

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS PAUL BARBARA,

Defendant and Appellant.

B277950

Los Angeles County
Super. Ct. No. YA091422

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

Teresa Biagini, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Senior Assistant
Attorney General, and Steven E. Mercer, Deputy Attorney
General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Nicholas Paul Barbara of two counts of discharging a firearm with gross negligence in violation of Penal Code section 246.3, subdivision (a). Barbara's sole contention on appeal is that the trial court should not have allowed the People to introduce, under Evidence Code section 1101, subdivision (b) (section 1101(b)), evidence of an incident about 17 months earlier in which Barbara also fired his gun from inside a residence. We find no error and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The October 19, 2014 incident*

In October 2014, Dorothy Reid was living on 187th Street in Torrance. Her friend Helen Artiano was staying with her. Artiano's son, defendant Barbara, was staying with Reid as well. At about 1:00 a.m. on October 19, Artiano woke Reid up. Artiano told Reid someone was trying to break into the house. Reid ran into the hallway. Barbara came down the hallway from the den, waving a gun in the air. Barbara told the women someone was trying to break in but he would protect them. He told his mother to call 911. Barbara then took the phone from his mother and spoke with the police.

When Torrance police arrived, Barbara told the women to stay inside. He went out to talk to the officers. Before Barbara went outside, he put his gun inside Reid's clothes dryer off the kitchen. Officers checked the backyard and walked around the house. They found no intruders or suspects, and no sign of any attempted entry. Barbara did not tell the officers that he had a gun or that he had fired it inside the house. Responding police officer Anthony Fontanez thought Barbara "was possibly under the influence of a narcotic." In Fontanez's view, Barbara's report

of an attempted break-in was “incoherent” and “did not make sense” based on Fontanez’s observations.

Reid went back to bed. About 6:00 a.m., three rapid gunshots woke her. Reid jumped out of bed, went into the hallway, and—encountering Artiano—asked her “what the hell [was] going on.” Barbara came down the hall with his gun and said “he’s back,” adding “I think I shot him.” Reid and Artiano tried to talk to Barbara but he told them to shut the fuck up. Barbara again told his mother to call 911; she did so and he again took the phone from her. Barbara told the women to sit at the kitchen table and not say a word, and he again put his gun into the dryer. When police arrived and Barbara again went outside to speak with them, Artiano “jumped up,” called 911, and told the operator that Barbara had a gun.

Torrance police again arrived. Officers checked the backyard, side yards, perimeter, and windows. Nothing had been disturbed. Barbara told officers he had seen “a shadow movement,” “a shadow sitting in [a] window” on the northwest side of the house. According to Torrance Police Officer Kevin Kuet, it would not be possible for a person to sit in the window, because of the distance from the ground to the window and the absence of any ledge on the window.

Officers walked through Reid’s house and found a total of five bullet holes. One bullet had pierced the screen and broken the window in which Barbara said he had seen a shadow. (Barbara had told Kuet he did not know how that window had been damaged.) Two other bullets were lodged in a wall. Officers found three shell casings in the den and two by a doorway. Two 9-millimeter bullets had been fired out of a north-facing window and struck a storage shed in the back of the house. Beyond the

shed was a nursery and, beyond that, a school and houses. Reid's next-door neighbor testified at trial that he heard two gunshots shortly after 1:00 a.m. on October 19 and got up to check on his wife.

Barbara told officers he had accidentally fired his gun once. He denied having tried to shoot a prowler.

Torrance Police Officer Smith found Barbara's loaded gun in Reid's dryer. There was one live round in the chamber and seven in the magazine. Officers arrested Barbara for negligent discharge of a firearm.

Barbara testified at his trial. He said around 1:00 a.m. on October 19 he had seen "a shadow at the window" and "heard it speak." Barbara said he "felt compromised" and "was scared" so he "popped up and went boom, boom; double-tapped."¹ Barbara put his gun in the dryer "to secure it." Barbara said officers "didn't ask [him] about the weapon" and he "didn't bring it up."

Barbara testified he went outside around 5:00 or 5:30 a.m. He "felt like somebody was staring at [him] and [he] whipped around," then "saw a silhouette of a human, shoulder and head, duck down behind the fence." Barbara "briskly walked back into the house," "grabbed [his] weapon and ducked down in [a] defensive position." Barbara testified he "saw movement from" the back window and "was worried about somebody reaching in and blind firing [him][sic]" so he fired his gun three times. Barbara said he shot into the windowsill, "not . . . out of the home." When asked if he had told Kuet that he had accidentally

¹ Barbara later explained "double-tapped" means he pulled the trigger twice.

discharged one round,² Barbara answered, “I misspoke. I don’t have no recollection of saying that.”

Barbara testified that he had been on opioids for five to seven years for shoulder and back pain.

2. *The June 2013 incident*

a. *Argument on the motion*

The People filed a motion in limine to introduce evidence of an incident in June 2013 in which Barbara fired his gun inside another home. The People argued the evidence was admissible under section 1101(b) to show that Barbara fired his gun on October 19, 2014, intentionally rather than accidentally; that there was no prowler and so he did not shoot in self-defense; and that he acted with more than ordinary carelessness or mistake in judgment, knowing that he suffered from hallucinations.

Barbara’s counsel opposed the motion. She argued that the proposed testimony was “propensity” evidence and that intent, gross negligence, and the absence of self-defense were “factual determinations for the jury,” “not legal conclusions for the court to reach.” Barbara’s attorney did not say that he would admit he had fired his gun intentionally rather than accidentally.

The court granted the People’s motion. The court stated, “I believe that the conduct in 2013 is relevant for what I see as three reasons: One, that the current shooting was not an accident, but was intentional; also, I believe it’s relevant to prove the People’s position that the defendant is subject to hallucinations, which therefore contributes to his being grossly negligent in arming himself for the current charges; and I also

² The prosecutor played an audiotape of Kuet’s interview of Barbara for the jury.

believe it's relevant to prove that he was not acting in lawful self-defense."

The court granted a request by Barbara's attorney to exclude any mention of the psychiatric hold placed on Barbara after his June 2013 arrest.³ On its own motion, the court also told the prosecutor he could not mention the seizure by police of "a shed full of weapons" that Barbara had in June 2013.

b. *The testimony at trial*

In June 2013, Cristina Hauser lived on Rose Street in Bellflower with her husband Kevin Justis and their daughter. Hauser and Justis knew Barbara from their church. They allowed Barbara to live in a trailer in the back of their half-acre property. On Friday, June 28, 2013, the Hauser-Justis family left town for a softball event in Las Vegas. When the family went out of town, Barbara fed their dogs, who stayed outside, and kept an eye on the house. Hauser's understanding was that Barbara was not to go into their house except in an emergency.

Hauser and Justis came home two days later, early on Sunday, June 30. Hauser noticed a mark on the ceiling in her bedroom—a scrape or scuff; then she discovered a bullet or casing on the floor in the carpet. Hauser called Justis to come and look. Justis noticed a little hole between the door jamb and the wall in the bedroom. Justis called Barbara to see where he was and to ask what had happened. Barbara told Justis that he had been in the house on Friday night, "heard somebody or something come through" the bedroom window, "trying to break in," and "so he fired a shot to scare them off." Barbara said he had been in the

³ See Welfare and Institutions Code section 5150.

kitchen and fired down the hallway into the bedroom. Hauser had not known that Barbara had a gun.

Justis told Barbara he was calling the police, and asked Barbara to return to the property. Barbara returned some hours later, in the afternoon. Los Angeles County Sheriff's Deputy Robert Girgis spoke with Barbara. Barbara told Girgis he thought he had seen a burglar inside the house on June 28. According to Girgis, Barbara "stated that he took a firearm and went inside the home just to see if there were burglars, and when he was inside he stated that he did fire off a round." Girgis said Barbara told him he thought "he saw a shadow." Girgis testified Barbara said "he might have hallucinated the entire situation and that there was nothing." According to Girgis, Barbara said he had not called police because "he was embarrassed [by] the incident."

Department records showed two calls the next day, Saturday, June 29. Girgis asked Barbara about those. Barbara told Girgis "he thought he saw, again, a shadow inside of the residence." Girgis testified that "later in the interview, [Barbara] said "he might have hallucinated those as well."

Barbara testified about the June 2013 incident as well. Barbara said on June 28 he had "chased a man off the property who was leaving the backyard." Five to 10 minutes later, Barbara was standing in the kitchen. "A shadow occurred and [Barbara] saw a movement out of the corner of [his] eye after [he] was searching the home." Barbara said he waited in the kitchen but heard nothing more. He "started to unload [his] weapon and then . . . caught movement and heard movement [*sic*] out of the corner of [his] eye." Barbara continued, "And when I brought my weapon up, I accidentally discharged a round into the door jamb."

Barbara said, “I thought someone was attacking me.” He added, “I was scared I was going to be shot by somebody in that room when I saw and heard movement.”

Barbara testified that the next night, June 29, he “heard somebody in the back of the property.” He called the police, who came, “looked around the property, and left.” After “they drove away it started again.” Barbara eventually left the property and went to a hotel.

Barbara testified he “never admitted to hallucinating anything” to Girgis, that he “emphatically said [he] saw a shadow and heard movement in that room.”

3. ***The verdicts and sentence***

The jury convicted Barbara on both counts. Before sentencing, the trial court ordered a diagnostic evaluation under Penal Code section 1203.03. At sentencing, the court rejected the People’s request that the court send Barbara to state prison. The court imposed a prison sentence but suspended execution of it and placed Barbara on probation.

DISCUSSION

We review the trial court’s ruling on a section 1101(b) issue, “being essentially a determination of relevance,” for abuse of discretion. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195 [“We review for abuse of discretion a trial court’s rulings on the relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.”].) We will not disturb a trial court’s ruling “ ‘ “unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” ’ ” (*People v. Rogers* (2013) 57 Cal.4th

296, 326, quoting *People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329.)

Here, the trial court admitted testimony about the June 2013 incident under section 1101(b) for three reasons: to show Barbara fired his gun in October 2014 intentionally rather than accidentally; to show there was in fact no prowler and so Barbara did not act in self-defense; and to show that Barbara knew he suffered from hallucinations and so acted with gross negligence in shooting his gun at “shadows” and “silhouettes.” Any one of these grounds is sufficient for the admission of the “prior act” evidence. We find the trial court did not abuse its discretion in its determination of any of the three issues.

1. ***Intent***

The People were required to prove beyond a reasonable doubt that Barbara “intentionally shot a firearm.” (CALCRIM No. 970.) Barbara contends, “Evidence of the 2013 shooting was irrelevant to prove that the 2014 shooting was not accidental because intent was not in issue. Appellant didn’t dispute that he intentionally fired his gun.” While Barbara ultimately testified that he fired his gun in Reid’s home intentionally, the prosecutor and court could not have known until Barbara took the witness stand that that is what he would say. In arguing the motion in limine, Barbara’s trial lawyer never said he would admit shooting his gun on purpose. Nor did she present any opening statement to that effect. Officer Kuet had taped his interview with Barbara and that tape was played for the jury. Jurors also were given a transcript. According to the transcript, Barbara told officers that he had “accidentally discharged” his gun:

“[OFFICER:] Nick, I just have a couple of questions for you really quick. Did you actually shoot your gun this morning?

“[BARBARA:] Yeah. I actually – I accidentally discharged it.

“[OFFICER:] How many times did it accidentally been discharged [*sic*]?

“[BARBARA:] I think it was one when I was trying – when I sat down.”

Accordingly, at the outset of the trial, when the court ruled on the People’s motion in limine, and throughout the People’s case-in-chief, whether Barbara fired his gun intentionally or accidentally was very much in issue. The trial court did not abuse its discretion in permitting the People to introduce evidence of the 2013 incident to show Barbara discharged his gun on purpose in Reid’s home.

2. *Absence of self-defense*

The People also were required to prove beyond a reasonable doubt that Barbara did not act in self-defense or defense of someone else. (CALCRIM No. 970.) Barbara testified that he shot his gun in self-defense and to protect his mother and Reid. Barbara argues the 2013 incident did not tend to show he did not act in self-defense because the question is whether a reasonable person would believe he was in danger. But the “reasonable person” question is only half the inquiry. The People must prove the defendant did not *actually and* reasonably believe he was in imminent danger. (CALCRIM No. 970; see, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 551-552 [self-defense renders conduct “noncriminal where the actor possessed both an actual and reasonable belief in the need to defend”]; court did not err in

declining to instruct on self-defense when there was “no substantial evidence of ‘*actual* fear of an *imminent* harm’ ”].) Accordingly, whether Barbara was honestly in *actual* fear of imminent harm was relevant. The People were entitled to introduce evidence to support their contention that jurors should not believe Barbara’s testimony that he fired his gun in self-defense given that in both 2013 and 2014 neither police nor the homeowners found any evidence whatsoever of any prowler or attempted burglary.

3. ***Gross negligence***

The analysis of this third basis for the court’s admission of the section 1101(b) evidence is similar to that of the second. The People were required to prove beyond a reasonable doubt that Barbara “did the shooting with gross negligence.” (CALCRIM No. 970.) “[G]ross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] “The state of mind of a person who acts with conscious indifferences to the consequences is simply, ‘I don’t care what happens.’ ” ’ ” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1204 (*Ochoa*).)

Barbara notes the test is objective. But, as our Supreme Court has stated, “[i]n determining whether a reasonable person *in defendant’s position* would have been aware of the risks [of his conduct], the jury should be given relevant facts as to what defendant knew, including his actual awareness of those risks.” (*Ochoa, supra*, 6 Cal.4th at p. 1205.) “[I]f the evidence showed that defendant *actually appreciated the risks* involved in a given enterprise, *and nonetheless proceeded* with it, a finding of gross negligence . . . would be appropriate whether or not a reasonable person in defendant’s position would have recognized the risk.”

(*Ibid.*) “[A]lthough the test for gross negligence [is] an objective one, ‘[t]he jury should therefore consider all relevant circumstances . . . to determine if the defendant acted with a conscious disregard of the consequences rather than with mere inadvertence.’” (*Ibid.*)

In both 2013 and 2014, Barbara told responding officers that he had seen a person, a prowler, or a “shadow.” In two inspections in 2013 and two inspections in 2014, police found no evidence of any such prowlers or intruders. Although Barbara denied having made the statements, Deputy Girgis testified that in 2013 Barbara told him he “might have hallucinated the entire situation and that there was nothing.” It was up to the jury to decide whom to believe. The People were entitled to argue that Barbara admitted to suffering from hallucinations some 17 months before the actions giving rise to this prosecution and that, accordingly, he was grossly negligent in continuing to possess a fully loaded Glock and to shoot it repeatedly from inside Reid’s home. In other words, the 2013 incident was relevant and admissible under section 1101(b) to support the People’s contention that a reasonable person – knowing he had repeatedly misperceived or imagined threats that were not real – acted as if he did not care what happened in keeping and firing a semiautomatic handgun.

4. ***Evidence Code section 352 balancing***

Finally, Barbara asserts the trial court should have excluded the June 2013 incident in any event because its probative value was substantially outweighed by a substantial danger of undue prejudice. (Evid. Code, § 352, subd. (b).) Barbara argues the 2013 incident “was weak evidence” and “had very little probative value.” We disagree for the reasons

discussed above. That authorities found no evidence to support Barbara's four reports of intruders in the two incidents was relevant to the jury's determination of whether Barbara actually and reasonably believed in the need for self-defense and whether he was grossly negligent in firing his weapon.

Moreover, the facts of the 2013 incident were less serious than those of the 2014 incident, so there was no likelihood the evidence would inflame the jury's passions. In 2013, Barbara fired his gun once with no one else in the home and no structures or neighbors nearby. The single bullet hit the ceiling. In 2014, Barbara discharged his weapon five times in two separate actions with other people in the house and neighbors nearby. At least two rounds went through a window and hit the storage shed outside.

DISPOSITION

Barbara's conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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