

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

YOSEF SHAHARABANI,

Defendant and Appellant.

B231625

(Los Angeles County
Super. Ct. No. LA062343)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Joseph A. Brandolino, Judge. Affirmed.

Gloria C. Cohen, 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, James William Bilderback II
and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Yosef Shaharabani appeals the judgment (order granting probation) entered following his conviction by jury of assault with force likely to produce great bodily injury in which he personally inflicted great bodily injury on a person over the age of 60 years. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a), 1203.09, subd. (f).)¹ Shaharabani contends the trial court committed instructional, evidentiary and sentencing error. We reject these contentions and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. The prosecution's evidence.

Abraham and Shoshana Ilfrach (the Ilfrachs) and their two daughters came to the United States from Israel in 1979. The Ilfrachs adopted daughter, Sharon, started to date Shaharabani when she was 27 or 28 years of age.² When Sharon and Shaharabani moved in together, Abraham had “almost no relationship” with her. However, after the Ilfrachs sold their home, they lived with Sharon, Shaharabani and their first son for a few months before returning to Israel. During this time they were close and Shaharabani was a good father and husband.

Abraham tried to help Shaharabani's business in many ways and gave Shaharabani \$100,000 to maintain cash flow. Shaharabani promised to repay the money but has not done so in full. Shoshana testified she and Abraham gave Shaharabani and Sharon approximately \$65,000 in cash in various transfers and \$100,000 to help them in their business. Abraham testified Sharon received an inheritance of approximately \$200,000 from her biological mother which was used to purchase real estate in Israel in Abraham and Shoshana's name.

Abraham's relationship with Shaharabani and Sharon ended when Shaharabani told Abraham to give Shaharabani everything he had. When Abraham asked how he and Shoshana would live, Shaharabani said, “Don't worry. I'll take care of you.” After that

¹ Subsequent unspecified statutory references are to the Penal Code.

² We refer to the Ilfrachs and their daughter by their first names for the sake of clarity. No disrespect is intended.

incident, the Ilfrachs did not see Sharon or their grandson for four years and they had not met Sharon's second son.

In 2009, the Ilfrachs travelled to Los Angeles before leaving on a cruise. Shaharabani telephoned Shoshana and asked the Ilfrachs to visit. When they arrived on Thursday, Sharon and Shaharabani welcomed them and invited them to stay in a cottage where Sharon and the children were living that was part of a large estate behind a wall on Donna Street. They did not spend the night the first evening. As Sharon walked them to their car, Sharon told them she and Shaharabani were divorced. The next day, Sharon told her parents that, in 2008, she had been alone in North Carolina for four months while Shaharabani was in Israel with the children. When Shaharabani returned from Israel, she returned from North Carolina but she had no place to live, no driver's license because of a delinquent seatbelt ticket, no job and no car. Abraham refused to give Sharon money but took her to the courthouse and paid her ticket, went to the DMV and had her license reinstated, rented her an apartment and obtained a car for her.

That evening, Shoshana prepared dinner at the cottage and the Ilfrachs slept in the cottage. Shaharabani ate with them but did not sleep there. On Saturday evening or Sunday morning, Sharon told them they could no longer stay at the cottage. Abraham had met the neighbor who owned the property and had informed the neighbor of Sharon's situation. The neighbor was leaving for Israel and he wanted to help Sharon. The neighbor sold Abraham and gave Sharon furnishings for her apartment. Sharon was present during the conversation and also told the neighbor things about her relationship with Shaharabani.

The following Tuesday, Abraham planned to help Sharon move into the apartment he had rented for her and the children but she telephoned and said Shaharabani had told her not to move that day. Sharon telephoned again in the afternoon and said she would bring her belongings to her parents' car in a shopping cart, permitting the Ilfrachs to stay outside the wall around the property. As Abraham loaded the car, Shaharabani appeared and went into the cottage. A short while later, Abraham saw Shoshana backing away from Shaharabani and heard her say, "Don't get close to me. I'm afraid from you."

Abraham stood between them and Shaharabani told Abraham to leave. Abraham angrily responded they were there to help Sharon. The older child ran to the cottage and Shaharabani said, "Look what you're doing to my child. You're scaring him." Abraham said, "I don't want [anything to do] with you [or] your children. I don't want to see you anymore." Shaharabani suddenly struck Abraham very hard in the face and knocked him to the ground. Shaharabani was not holding a child in his arms during the encounter. Abraham is 5 feet 4 inches tall and weighs about 150 pounds. He was 67 years of age at the time of the incident. There was blood coming from his nose and he could not get up by himself. Shoshana took pictures of his injuries before paramedics transported him to the hospital.

Shoshana testified Shaharabani punched Abraham in the nose, knocked him onto the grass, kicked him "maybe 40 or 50 times," then grabbed the children and fled. Abraham was bleeding from a cut on his nose and his nose was broken. Shoshana and Sharon were screaming.

A tape recording of a 911 call placed by Sharon was played for the jury.

Vincent Green, M.D., examined Abraham at the Providence Tarzana Medical Center at approximately 7:00 p.m. Abraham said he had been punched in the nose and kicked in the chest by his ex-son-in-law. Abraham did not have any rib or chest pain but had obvious facial trauma. Green determined Abraham's nose was broken in two places and the nasal bone was deviated and "out of place." Abraham also had five lacerations which required nine sutures. Green indicated that, "in order to get . . . the lacerations and fracture of the nasal bone in two spots, this would have to be an extremely hard hit." When asked whether the injuries were consistent with a trip and fall, Green testified: "To me, . . . with my 12 years of experience in emergency medicine, this is all consistent with a punch, rather than a fall."

Los Angeles Police Officer Cid Camacho, a West Valley division officer, arrived at the scene after Abraham had been taken to the hospital and spoke to Sharon. Camacho received a telephone call from the Van Nuys division indicating Shaharabani was at the Van Nuys station to file a police report. Camacho took a statement from Sharon and then

went to the hospital and spoke to Abraham. After seeing Abraham's injuries, Camacho asked the Van Nuys officers to take Shaharabani into custody. The officers also booked Shaharabani's jeans, shirt and shoes into evidence.

The parties stipulated Shaharabani's jeans and shirt tested positive for human blood. Abraham was excluded as a potential contributor to the blood found on the jeans but was included as a potential contributor to the blood on the shirt.

Los Angeles Police Officer David Hernandez spoke to Abraham at the hospital. Abraham admitted he went inside the gated area of the property to help Sharon "move her belongings and leave quickly."

Sharon testified that, on Saturday, Shaharabani asked Sharon to tell her parents to leave because he had heard they were saying mean things about him to the neighbors. On the evening of the incident, the Ilfrachs arrived unexpectedly at the cottage. As the Ilfrachs loaded Sharon's belongings into a car, Shaharabani returned and asked Sharon what was going on. When Sharon explained, Shaharabani said he was going to call the police. Sharon ran to the front gate to tell her parents the police were on the way. Shaharabani arrived at the scene, picked up their younger son and asked the Ilfrachs to leave. Shoshana pushed Shaharabani and Abraham yelled he was not leaving. When the child started to cry, Shaharabani said, "Look what you're doing to my son." Abraham said he didn't care and put his hands slightly extended in front of him. Sharon took the child from Shaharabani, turned to go to the cottage and did not see what happened after that but noticed a hole in the grass near where Abraham fell. Sharon called 911 immediately. Sharon claimed she merely repeated in English what Shoshana yelled in Hebrew. Sharon testified Abraham approached Shaharabani, cursed him and was the aggressor. However, in the 911 call Sharon stated Shaharabani punched her father then started to kick him and Sharon had to try to pull Shaharabani off her father.

Sharon denied that her parents loaned them \$100,000 and testified the money was an investment in Shaharabani's flooring business. Sharon inherited \$200,000 from her biological mother but never received any of the money.

2. Defense evidence.

Shaharabani testified that in January of 2009, he and his sons went to Israel with Sharon's permission. Before he returned, his girlfriend rented the cottage on Donna Street for him and the children. On Friday, the Ilfrachs had dinner with Shaharabani, Sharon and the children at the cottage. On Saturday, when Shaharabani returned from work, he saw the Ilfrachs talking to a neighbor with whom Shaharabani did not have a good relationship. Shaharabani noticed the neighbor was looking at him differently and knew immediately the Ilfrachs had said something bad about him. Sharon confirmed his suspicion and Shaharabani asked her to tell the Ilfrachs to leave the property. On Tuesday, Shaharabani told Sharon not to move in the presence of the children. When Shaharabani called Sharon and learned the Ilfrachs were present, Shaharabani called a friend to change the lock. Shaharabani arrived at the cottage and told Sharon he was going to call the police. When Sharon went to ask her parents to leave, their younger son followed her. Fearing the child might run into the street, Shaharabani gave chase, caught his son near the gate and picked the child up. Shoshana approached Shaharabani and screamed, "I'm not [afraid of] you. . . . I'm not scared [of] the police." Shoshana touched Shaharabani's chest with her hands and he stepped back to avoid a second attempt to touch him.

At that point, Abraham approached angrily and began screaming and calling Shaharabani names. Shaharabani asked Abraham to leave but Abraham continued to yell and Shaharabani's son started crying. Shaharabani said, "Look what you're doing to my son." Abraham said, "I don't care about you. I don't care about your son. You and him can . . . die." Abraham then pushed Shaharabani with two hands, touching both Shaharabani and the child. Sharon took the child from Shaharabani and Shaharabani used his training in the Israeli special forces to make a circular motion with his right hand to knock Abraham's hands away.

Shaharabani then went inside, got his other son and left in his car. Shaharabani saw Abraham on the ground and saw blood but did not want his children to see Abraham like that. He took the children to his girlfriend's home and a friend drove him from there

to the Van Nuys police station to file a report against the Ilfrachs for attacking him and entering his property.

Regarding the Ilfrachs' claim they had loaned him \$100,000, Shaharabani testified that, when he and Sharon married, he was installing hardwood floors. After one year, he had a crew working for him. Two years later, Shaharabani and Sharon had a warehouse and were importing hardwood flooring. The following year, they had another warehouse and they were financially stable. Abraham and Shoshana saw how well they were doing and invested \$100,000 in containers of hardwood flooring to resell. They profited on the first investment and decided to reinvest the money. When the economy went bad, they lost the \$100,000 investment.

On cross-examination, Shaharabani testified he broke up with Sharon after they received a letter from the Ilfrachs threatening to sue Shaharabani for the \$100,000. The prosecutor asked whether Shaharabani was sued by a different business partner for \$186,000 worth of hardwood flooring. Shaharabani claimed the individual in question laundered money and tried to sue Shaharabani for something, but did not sue Sharon because he was friends with the Ilfrachs. The prosecutor asked whether there was a judgment against Shaharabani in Van Nuys Superior Court awarding Omer Katzir \$186,000 plus attorneys fees. Shaharabani responded: "I [have] never been with him in court, never, ever." Shaharabani testified, "this guy tried to sue I didn't owe any money to anyone else." Shaharabani denied he assaulted Katzir when Katzir tried to collect the money. Shaharabani also denied there was a judgment against him, stating: "I never was in front of the judge with him together against me"

Regarding the incident, Shaharabani testified he did not flee. Rather, he took his children to a safe place and then went directly to the Van Nuys police station. Shaharabani indicated the motivation for the Ilfrachs' false accusations against him grew out of their concealment of the \$200,000 Sharon and her biological sister had inherited.

Yoav Cohen testified that, on the day of the incident, Shaharabani asked him to change the key to the cottage door. When they arrived, Abraham was loading property into a car. Shaharabani went into the cottage and returned carrying his son. Cohen heard

Shoshana yelling and saw Shoshana try to push Shaharabani. Abraham approached Shaharabani, made gestures with both arms and tried to push Shaharabani. Shaharabani, who was holding his son throughout the incident, made a motion to defend himself. When Shaharabani went back to the cottage, Cohen saw Abraham on the grass and heard screaming. Shortly thereafter, Shaharabani returned to the car with the children. Shaharabani drove Cohen and the children to the home of Shaharabani's girlfriend and then left with another friend.

3. Rebuttal.

At the scene, Sharon told Officer Hernandez her parents were helping her move her belongings. She did not say they were uninvited.

Omer Katzir, a wholesale manufacturer of hardwood flooring, met Shaharabani when Shaharabani started his business. They developed a friendship and started to do business together in approximately 2005. Their agreement was to split the profit on the material Katzir supplied Shaharabani. When Shaharabani failed to pay, Katzir sued Shaharabani in Van Nuys Superior Court and obtained a judgment against Shaharabani personally in the amount of \$186,066.78. Shaharabani was not present in court on the day judgment was entered in Katzir's favor. However, Shaharabani was represented by an attorney and Shaharabani had been present in court on other days.

4. Jury instructions.

At the jury instruction conference, defense counsel objected to CALCRIM 372, claiming instruction on flight was improper because "the evidence [wa]s pretty clear that although Mr. Shaharabani left the Donna Street address, he merely dropped his children off at a girlfriend's house fairly close by and then quickly went to the Van Nuys Police Station." The prosecutor argued, "I think it is important that he fled the scene. He didn't have to leave immediately with the children, and by leaving, he gave himself an opportunity to either hide evidence or think of what he was going to say or change clothing, whatever it may be. The point is that he knew something happened, he knew somebody was injured, and he fled."

The trial court concluded: “There are two ways to view the flight, and I think one of the ways to view it . . . makes this instruction appropriate, so I’ll allow it.”

As given, CALCRIM No. 372 provided: “If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.”

5. Verdicts and sentencing.

The jury convicted Shaharabani of assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)) in which he personally inflicted great bodily injury (§ 12022.7, subd. (a)) on a person over the age of 60 years (§ 1203.09, subd. (f)).

At sentencing, the trial court stated it was “torn between a low term state prison sentence and a probationary sentence in this case. Obviously, . . . the victim was elderly . . . but on the other side of the coin, [Shaharabani] has no criminal history. And the court was thinking possibly, instead of a state prison sentence, giving the defendant a chance to maybe turn things around with five years formal probation, a year of domestic-violence counseling, . . . , restitution to the victims, and all other standard terms of probation.”

The prosecutor requested a state prison term, indicating Shaharabani rejected a pre-trial offer of 365 days in county jail. Also, because Shaharabani inflicted physical injury on an elderly victim, the presumptive punishment was state prison.³

Defense counsel argued 36-year-old Shaharabani intended to stay married to Sharon, was a good father and a productive member of the community, and he had no prior criminal record. Defense counsel asked the trial court to consider that Shaharabani,

³ Section 1203.09, subdivision (f) provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . any person convicted of having committed one or more of the following crimes against a person who is 60 years of age or older: assault with a deadly weapon or instrument, battery which results in physical injury which requires professional medical treatment, carjacking, robbery, or mayhem.”

a permanent resident, might face deportation if the trial court sentenced him to one year in county jail and requested probation with approximately 200 days in county jail.

The prosecutor responded Shaharabani had not shown any remorse and had refused to accept responsibility for his actions. When the prosecutor noted Sharon was not in court for sentencing, the trial court indicated it expected Shaharabani would continue to support his children if probation were granted, regardless of his domestic situation.

Finally, the prosecutor argued it would be inappropriate to consider immigration issues in sentencing Shaharabani, noting 365 days in jail had been offered before trial “and he should get no less than 365 days at this time. It’s clearly warranted. I mean, his behavior and his attitude and the untruthfulness on the stand, in my opinion, warrant state prison. But if the Court is willing to give him a chance, he should at least do the full one year in the county jail.”

Thereafter, the trial court granted Shaharabani probation on various conditions, including serve 365 days in jail, make restitution in an amount to be determined at a hearing and participate in a 52-week domestic violence counseling program. The trial court indicated, “I think probation is a gift in this case, given all the aggravating factors that were mentioned by the prosecutor”

At the restitution hearing, defense counsel asked the trial court to reconsider its ruling and to impose 364 days in jail to avoid adverse immigration consequences for Shaharabani, noting Shaharabani’s son had medical issues. The trial court indicated it understood the request and appreciated defense counsel’s advocacy. However, the trial court believed the sentence imposed was appropriate given the facts of the case. The trial court indicated it had considered a state prison term and “actually, I gave the defendant a bit of a gift to put him on probation”

CONTENTIONS

Shaharabani contends the trial court should not have instructed the jury on flight in the words of CALCRIM No. 372, improperly permitted Katzir to testify on rebuttal and abused its discretion in requiring Shaharabani to serve 365 days in county jail.

DISCUSSION

1. *The trial court committed no instructional error.*

Shaharabani contends the trial court committed reversible error in giving CALCRIM No. 372 on flight and consciousness of guilt. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1244 [evidence indicating an accused left the scene and went home “is not evidence of flight that necessarily supports an inference of consciousness of guilt. [Citations.]”].) He claims the evidence did not permit an inference of flight to avoid arrest in that he left the confrontation to take his children to a safe location and then went directly to the police station, arriving there while the police were still investigating on Donna Street. Shaharabani claims this evidence shows he acted as an innocent person who had used reasonable force to defend himself and was insufficient to warrant the conclusion he left the scene to avoid arrest or observation. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Shaharabani insists the circumstances surrounding his departure were not ambiguous as in *People v. Pensinger, supra*, 52 Cal.3d 1210, 1244, or *People v. Cannady* (1972) 8 Cal.3d 379, 391.

Shaharabani claims the instruction was prejudicial in that it permitted the jury to make an unconstitutional permissive inference (see *Ulster County Court v. Allen* (1979) 442 U.S. 140, 166, fn. 28 [60 L.Ed.2d 777]; *People v. Mendoza* (2000) 24 Cal.4th 130, 180) and lowered the prosecution’s burden of proof by improperly introducing consciousness of guilt into the jury’s deliberations. Thus, the error must be evaluated under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. However, even under *People v. Watson* (1956) 46 Cal.2d 818, 836, the error requires reversal because the instruction permitted the prosecutor to argue Shaharabani fled due to consciousness of guilt, he needed time to make up a story with Cohen, and he made a police report at the station to avoid being challenged by the evidence at the scene.⁴

⁴ In closing argument, the prosecutor questioned why Shaharabani left the scene and did not return after he took the children to his girlfriend’s home. “He knew Sharon was calling 911. Why – if you were innocent and you had done nothing wrong, you would

Shaharabani's claims lack merit. "Penal Code section 1127c requires that whenever evidence of flight is relied on to show guilt, the court must instruct the jury that while flight is not sufficient to establish guilt, it is a fact which, if proved, the jury may consider." (*People v. Pensinger, supra*, 52 Cal.3d at p. 1243.) Instruction on flight is appropriate if there is substantial evidence the defendant departed the crime scene under circumstances suggesting the movement was motivated by a consciousness of guilt. (*People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) "To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Although Shaharabani's departure immediately following the confrontation with Abraham could be viewed as Shaharabani suggests, it also reasonably suggests an intent to evade arrest. Indeed, as the prosecutor argued, at minimum, the evidence supports an inference Shaharabani sought to report his version of the events to the police without being contradicted by the physical evidence available at the scene, primarily Abraham's injuries. Because the evidence supported an inference Shaharabani's movement was motivated by consciousness of guilt, and the People relied on Shaharabani's flight to establish guilt, the trial court was required to instruct on flight. (§ 1127c.)

Shaharabani's claims the flight instruction improperly reduces the People's burden of proof and allows an impermissible inference were rejected in *People v. Mendoza, supra*, 24 Cal.4th 130, a case which considered CALCRIM No. 372's predecessor, CALJIC No. 2.52. *Mendoza* stated: "The instruction informs the jury that it may

have gone back to the house and said, 'Officers, this is what happened.' " "But he fled because he didn't know what he was going to say, and he fled because he knew he was guilty. It's consciousness of guilt. It wasn't until he got it together with his friend and they thought of the story and then they drive to Van Nuys police station where they know that the witnesses aren't going to be there. They know that the investigating officers aren't going to be there. They're going to make a report to a desk officer so at least there's some paper they made a report. That was his intent."

consider flight in connection with all other proven facts, giving the fact of flight the weight the jury deems appropriate. [Citation.] The instruction is not argumentative; it does not impermissibly direct the jury to make only one inference. Finally, defendant contends the instruction unconstitutionally lessens the prosecution's burden of proof. It does not. [Citation.]" (*People v. Mendoza, supra*, at pp. 180-181.)

Moreover, even assuming error for the sake of discussion, the instruction was not prejudicial. The instruction does not assume guilt or flight and is helpful to the defense by admonishing the jury to employ "circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.)

Also, there was overwhelming evidence of Shaharabani's guilt. Shoshana's testimony that Shaharabani punched Abraham in the face was decisively corroborated by Dr. Green's testimony that an individual's nose cannot be broken in two places absent a great amount of force and such an injury is inconsistent with a fall. Shaharabani claimed he only defended himself but admitted he used his military training to prevent Abraham from pushing him. Although at trial Sharon attempted to support Shaharabani's version of the events, she was impeached by her 911 call during which she stated Shaharabani beat her father.

Given these facts, under any standard of review, the jury would not have concluded Shaharabani acted in self defense had the instruction been omitted. Consequently, any error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 837.)

2. Admission of Katzir's testimony not an abuse of discretion.

On cross-examination, Shaharabani denied Katzir had obtained a judgment against him in a civil case. Thereafter, the prosecutor indicated the People intended to call Katzir to testify about the judgment. The prosecutor also indicated Katzir would testify that, when he spoke to Shaharabani about the debt, Shaharabani shoved Katzir into some bushes. The prosecutor noted Katzir, like Abraham, was older than Shaharabani and Shaharabani threatened Katzir and his children, stating he knew where they lived.

Defense counsel objected to the testimony as improper rebuttal, noting the defense did not present evidence of Shaharabani's good character or of his business dealings with Katzir. Defense counsel also claimed the evidence constituted improper character evidence and was unduly prejudicial under Evidence Code section 352. In response, the prosecutor noted defense counsel did not object when Shaharabani was cross-examined about Katzir. Thus, the defense had benefitted by denying the existence of the judgment, even though the prosecutor had provided the defense a copy of the judgment.

The trial court excluded evidence indicating Shaharabani shoved Katzir into the bushes but found Shaharabani "did adamantly deny that he was sued and that there's any judgment against him." When defense counsel asserted Shaharabani testified only that he had never been in the same courtroom with Katzir, the trial court responded Shaharabani "clearly was making it sound like . . . he had never been sued and never had a judgment against him, and that's the court's view of the testimony." The trial court concluded Katzir's testimony was "absolutely relevant and it survives [an Evidence Code section] 352" analysis.

Thereafter, the prosecutor argued to the jury that Shaharabani had "lied on the stand. He told you he was not sued. He was just a great businessman. He had no lawsuit. I mean, such a blatant lie." The prosecutor concluded, "[Shaharabani's] a liar, and you got the instruction that if someone lies deliberately on the stand like that, you don't have to take into account any of their testimony. And he's a liar."

On appeal, Shaharabani contends evidence of Katzir's lawsuit was inadmissible under Evidence Code section 780, subdivision (i) to impeach Shaharabani's credibility because Shaharabani admitted he was sued by Katzir.⁵ Thus, there was no lie to impeach.

⁵ Evidence Code section 780 provides, in relevant part: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including . . . (i) [t]he existence or nonexistence of any fact testified to by him."

However, contrary to Shaharabani's assertion, when the prosecutor asked whether Shaharabani owed a former business partner \$186,000, Shaharabani said, "that's not true." In response to further questions, Shaharabani denied he had been sued by Katzir and stated he had "never, ever" been in court with Katzir. These statements permitted the trial court to conclude Shaharabani had "adamantly denied" having been sued by Katzir or having had a judgment entered against him. Thus, evidence indicating Katzir had obtained a judgment against Shaharabani was relevant in determining the truthfulness of Shaharabani's testimony. (Evid. Code, § 780, subd. (i).)

Shaharabani's claim the evidence was improper rebuttal because he did not place his business dealings in issue also fails. Shaharabani testified about the success of his business to support his assertion the Ilfrachs did not loan him \$100,000 as they claimed, but had invested the money with a profit motive. In order to counter this assertion, the People properly could produce evidence showing Shaharabani had failed to pay a business partner. Thus, contrary to Shaharabani's assertion, the prosecutor did not improperly cross-examine Shaharabani about a collateral matter for the sole purpose of impeaching him. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.)

Shaharabani further claims the evidence should have been excluded under Evidence Code section 352 as too collateral to the charged offense and too prejudicial in that it permitted the prosecutor unfairly to characterize Shaharabani as a deadbeat. However, as indicated above, the impeachment was not collateral in that it addressed Shaharabani's claim he did not owe the Ilfrachs any money. The evidence also directly addressed Shaharabani's credibility, which the jury had to evaluate in determining whether to credit Shaharabani's claim he acted in self defense.

Similarly, the testimony was not unduly prejudicial. The prejudice Evidence Code section 352 " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) "In other words, evidence should be excluded as unduly prejudicial when it is

of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

The fact Shaharabani owed money to a supplier is not evidence that would evoke an emotional response from a jury. Thus, it was highly unlikely the jury used this evidence for an improper purpose. In sum, we find no abuse of the trial court's discretion in permitting the prosecutor to present Katzir's testimony. (See *People v. Scott* (2011) 52 Cal.4th 452, 491; *People v. Riggs* (2008) 44 Cal.4th 248, 290; *People v. Pollock* (2004) 32 Cal.4th 1153, 1171.)

3. *The trial court committed no sentencing error.*

Shaharabani contends the trial court's refusal to exercise its discretion to reduce the jail time to 364 days constituted a failure to give due consideration to the rehabilitative purpose of probation and was irrational, especially considering the immigration consequences of a 365-day term.⁶ (See *People v. Feyrer* (2010) 48 Cal.4th 426, 439; *People v. Minor* (2010) 189 Cal.App.4th 1, 9-10; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) Shaharabani asserts one day less in county jail would not have derailed Shaharabani's rehabilitation. Thus, the conditions of probation should be modified to require Shaharabani to serve 364, rather than 365, days in jail.

A grant of "[p]robation is an act of clemency which rests within the discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal

⁶ Under federal law, generally, a conviction of an aggravated felony is a deportable offense. Title 8 United States Code section 1227, subdivision (a)(2)(A)(iii) declares any alien who is convicted of an aggravated felony at any time after admission to be deportable. Title 8 United State Code section 1101, subdivision (a)(43)(F) defines "aggravated felony" to include "a crime of violence . . . for which the term of imprisonment [is] at least one year. . . ." Title 18 United States Code section 16, subdivision (a) defines "crime of violence" to mean "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"

unless there has been an abuse of discretion.’ [Citation.]” (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 831; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 364-365.) Under section 1203.1, a trial court granting probation may impose “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer” (§ 1203.1, subd. (j).)

In determining whether probation is appropriate, the trial court is required to consider public safety, the nature of the offense, and the interests of justice, including punishment. (Cal. Rules of Court, rule 4.414, subd. (b)(6); § 1202.7.) A trial court abuses its discretion when its decision is arbitrary or capricious, or exceeds the bounds of reason under the circumstances. (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 831; *People v. Kronemyer*, *supra*, 189 Cal.App.3d at p. 365.) In applying this test we cannot substitute our judgment for that of the trial court. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Unless the trial court’s action was “so irrational or arbitrary that no reasonable person could agree with it,” we must uphold it. (*Ibid.*)

Shaharabani’s claim the trial court “failed to give due consideration” to the rehabilitative purpose of probation is contradicted by the record which indicates the trial court considered the purpose of probation and granted Shaharabani probation in order to give Shaharabani “a chance to maybe turn things around.”

Further, the record demonstrates the trial court considered all relevant factors, including “the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant” (§ 1202.7.) After considering these matters, the trial court granted Shaharabani probation with 365 days in jail. We find no abuse of discretion in this decision. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Indeed, because the jury found Shaharabani inflicted physical injury on a person over the age of 60 years, a state prison term was the statutorily presumptive punishment in this case. (§ 1203.09, subd. (f); see fn. 3, *ante*.) The trial court extended Shaharabani leniency and granted probation. Although one day less in county jail might not derail Shaharabani's rehabilitation, the condition of probation directing Shaharabani to serve 365 days in jail was not irrational or arbitrary.

DISPOSITION

The judgment (order granting probation) is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.