytime up until the moment of the initial use of pepper spray, the following instructions apply:

"The defense of self defense is not applicable to a trespasser. However, if you find that the defendant was a trespasser at the time he entered the home or anytime up until the moment of the initial use of the pepper spray, you must determine whether the defendant's application of pepper spray was reasonable or unreasonable. Consider the following in making that determination:

"1.1. A lawful resident(s) has requested that the trespasser leave[.]

"1.2. The trespasser does not leave within a reasonable time and it would appear to a reasonable resident that the trespasser poses a threat to the home or the residents[.]

"1.3. The resident(s) uses no more than reasonable force to make the trespasser leave.

"1.4. 'Reasonable force' means the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave[.]

"1.5. If the trespasser resists, the resident(s) may increase the amount of force he uses in proportion to the force used by the trespasser and the threat the trespasser poses to the property and the resident(s).

"1.6. However, up until the moment of the initial use of pepper spray, the resident(s) may not use 'unreasonable force.'

"1.7. 'Unreasonable force' means more than the amount of force that a reasonable person in the same situation would believe is necessary to make the trespasser leave up until the moment of the initial use of the pepper spray[.]

"1.8. In relation to the defendant, your focus is on the moment of the initial use of the pepper spray. When deciding if the defendant, as a trespasser, used 'reasonable force' at the moment of the initial use of the pepper spray against 'unreasonable force' on the part of the resident(s), consider all the circumstances as they were known to and appeared to the defendant and consider whether a reasonable person in a similar

situation with similar knowledge would have believed. The People have the burden of proving beyond a reasonable doubt that the Defendant's use of the pepper spray was an application of more force than was reasonable against the resident(s) at the moment of the initial use of the pepper spray. If the People have not met this burden, you must find the defendant not guilty of the use of tear gas while not in self-defense.

"2. If you find that the crime of trespass occurred after the defendant employed the use of the tear gas, the following instructions apply until such time as you determine that the defendant has become a trespasser. Once the defendant becomes a trespasser (based on your determination) his right of self-defense terminates and the instruction[s] above in sections 1.1-8 apply. The following instructions apply if you find that the defendant became a trespasser after the moment of the initial use of the pepper spray:

"2.1. A lawful resident has requested that the defendant leave[.]

"2.2. The defendant does not leave within a reasonable time and it would appear to a reasonable resident that the defendant poses a threat to the home or the residents:

"2.3. The owner uses reasonable force to make the defendant leave.

"2.4. 'Reasonable force' means the amount of force that a reasonable person in the same situation would believe is necessary to make the defendant leave[.]

"2.5. If the defendant resists, the resident may increase the amount of [force] he uses in proportion to the force used by the defendant and the threat the defendant poses to the property and the residents.

"2.6. However, up until the moment of the initial use of pepper spray, the residents may not use 'unreasonable force.'"

After giving this special instruction, the court instructed the jury fully concerning self-defense, using the pattern instruction, CALCRIM No. 3470. The self-defense instruction included the concept that the defendant may use reasonable force if he reasonably believes he is in imminent danger of being touched unlawfully.

Defendant focuses on the introductory language of the special instructions, where the court stated that a "defense of self defense is not applicable to a trespasser" and "[o]nce the defendant becomes a trespasser (based on your determination) his right of self-defense terminates and the instruction[s] above in sections 1.1-8 apply." The context of this language, however, made it clear that, if the resident uses unreasonable force in attempting to expel the trespasser, the trespasser may respond with reasonable force. Until the resident uses unreasonable force, the trespasser has no right to respond with any force. In context, the trial court allowed a defense of self-defense if the jury found that the circumstances justified defendant's use of force, which is consistent with the law in this regard. (See *People v. Johnson* (2009) 180 Cal.App.4th 702, 709-710.) Thus,

this assertion, which is the only assertion made in defendant's heading to his argument, is without merit.[1]

In the body of defendant's argument, however, he makes the additional argument that he was entitled to "use reasonable force in self-defense, when it appeared excessive force was about to be applied to him . . . ." (See *People v. Adams* (2009) 176 Cal.App.4th 946, 950-955.) We first note that defendant has forfeited this assertion because (1) it is different from the main assertion made in the heading of this argument and (2) the subheadings under the main heading make no additional contention. (Cal. Rules of Court, rule 8.204(a)(1)(B) [requiring party to state each point under appropriate heading or subheading summarizing the point].) In any event, the assertion is without merit because the trial court sufficiently charged the jury concerning the application of self-defense when confronted with imminent harm. Furthermore, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*); *People v. Quach* (2004) 116 Cal.App.4th 294, 303 [applying *Chapman* test to this type of error].)

Defendant argues: "[E]ven if [defendant] was trespassing, he could take out and use the pepper spray even before he was

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[1] Defendant's heading for this argument states: "The trial court erred reversibly in instructing the second jury that trespassers have no right of self-defense, when in fact a trespasser may validly respond to excessive or offensive touching with the use of reasonable force."

actually battered by the occupants of the house. He did not have to wait until the young men converged upon him to tackle and pummel him." While the special instructions quoted above did not include discussion of imminent application of force, the subsequent instruction on self-defense sufficiently apprised the jury of that concept. The court stated that a defendant acts in "lawful self-defense" if "[t]he defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully." The instruction went on to discuss the concept of "imminent danger" and the requirement that the defendant's belief be reasonable. Therefore, taken as a whole, the instructions did not prevent the jury from applying self-defense if it found that, even though the residents had not yet applied the force necessary to justify defendant's self-defense, defendant reasonably believed he was in imminent danger of unreasonable force.

Finally, any error was harmless beyond a reasonable doubt. The evidence was overwhelming that well before the residents, in defendant's own words, "tackle[d] and pummel[led] him," or even appeared to be in the process of doing so, defendant attacked them with the pepper spray. At the point when defendant used the pepper spray, he had no right of self-defense to do so.

II

Instructions on Self-Defense and Unanimity (First Trial)

Defendant contends the first trial judge erred by failing to give instructions, sua sponte, on self-defense and unanimity with respect to the trespassing charge (count 5) during the

first trial. We conclude that (A) self-defense is not a defense to trespass to land; therefore, there was no duty to instruct, and (B) the circumstances of the case did not require a unanimity instruction.

A. *Self-Defense*

Defendant asserts the trial court had a duty to instruct the jury concerning self-defense as a defense to trespassing. However, he gives no authority for the novel assertion that self-defense is a defense to trespassing. Responding to the Attorney General's comment that no authority was given, defendant refers back to the argument in part I of the discussion. That argument, however, had to do with self-defense as a defense to the charge of using pepper spray during a trespass, not as a defense to the charge of trespass. Defendant gives no authority or reasoning to support application of the defense of self-defense to the trespassing charge. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [brief must provide citation to authority and reasoning on each point].)

Defendant's argument concerning self-defense therefore fails because he provided (1) no authority for the proposition that self-defense is a defense to trespassing and (2) no reasoning for that argument.

B. *Unanimity*

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to

prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act. [Citations.]" (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) "Where no election is made, the court has a duty to instruct sua sponte on the unanimity requirement." (*People v. Curry* (2007) 158 Cal.App.4th 766, 783.) "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 92.) "'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citations.]" (*Id.* at p. 93.)

The trespassing charge in this case did not require a unanimity instruction because there was only one discrete act that would constitute trespassing. Although there was some question as to whether the trespassing began when defendant (1) entered the home without consent or (2) failed to leave when asked to, it was all one trespassing. The evidence did not support two trespass counts. Even if there was some room for disagreement as to when the trespass began, it is necessarily true, from the unanimous verdict, that the jurors all agreed that, at the point defendant failed to leave when asked to, defendant was trespassing, regardless of when the trespass began. In other words, there was no evidence that a trespass began when defendant entered the residence but ended before the

residents asked him to leave. Accordingly, no unanimity instruction was required.

Given this conclusion, we need not consider the parties' arguments concerning whether the court had a duty to give a unanimity instruction sua sponte or whether defendant invited error.

III

Collateral Estoppel (Second Trial)

Defendant contends that his conviction for using pepper spray, obtained in the second trial, must be reversed because the trial court instructed the jury, based on collateral estoppel, that defendant was convicted of aggravated trespassing in the first trial. He claims this application of collateral estoppel was improper. We conclude the court erred, but that the error was harmless.

Collateral estoppel prevents relitigation of claims or issues litigated to final judgment in a prior action. (*People v. Barragan* (2004) 32 Cal.4th 236, 252–253.) The prerequisites to applying collateral estoppel are "'(1) [a] claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]' [Citation.]" (*Id.* at p. 253.) The final judgment prerequisite requires that the time for seeking a new trial or appealing the judgment has expired and any appeal is final. In other words,

the judgment is not final and preclusive if it is still subject to direct attack. (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1067-1068; *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 787.)

Whether collateral estoppel may be used offensively by the prosecution in a criminal action has been debated for many years. (Purcell, *Ninth Circuit Reversal: The Removal of Offensive Collateral Estoppel in Alienage Proceedings* (Apr. 2008) 16 Wm. & Mary Bill Rts. J. 1279.) In general, such offensive use of collateral estoppel has been limited to alienage and evidence suppression issues. For example, a person who is adjudicated as a noncitizen of the United States and deported may not in a subsequent proceeding challenge the prior adjudication that he is not a citizen. (See *United States v. Rangel-Perez* (1959) 179 F.Supp. 619, 622-629.)

It is notable that neither alienage nor evidence suppression determinations traditionally give rise to jury trial rights. The determinations are made by the court. (Kennelly, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases* (Sept. 1994) 80 Va. L. Rev. 1379, 1383-1384.)

Recently, the Ninth Circuit of the United States Court of Appeals has retrenched from offensive use of collateral estoppel in alienage determinations. (*United States v. Smith-Baltiher* (9th Cir. 2005) 424 F.3d 913, 921 (*Smith-Baltiher*.) The court reasoned that, because alienage is an element of the offense, the defendant has a right to a jury determination on that element, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-

77 [147 L.Ed.2d 435, 447]. (*Smith-Baltiher, supra,* at p. 921; see also *Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 169-170 [prohibiting use of collateral estoppel to prevent defendant from contesting matter of identity in murder trial after conviction for attempted murder based on same incident].)

While the general rule limits offensive use of collateral estoppel in criminal prosecutions to cases involving alienage and evidence suppression, at most, one California Supreme Court case stepped beyond that limitation. In 1966, the court held that in a felony-murder retrial it was proper for the trial court to instruct the jury that, during the first trial, the defendant had been convicted of the predicate felonies (burglary and robbery). (*People v. Ford* (1966) 65 Cal.2d 41, 50-51 (*Ford*), overruled on another ground in *People v. Satchell* (1971) 6 Cal.3d 28, 34-41.) The critical difference between *Ford* and this case, however, is that, in *Ford,* an appeal intervened between the first and second trials. Therefore, the burglary and robbery convictions had been affirmed on appeal when they were used offensively by the prosecution in the second trial. (*Id.* at pp. 44-46.)

The *Ford* court stated: "The doctrine of res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined though the offenses be different. (*Sealfon v. United States*, 332 U.S. 575, 578 [92 L.Ed. 180]; see *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.*, 58 Cal.2d 601, 606.) Thus where a defendant is tried on multiple counts of a single information,

each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. (See *People v. Beltran*, 94 Cal.App.2d 197, 205, and cases cited and discussed therein.) It follows that the doctrine of res judicata justifies instructions, where relevant, that a defendant has been found guilty of crimes *finally adjudicated* which are charged as elements in another charge or charges then in the process of being retried. Accordingly, it was not error for the trial court to give appropriate instructions that defendant had been convicted of the various felonies . . . ." (*People v. Ford, supra,* 65 Cal.2d at p. 51, italics added.)

Citing *Ford*, the Attorney General urges us to approve the trial court's reliance on collateral estoppel in instructing the jury that defendant committed aggravated trespassing. However, even assuming *Ford* is good law on the subject of offensive use of collateral estoppel, one of the essential prerequisites for applying collateral estoppel was absent here. There had been no final adjudication of the aggravated trespassing count. Although defendant was found guilty by the jury, he retained his right to appeal the final judgment, including that finding.

While there have been cases, most notably *Ford*, and commentary encouraging the offensive use of collateral estoppel in criminal prosecutions, no case or commentary that we have found has gone so far as to encourage such use when there has been no final judgment on the verdict to which collateral

estoppel is to be applied. Deferring to defendant's right to trial by jury, we see no reason to extend the use of collateral estoppel to give preclusive effect to a factual determination made by a jury but still open to direct attack on appeal. Therefore, the trial court erred by instructing the jury that defendant committed aggravated trespassing.

This does not end the matter, however, because we cannot reverse unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Defendant urges us to find that the instruction concerning aggravated trespassing prevented the jury from deciding an element of the offense and was structural error, reversible per se and not subject to harmless error analysis, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275 [124 L.Ed.2d 182]. We disagree. The instruction did not prevent the jury from deciding on each element of the offense. (See *People v. Gamache* (2010) 48 Cal.4th 347, 396 [structural errors go to the very construction of the trial mechanism, such as the failure of a jury to reach any verdict on an essential element].) Indeed, defendant identifies no specific element of unlawful use of tear gas that was not necessarily decided by the jury. Accordingly, since the jury was misinstructed, we must determine whether it is "reasonably probable a verdict more favorable to defendant would have resulted had the instruction not been given." (*People v. Crandell* (1988) 46 Cal.3d 833, 870, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

Defendant's argument that the error was prejudicial is meager at best. Aside from arguing that the error was structural, defendant states: "[The error] certainly determined the outcome of [defendant's] case, and met any standard for reversal however stringent. It cannot be deemed harmless in any sense of the word." To the contrary, it is unlikely that the error in instructing the jury that defendant committed aggravated trespassing had any effect on the verdict in the second trial.

Despite defendant's agitation concerning the instruction that he committed aggravated trespassing, the jury was fully apprised of the elements of unlawful use of tear gas. While the special instruction informed the jury that defendant committed aggravated trespassing, it left to the jury the determination of whether, when defendant used the pepper spray, he was trespassing. As the trial court noted in denying a motion for new trial on this issue, the instruction "provided the jury with the ability to basically determine that [defendant] was not a trespasser at the time that he used the pepper spray; [therefore] he had all . . . the defenses available to him had he not been a trespasser."

Specifically with respect to defendant's claim of self-defense, the instruction did not misinstruct the jury on defendant's right to use force. It stated that he could use reasonable force to defend himself if the residents used unreasonable force against him. That is, in a nutshell, the law of self-defense. (See CALCRIM No. 3470 [defendant must use no

more force than reasonably necessary].) In fact, the trial court gave the full pattern instruction on self-defense. There was no dispute that defendant used the pepper spray, only whether he did so in self-defense. The jury therefore necessarily concluded that defendant used unreasonable force.

Furthermore, it is unlikely on the facts that a jury would find that defendant's use of the pepper spray was reasonable. He was inside the residence at an unreasonable hour. He was apparently obsessed with finding Kelly. He had armed himself with pepper spray, and with a loaded firearm just outside in his vehicle. He was the aggressor. The weight of the evidence was that, at the moment defendant used the pepper spray, he had no right to do so rather than leave the residence.

The judge who presided over the second trial described the facts of this case from her point of view at sentencing: "I see these young folks that are awakened from their sleep, hearing somebody pounding on their front door; and according to our first victim, some guy comes into my home, I've never met him before, he's frantically roaming from room to room screaming, appearing angry, I had to grab him to get him out of my house, he had no permission, no reason, no right. [¶] . . . [¶] And then there's the struggle in the home. He wasn't going to leave. [Defendant] was not going to leave. . . . [¶] . . . [¶] As to his participation in the crime, he was the one that instigated the entry into the home, his claim being that he had been phoned. I don't believe that for a minute. I believe that he had most likely been scouting the neighborhood, seen the van

in the yard and discovered that his then-girlfriend was present in the home and decided that he was going to enter the home and do whatever he needed to do to get her out of there."

It is not reasonably probable a verdict more favorable to defendant would have resulted had the aggravated trespassing instruction not been given. As a result, the instructional error was harmless.

IV

Alleged Prosecutorial Misconduct (Both Trials)

Defendant contends that he was denied a fair trial because of the prosecutor's reprehensible conduct. While he notes several instances which he claims were misconduct, for the most part his argument is a general attack on the prosecutor as being overly partisan. He asserts that the trials had a "poisonous zoo-like trial atmosphere," that the prosecutor "hated [defendant] with a fiery purple passion" and made "desperate off-the-wall justifications of his conduct and arguments," "openly displaying his loathing for [defendant]," and that the prosecutor's misconduct "pervaded [the trial] with a thoroughgoing atmosphere of bitter acrimony."[2] Having reviewed the few specified incidents which defendant contends constituted misconduct, we conclude defendant was not deprived of a fair trial.

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[2] We are frankly unimpressed by appellate counsel's florid aspersions. As an appellate court, we consider an appellant's contentions in the context of the record and the law. Acerbic accusations are unhelpful.

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights -- such as a comment upon the defendant's invocation of the right to remain silent -- but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) "'[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 952.)

A. *Confronting Defendant's Parents*

Defendant contends that the prosecutor "accost[ed] [defendant's] elderly parents as they parked on the street near the prosecutor's office, early on in the first trial." The contention appears to bear no relationship to defendant's right to a fair trial and has no merit.

Before trial, the prosecutor was interviewing witnesses at the District Attorney's office in the evening when he learned that defendant was outside, near a van, talking to witnesses. The prosecutor went out to investigate. He saw a van, driven by an elderly person, pulling away. Defendant was in the backseat. The prosecutor displayed his badge and called out, but the van did not stop. Defendant moved to dismiss based on this incident, but the trial court denied the motion, stating that there was no prejudice.

On appeal, defendant presents this as evidence of prosecutorial misconduct. He provides no authority for the proposition, and we know of none. (See *People v. Diaz* (1983) 140 Cal.App.3d 813, 824 [contention not supported by authority is forfeited].) The contention is without merit.

B. *Making Faces*

Defendant asserts that the prosecutor and investigating officer committed misconduct by "making faces" during defendant's testimony. Even assuming an investigating officer can commit prosecutorial misconduct, which is doubtful, this assertion has no merit.

During a break in the proceedings of the second trial, defense counsel stated to the court: "[Defendant] would like the Court to admonish counsel and the investigating officer not to make faces at him while he's testifying. I think the jury can see it." The court responded: "Okay. I think sometimes we have the tendency to be surprised by testimony that we hear, and I did observe an occasional, like, raised eyebrow. It was not,

in my mind, real apparent, but please remember to keep your facial expressions as neutral as possible."

Defendant claims this eyebrow-raising was "highly unprofessional." For that proposition, he provides no authority. (See *People v. Diaz, supra,* 140 Cal.App.3d at p. 824.) We know of no authority stating that eyebrow-raising is highly unprofessional or constitutes prosecutorial misconduct.

C. *Bar Membership and Civil Complaint Issues*

In a summary argument, without citation to authority, defendant claims the prosecutor, in the first trial, "argumentatively grilled [defendant] on prejudicial issues of whether [defendant's] not being admitted to the California State Bar meant he was morally unfit, and whether jurors would have to personally pay for his multi-million-dollar lawsuit," referring to defendant's civil complaint against the government for lack of proper medical care. This summary argument does not establish prosecutorial misconduct.

Defendant bears the burden on appeal of establishing that the prosecutor committed misconduct. This burden includes a full explanation of the prosecutor's actions in the context of the trial proceedings and authority to support the proposition that those actions constituted misconduct. This burden also requires a persuasive explanation of how the prosecutor's conduct prejudiced defendant. We will not comb the record and the authorities to make defendant's argument for him. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [judgment presumed correct and appellant bears burden to establish

otherwise].) Defendant's summary argument fails to carry that burden and is therefore without merit.

In any event, there was no prejudice to defendant in the two instances cited: the questions about defendant's moral fitness to be a member of the bar and the potential that the jurors, as citizens, would end up paying for defendant's lawsuit. In both, an objection was made and sustained to the prosecutor's question. The general matters of defendant's nonmembership in the California State Bar and his lawsuit against the state for lack of medical care were, according to the trial court, proper areas of inquiry, and defendant makes no argument to the contrary on appeal. The jury was instructed not to consider questions to which objections were made and sustained. Therefore, there was no prejudice because it was not reasonably probable that defendant would have obtained a better result if the prosecutor had not asked these two questions. (*People v. Rundle, supra,* 43 Cal.4th at p. 157.)

D. *Reference to "Fornication"*

Similarly, defendant claims that, in the second trial, the prosecutor committed misconduct by asking defendant whether he had committed "fornication" with Kelly. Defense counsel objected to the question, and the trial court sustained the question. Defendant asserts this reference to fornication was prejudicial because one of the jurors was a Christian preacher and another juror taught at a local Christian college.

Again, defendant provides no citation to authority establishing that this question constituted prosecutorial

misconduct. The contention is therefore forfeited. (See *People v. Diaz, supra,* 140 Cal.App.3d at p. 824.)

In any event, the prejudice is not self-evident. Defendant had admitted that his relationship with Kelly was "quasi-romantic" and "quasi-sexual," whatever that means. The question of whether they had engaged in sexual relations -- fornicated -- would have tended to show defendant's motivation for entering the residence and attacking the residents. The fact that there was a religious person on the jury makes no difference. It is unlikely that juror would have had any different view of defendant simply because the prosecutor used the word "fornication."

Finally, defense counsel made, and the trial court sustained, an objection to the question, and the court instructed the jury not to consider such questions. There was no prejudice.

E. *Impugning Defense Counsel*

Defendant states that the prosecutor improperly impugned defense counsel with personal attacks. He fails, however, even to reveal what it is the prosecutor did to impugn defense counsel. His only support for the contention is a citation to 37 pages of reporter's transcript. He also provides no authority for the proposition that whatever the prosecutor said was misconduct. Since defendant has not developed this argument, we will not consider it. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 846, fn. 9 [point asserted but not developed not considered on appeal].)

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

HULL, J.