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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JOHN SCHEIBLICH, JR., Defendant and Appellant.	B247291 (Los Angeles County Super. Ct. No. NA091966)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard R Romero, Judge. Reversed and remanded.

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Adrian K. Panton, 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, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

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An information, filed on May 15, 2012, charged Christopher John Scheiblich, Jr., with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and elder abuse (Pen. Code, § 368, subd. (b)(1)). The information specially alleged on both counts an enhancement for the infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)). A jury found Scheiblich guilty of assault with a deadly weapon and "true" the great-bodily-injury enhancement. It found Scheiblich not guilty of elder abuse. The trial court sentenced Scheiblich to a state prison term of six years, consisting of the three-year midterm for assault with a deadly weapon, plus three years for the great-bodily-injury enhancement.

Scheiblich appealed, contending that the trial court committed prejudicial error by admitting evidence of his prior arrests and convictions as character evidence under Evidence Code section 1102 and instructing the jury it could consider that evidence to determine whether the People had proved his guilt beyond a reasonable doubt. We agree with Scheiblich, and the People concede, that the evidence of Scheiblich's prior arrests and convictions was not admissible character evidence under Evidence Code section 1102. Although the evidence nevertheless was admissible as impeachment evidence, the instruction to the jury that it could consider the evidence to determine whether the People had proved guilt beyond a reasonable doubt, when viewed in context of the totality of the matter, prejudiced Scheiblich's case. As a result, we reverse the judgment and remand the matter to the trial court.

DISCUSSION

Under Evidence Code section 1102, "[i]n a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by [Evidence Code] [s]ection 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character. [¶] (b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)." The provision, while allowing opinion or reputation evidence, does not permit evidence of specific acts to prove character as

circumstantial evidence of the defendant's disposition to commit the charged offense. (*People v. Felix* (1999) 70 Cal.App.4th 426, 431-432.)

In this case, Scheiblich testified in defense that he was on a residential street in San Pedro on April 15, 2012, walking in circles and screaming into his phone, simultaneously arguing with his fiancée and giving directions to his friend who was coming to the area to pick him up. A man, 65-year-old AnthonyA., came out of his house, asked Scheiblich to be quiet and told him to get out of there. Scheiblich refused. Anthony A. returned to his house and later exited with a golf club. Scheiblich told him, "'Hit me. Hit me. Hit me.'" According to Anthony A., he dropped the golf club on the grass and made an aggressive move toward Scheiblich. Anthony A. then either slipped or was pushed down a slope and wound up on his stomach, straddling the sidewalk and a parkway. The next thing Anthony A. remembered was a blow to his back with a hard object. He thought he had lost consciousness. The police and paramedics came to the scene, and Anthony A.'s wife took him to the hospital, where he received 16 staples for two lacerations on his head. He also had a broken rib and three marks on his body. At trial, Anthony A. identified his golf club, which had on it gray hair like his own that was not on the golf club the day before the incident. Scheiblich testified in contrast that Anthony A. had hit him first in the head with the golf club and that after regaining his footing he punched Anthony A. in the side and struck Anthony A. twice in the head with the golf club. Scheiblich ran from the scene.

Explaining his departure from the scene, on cross-examination, Scheiblich testified that he was scared rather than relieved when he heard the police sirens and believed that people were following him. He continued, "I just got assaulted by an older man that is a lot bigger than me, as everyone can see. This is not my everyday thing. I don't walk around looking for trouble, to cause trouble. I merely had . . . an altercation with a man. He . . . [brought] a golf club out of his house, he struck me with a golf club, and we had a scuffle, yes, ma'am. I'm not going to deny that. But I was scared, yes, ma'am. I went into the house [after the incident] not knowing what to do. I know I never

had to deal with something like this before. I never had this happen. So, yeah, I didn't know what to do."

Based on Scheiblich's testimony that he did not "walk around looking for trouble" and "never had to deal with something like this before," the trial court, over defense objection, permitted the People to question Scheiblich about his prior arrests and convictions. The prosecutor asked, "You just told us that you don't go looking for trouble, this isn't you. Isn't it true in February of this year, you were convicted of disturbing the peace? [¶] . . . [¶] And isn't it true that in February of 2005, you were convicted of trespassing?" Scheiblich admitted both crimes. The prosecutor then asked Scheiblich if he had been arrested in December 2011 for domestic violence, in September 2011 for disturbing the peace, and in August 2011 for domestic violence. Scheiblich responded, "Keyword, arrested, not convicted." Later the prosecutor asked, and Scheiblich admitted, that in February 2010 Scheiblich was convicted of trespass to injure property; in December 2011 he was arrested for domestic violence; in August 2011 he was arrested for domestic violence; in February 2010 he was convicted for disturbing the peace; in April 2005 he was arrested for domestic violence; in December 2005 he was arrested for battery; and in April 2010 he was arrested for aggravated battery on a pregnant person. Scheiblich admitted the arrests and convictions, again emphasizing that many were arrests and not convictions. The prosecutor then asked, "So this is really you. You really do go looking for trouble, don't you?" Scheiblich responded, "Absolutely not. I think you are implying something on me that's not true."

Although the cross-examination by the prosecutor involved specific acts of prior arrests and convictions, the trial court instructed the jury under CALJIC No. 350, which pertains to character evidence, that "[y]ou have heard character testimony that the defendant is not a person who looks for trouble. [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt. [¶] Evidence of the defendant's character for not being a person who looks for trouble can by itself create a

reasonable doubt. However, evidence of the defendant's good character may be countered by evidence of his bad character for the same trait. You must decide the meaning and importance of the character evidence."

The evidence of Scheiblich's prior arrests and convictions was not admissible under Evidence Code section 1102, as it was not opinion testimony or reputation evidence. (*People v. Felix, supra,* 70 Cal.App.4th at pp. 431-432.) The People concede as much. The evidence of the prior arrests and convictions nevertheless was admissible to impeach Scheiblich's testimony in relation to his leaving the scene after the incident that, "This is not my everyday thing. I don't walk around looking for trouble, to cause trouble. . . . I know I never had to deal with something like this before. I never had this happen. So, yeah, I didn't know what to do." (See *People v. Lankford* (1989) 210 Cal.App.3d 227, 240 ["defendant who chooses to introduce false or misleading evidence of his credibility risks prosecution rebuttal of that evidence by proof of relevant specific acts of his conduct"]; *People v. Senior* (1992) 3 Cal.App.4th 765, 778 ["proper to impeach [defendant's] categorical, blanket denials of threats with evidence of a threat made the same day he denied having threatened the victim"].)

As impeachment evidence, however, the jury's consideration of it should have been limited to evaluating Scheiblich's credibility. The jury could not consider the evidence, as it would if the evidence were proper character evidence under Evidence Code section 1102, to decide whether the People had proved Scheiblich's guilt beyond a reasonable doubt. By instructing the jury under CALJIC No. 350, however, the trial court allowed the jury to do just that. As noted, the court told the jury, "You have heard character testimony that the defendant is not a person who looks for trouble. [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt." The court, therefore, erroneously instructed the jury that it could consider the evidence of Scheiblich's prior arrests and convictions, which was improperly admitted as character rather than impeachment evidence, to determine whether Scheiblich had the propensity to

commit and was guilty of the charged crime. At oral argument, the People conceded that point as well. As a result, instead of limiting the jury's consideration of the evidence of prior arrests and convictions to impeaching Scheiblich's testimony that he did not go looking for trouble and had never dealt with an incident like the charged offense, the court allowed the jury to consider the evidence for propensity.

Although certain testimony, including that of Anthony A. and his wife, pointed to Scheiblich as the aggressor, other testimony, albeit that of Scheiblich and his friend, indicated that Anthony A. hit Scheiblich first. And the evidence is undisputed that, after Anthony A. and Scheiblich had a heated verbal exchange, Anthony A. went back into his house and then exited holding a golf club. Under these circumstances, the erroneous instruction allowing the jury to consider the evidence of prior arrests and convictions for propensity, and the failure to give any instruction limiting consideration of the evidence for purposes of impeachment, prejudiced Scheiblich's case. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [examination of entire cause, including evidence, demonstrates reasonable probability that result more favorable to defendant would have been reached absent error].)

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court to afford the People a reasonable time to elect to retry Scheiblich on the charge of assault with a deadly weapon, along with the special allegation of the infliction of great bodily injury.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

I concur:

MILLER, J.*

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

JOHNSON, J., Dissenting:

I respectfully dissent.

As the majority states, the evidence of Scheiblich's prior arrests and convictions was admissible to impeach Scheiblich's testimony that he was a peaceable person who did not have any experience with law enforcement. Scheiblich testified that he hit Anthony A. with the golf club to defend himself, and then ran from the scene and hid in a garage because he was scared, not because he was guilty: "This is not my everyday thing. I don't walk around looking for trouble, to cause trouble." "I was scared . . . . I know I never had to deal with something like this before. I never had this happen. So, yeah, I didn't know what to do." I also agree (as respondent admits) that the evidence of Scheiblich's arrests and convictions was not admissible under Evidence Code section 1102. That section allows only opinion or reputation evidence, and does not permit specific act evidence, to prove character as circumstantial evidence of the defendant's disposition to commit the charged offense. (*People v. Felix* (1999) 70 Cal.App.4th 426, 432.) The trial court erred in relying on section 1102, and its instruction regarding character evidence was incorrect to the extent that it characterized the arrests and convictions as character evidence under that section. I also agree the trial court erred when it refused to give a limiting instruction specifically telling the jury that it could not use the evidence to prove Scheiblich's propensity to commit the charged offenses.

I part company with the majority on the effect of the instructions, as my review of the record convinces me that the error was harmless. It was undisputed that Scheiblich hit Anthony A. in the head repeatedly with the golf club while Anthony A. was on his knees and lying prone on the ground. The evidence that Scheiblich was the aggressor and the first to strike a blow was strong. Anthony A. testified that he dropped the golf club as Scheiblich, who was trespassing on Anthony A.'s front yard, walked toward him, and that soon after he was on the ground and being hit with a hard object. Anthony A. suffered head injuries requiring 16 staples, a broken rib, and marks on his body. Anthony A.'s wife testified, consistent with her testimony at the preliminary hearing, that she saw Scheiblich walking on their property and taunting Anthony A., saw Anthony A.

drop the club and put his hands up, and then saw Scheiblich hitting Anthony A. repeatedly with the golf club. Scheiblich testified that he did not leave the sidewalk, and Anthony A. hit him first in the head with the club so hard that he fell to his knee, but he also admitted that "defending [him]self" he hit Anthony A. when the older man was on the ground with no weapon. Scheiblich admitted that he ran from the scene and hid ("[b]ecause [he] knew [he] did something wrong") in a garage storage space; when flushed out, and after he was handcuffed, he broke away and ran again. This commitment to flight from the police, while handcuffed, is indicative of consciousness of guilt. (*People v. Williams* (1997) 55 Cal.App.4th 648, 652.) It certainly is not the behavior of a man who had just been assaulted on a public sidewalk by a senior citizen wielding a golf club.

The officer who found Scheiblich in the storage space and the officer who arrested him after his second flight testified that Scheiblich did not appear to be injured in any way, although Scheiblich's friend Max Cumpson testified that he saw an injury to the middle of Scheiblich's forehead in People's exhibit 12, Scheiblich's booking photograph, which Scheiblich characterized as "a actual nice scar." Scheiblich also testified (again because he "did not know what to do") that he did not tell the police that he had a head injury, although on redirect he contradicted himself and said he told the police he had a head injury and they denied him treatment. He did not report a head injury on the medical history taken at the police station, and there was no evidence that he was ever treated. The only witness who testified he saw Anthony A. strike Scheiblich with the golf club was Scheiblich's friend Cumpson. Cumpson was in custody, had an extensive record, and had driven over in a stolen car to pick Scheiblich up. Further, Cumpson had discussed how he would testify with Scheiblich months earlier.

After Scheiblich's arrests and convictions were introduced, the prosecutor asked Scheiblich if his history contradicted his testimony that he was not a person who looked for trouble, and Scheiblich responded, "Absolutely not." In closing argument the prosecutor did not refer to the arrests and convictions, and described Scheiblich, over defense objection, as "looking for trouble . . . which is completely consistent with the

type of person that he is." The mark on Scheiblich's forehead was inconsistent with a blow from a golf club. The defense referred to the arrests and convictions as showing that Scheiblich was "a troublemaker," but warned the jury: "You can't use that to say he's guilty. It goes to rebut the character evidence that he said when he said, 'I wasn't looking for trouble.'"

Given the strength of the evidence against Scheiblich, I conclude there is no reasonable probability that the jury would have found him innocent of assault with a deadly weapon had the instructions explicitly limited the use of the prior arrests and convictions to impeachment. Scheiblich admitted he taunted Anthony A. and hit him repeatedly with the golf club while Anthony A. was on the ground. Anthony A. and his wife testified at trial that Anthony A. dropped the golf club, and the jury was able to observe and weigh their testimony and demeanor. There was uncontroverted evidence of Anthony A.'s serious injuries, consistent with his account. Scheiblich ran away not once but twice, and "the inference of consciousness from guilt from flight is one of the simplest, most compelling and universal in human experience." (*People v. Williams*, *supra*, 55 Cal.App.4th at p. 652.) The jury was also able to observe Scheiblich's demeanor as he testified, and to judge the credibility of Cumpson in the light of his criminal background and his admission that he had discussed his testimony with Scheiblich.

The evidence against Scheiblich was strong, and it is not reasonably probable that a different result would have been reached if the court had given the limiting instruction. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 925 [applying standard in *People v. Watson* (1956) 46 Cal.2d 818, 836 to failure to give instruction regarding propensity evidence].)

I would affirm the judgment.

JOHNSON, J.