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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HUI SUN, Defendant and Appellant.	B194690 (Los Angeles County Super. Ct. No. GA055979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Reversed in part, affirmed in part and remanded.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Attorney General and Ryan B. McCarroll, Deputy Attorney General for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts IIIC and IIID of the Factual and Procedural Background and Background and parts I and III of the Discussion.

Appellant Hui Sun, convicted of one count of second degree murder and one count of attempted murder, appeals his convictions and aspects of his sentence, contending: (1) prosecutorial misconduct influenced the jury's decision to convict him of murder rather than manslaughter; (2) the trial court erred in imposing and staying rather than striking various sentence enhancements; (3) the court erred in failing to award presentence custody credits for time appellant -- who attempted suicide after shooting his two victims -- spent in the hospital prior to his arrest; (4) the court erred in failing to award an extra day of credit for 2004, a leap year; and (5) the abstract of judgment contains numerous errors, including failure to award any presentence custody credits and miscalculation of the sentence. Respondent concedes the latter two points.

We conclude first, that although the prosecutor misstated the law in closing argument, the court correctly handled the situation by admonishing the jury to follow the instructions rather than counsel's argument. Second, the enhancement imposed under Penal Code section 12022.7, subdivision (e) should have been stricken.[1] Third, appellant was not entitled to presentence custody credits prior to his arrest. Accordingly, we reverse in part and remand for the section 12022.7, subdivision (e) enhancement to be stricken, for the extra day to be credited, and for the errors in the abstract of judgment to be corrected.

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[1] Statutory references herein are to the Penal Code.

Section 12022.53, subdivision (b) provides a 10-year sentence enhancement for a person who uses a firearm in the commission of specified felonies. Subdivision (c) provides a 20-year sentence enhancement for a person who discharges a firearm in the commission of one of those same felonies. Subdivision (d) provides a 25-year to life sentence enhancement for a person who, in the commission of one of the specified felonies, "personally and intentionally discharges a firearm and proximately causes great bodily injury."

FACTUAL AND PROCEDURAL BACKGROUND

I

Information

Appellant was charged by information with the murder of his mother-in-law, Ai Guo (count one), and the attempted willful, deliberate, premeditated murder of his wife, Jie Xu (count two). With respect to both counts, it was further alleged that appellant personally and intentionally discharged a firearm which caused great bodily injury within the meaning of Penal Code section 12022.53, subdivision (d); that he personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); and that he personally used a firearm within the meaning of section 12022.53, subdivision (b). With respect to count two, it was alleged that appellant personally inflicted great bodily injury upon Xu under circumstances involving domestic violence within the meaning of section 12022.7, subdivision (e).[2]

II

Verdict and Sentencing

Appellant was tried twice. In the first trial, the jury acquitted him of first degree murder on count one, but deadlocked over whether he was guilty of second degree murder or voluntary manslaughter. The jury was also deadlocked on count two, split between attempted murder and attempted voluntary manslaughter.

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[2] Section 12022.7, subdivision (e) provides that any person "who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony" shall be punished by an additional and consecutive term of imprisonment of between four and six years.

At the second trial, the jury found appellant guilty of second degree murder and attempted willful, deliberate, premeditated murder. The second jury also found all the special allegations true.

The court sentenced appellant to 72 years to life in prison calculated as follows: For count one (second degree murder) the court sentenced appellant to 15 years to life, plus 25 years to life for the section 12022.53, subdivision (d) enhancement, for a total of 40 years to life. For count two (attempted willful, deliberate, premeditated murder) the court sentenced appellant to a consecutive term of life in prison with the possibility of parole with a mandatory minimum of 7 years, plus 25 years to life for the section 12022.53, subdivision (d) enhancement, for a total of 32 years to life. The court imposed and stayed sentence on the remaining enhancements.

III

Evidence at Trial

A. Prosecution Evidence

According to witnesses who testified for the prosecution at trial, appellant was born in China, where he served in the military and in 1997, married Jie Xu.[3] Appellant and Jie came to the United States in 1998. They lived in an apartment in Alhambra and had two children. Jie's parents, Ai Guo and Qing Xu, came from China to live with them in 2000 and 2002 respectively.[4]

In September 2003, Jie discovered that appellant was having an affair. She said she wanted a divorce, and appellant agreed. Between September and

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[3] Because Jie Xu and her father, Qing Xu, who also testified, share a surname, to avoid confusion we refer to them by their first names.

[4] Guo's name is sometimes spelled "Gao."

December 2003, appellant moved in and out of the apartment, staying away for a few days each time. During the times he was at the apartment, he slept in the living room.

According to Jie, appellant had an "explosive" temper. In 1999, when Jie was pregnant, he kicked her. Qing sometimes heard appellant and Jie arguing, and once observed an injury on Jie's wrist.

In December 2003, during an argument over money, appellant kicked Jie's leg and hit her in the face. He also took one of the guns out of his gun locker, but did not directly threaten her with it.[5] Jie called the police, but did not tell them appellant had struck her because she was concerned about getting him in trouble due to his immigration status.[6] Jie called the police on two other occasions in December 2003. On the first, appellant had called her from outside the apartment and asked her to come talk to him. Jie felt apprehensive about meeting him alone. Jie called police on the second occasion because appellant had taken Jie's passport and the passport of one of their children.

Jia Xiang Wang, appellant's co-worker, testified that on December 24, 2003, appellant asked him for help following someone. Appellant did not say who. Wang, driving his own car, followed appellant to a location in Chinatown where they both parked and waited for approximately three hours. Appellant then told Wang to leave. Police officers later ascertained that the location where appellant and Wang parked that day was one block from Jie's place of employment.

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5 Appellant kept two guns in a small metal cabinet in the bedroom closet. Only he had the key.

6 A police expert in domestic violence explained that victims commonly minimize the violence when speaking to police.

On December 27, 2003, Jie was out shopping with Guo and the children. Appellant called and told her to come home because he had cooked dinner. When everyone arrived and sat down to eat, appellant poured himself half a glass of Chinese wine, apologized to Jie's parents, and drank some or all of the alcohol. Appellant next apologized to Jie, made a toast to their reconciliation, and drank another glass or half glass of the alcoholic beverage. Jie's parents and the children left the room so that Jie and appellant could be alone. Appellant seemed calm. He did not appear intoxicated. Appellant asked Jie to reconcile, but she refused, saying "[her] heart ha[d] died." She suggested that they give each other some time and space. Appellant had tears in his eyes.

Jie left the table and went into her parents' bedroom. Appellant followed. He still seemed calm. Guo, who was in the bedroom at the time, suggested that appellant give Jie some time to think things over.[7] Appellant walked into the bedroom he and Jie had shared, and Jie followed. When she got there, appellant was holding a gun in his right hand, behind his back. Jie tried to leave, but appellant blocked her way. Jie saw Guo in the doorway, and yelled at her to call the police. Guo grabbed appellant's left arm and asked him what he was doing. Appellant, still appearing calm, fired the gun at Jie, striking her in the face. He then shot Guo in the head and turned the gun on himself. Seeing Guo and appellant lying on the floor, Jie tried to call 911, but had difficulty communicating with the operator due to her injury.

Qing, who did not speak English, went to the apartment of a neighbor, Antoinette Rossi, and persuaded her to call 911. Rossi went to the family's

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[7] During this time, Qing was in the bathroom. He overheard appellant and Jie arguing. He heard Guo say "what are you doing?" and then heard three shots, but did not see the crime.

apartment and saw Jie slumped down with blood running from her head.[8] Guo was lying on the floor, not moving. Appellant was on the floor with a gun near his right hand, and a wound in his head.

Guo's autopsy showed stipling, which indicates the gun was only a few inches from her face when she was shot. The gun used in the incident required five pounds of pressure to fire.

B. Defense Evidence

The defense called a toxicology expert who testified that the alcoholic beverage appellant drank that night was 112 proof, which means it was 56 per cent alcohol. He estimated that appellant's blood alcohol level at the time of the shooting was between .17 and .33. A person with a .33 level would be confused and disoriented and would experience a loss of inhibitions. At any point within that range, the drinker would experience an impact on critical judgment and the ability to perceive and analyze reality. Some drinkers with that level of alcohol in their system would become happy, some would become quiet, and others would become angry. A person with a high tolerance for alcohol might appear normal, but the mental effects would still be present.[9]

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[8] Rossi did not hear any loud voices or arguing prior to the shooting. She had heard appellant arguing with his wife on four or five prior occasions.

[9] Jie and Qing testified that appellant was a regular drinker, who had a drink nearly every day after work and could drink several beers with no noticeable effect.

C. Relevant Jury Instructions

The jury was instructed on the burden of proof: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime and special allegation beyond a reasonable doubt."

With respect to the murder and attempted murder charges, the jury was instructed: "If you conclude that the defendant committed the acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of attempted murder or attempted voluntary manslaughter. The People must still prove each element of every charge beyond a reasonable doubt." The following instruction was also given: "The defendant is charged in Count 1 with murder. To prove that the defendant is guilty of this crime, the People must prove that: Number 1, the defendant committed an act that caused the death of another person; and number 2[,] when the defendant acted, he had a state of mind called malice aforethought; and number 3, he killed without lawful excuse." The court went on to explain that there are two kinds of malice aforethought, express and implied: "'The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: number one, he intentionally committed an act; [¶] two, the natural consequences of the act were dangerous to human life; [¶] three, at the time he acted, he knew his act was dangerous to human life.'"

The jury was originally instructed with regard to manslaughter: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion, . . . if, number one, the defendant was provoked; two, as a result of provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and three, provocation would have caused an ordinary person of average disposition to act rashly and without due deliberation;

that is, from passion rather than from judgment." "'In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.'"[10] Later, the court supplemented that instruction: "'Such provocation must be such that an average *sober* person would be so inflamed that he or she would lose reason and judgment.'" (Italics added.)

D. Relevant Portions of Closing Argument

During her closing argument, the prosecutor explained the concept of malice and the difference between express and implied malice. After highlighting the evidence tending to show appellant had acted with malice, she continued: "Once malice is proven, ladies and gentlemen, when there's a killing that's not an accident[,] [t]hat is murder, and that's all I have to prove for murder. And that's your starting point, ladies and gentlemen, second degree murder. So for your starting point, on count 1, it's second degree murder, ladies and gentlemen. If Person A kills Person B, and that's all you know, it is presumed to be malicious in second degree murder." Defense counsel immediately objected to this as a "misstatement of the law." The court admonished the jury as follows: "Ladies and gentlemen, I instructed you on the definitions of murder and malice aforethought, and you will be guided by those instructions on the law.[11] Counsel's argument, I remind you, is not evidence or statements of law, and if there is any discrepancy, refer to your notes and the jury instructions that you do have." The prosecutor

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10 Similar instructions were given with respect to attempted murder and attempted voluntary manslaughter.

11 Instructions had been read to the jury prior to closing argument.

continued her argument by stating: "Obviously, we have more facts than just a person shot and a person killed . . . ."

Thereafter, during defense counsel's closing argument, referring to the provocation instruction she stated: "'[Y]ou are not going to find in this instruction . . . that it has to be an average, sober person. What the instruction actually says is when an ordinary person of average disposition would have been provoked and how such a person . . . .'" At that point, an objection was interposed by the prosecutor and overruled by the court. Defense counsel went on: "'What it actually says is where an ordinary person of average disposition would have been provoked and how such person would react in this same situation, knowing the same facts.'" After defense counsel's argument concluded, the prosecutor requested that the jury be instructed that the test for provocation was whether a person of average, *sober* disposition would be provoked. The court agreed that a more complete instruction should have been given under the circumstances, and gave the supplemental instruction quoted above.

Defense counsel did not object to the supplemental instruction, but used that opportunity to reopen the issue of the prosecutor's argument concerning the presumption of malice. She asked that the court also inform the jury via a supplemental instruction that second degree murder was not to be presumed. The court denied the request stating there was no need to reopen that area because "the jurors have been instructed about malice and about how [the] People must prove every element beyond a reasonable doubt."[12]

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12 The court offered defense counsel an opportunity to re-open argument in order to discuss the new instruction on provocation, but she declined.

DISCUSSION

I

Prosecutorial Misconduct

Appellant's first argument on appeal is based on the statement made by the prosecutor during her closing argument concerning presumption of malice and second degree murder. Appellant contends that the statement represented a misstatement of law. Moreover, although the court admonished the jury as soon as defense counsel interposed an objection to the prosecutor's statement, appellant contends the court failed to adequately inform the jury concerning the true state of the law or to correct any misimpression the prosecutor's statement might have engendered. Appellant seeks to support this argument by comparing the court's reaction to the misstatement of law made in defense counsel's close concerning provocation, specifically, its decision to supplement the instructions given. We agree that the prosecutor's statement was incorrect, but conclude the court handled the situation correctly and find no basis for reversal.

A. Misstatement of Law

In its brief, respondent does not contest that the statement at issue was an inaccurate recitation of the law.[13] The Supreme Court made clear in *People v. Hill*

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13 In the trial court, the prosecutor argued that her statement was accurate, relying on *People v. Bloyd* (1987) 43 Cal.3d 333, in which the court said: "'It is settled that the necessary element of malice may be inferred from the circumstances of the homicide . . . Thus[,] this court has declared that "[w]hen the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree."'" (*Id.* at p. 349, quoting *People v. Lines* (1975) 13 Cal.3d 500, 505.) The "presumption of law" language originated in a 1930 case, *People v. Howard* (1930) 211 Cal. 322, disapproved in part in *People v. Thomas* (1945) 25 Cal.2nd 880. (See *People v. Lines*, *supra*, 13 Cal.3d at p. 505, quoting *People v. Howard*, *supra*, at p. 329.) In those earlier times, courts often conflated

(1998) 17 Cal.4th 800 that even an innocent misstatement of law can constitute misconduct. (*Id.* at pp. 822, 829-832.) The court expressed particular disapprobation of "attempt[s] to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*Id*. at p. 829.) "[A] prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.'" (*People v. Woods* (2006) 146 Cal.App.4th 106, 112, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) As the prosecutor's statement could have been interpreted by the jury as placing a burden to overcome a presumption of malice or second degree murder on appellant, it was an improper statement.

B. Prejudice

A prosecutor's misstatement of the law alone, however, does not automatically result in prejudicial error. "[T]he federal Constitution does not require (and the state Constitution does not permit) the reversal of a criminal conviction unless the misconduct deprived defendant of a fair trial or resulted in a

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"'presumption'" and "'inference.'" (See *Mudrick v. Market Street Ry. Co*. (1938) 11 Cal.2d 724, 734 [the terms presumption and inference "are often erroneously used interchangeably, and as conveying the same meaning"]; *Barsha v. Metro-Goldwyn-Mayer* (1939) 32 Cal.App.2d 556, 564 ["[T]he line of demarcation between [inferences and presumptions] is often difficult to draw" and "our highest courts have met with difficulty in accurately deciding their use and application"].) Notwithstanding its quotation of the language from *Howard*, we believe the court in *Bloyd* meant only to convey the accepted proposition that an inference of malice can arise from the actions of the defendant when the killing occurred. (See, e.g., *People v. Smith* (2005) 37 Cal.4th 733, 742 ["[T]he act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice"]; *People v. Lines*, *supra*, 13 Cal.3d at p. 506 [where "it is proved that the defendant assaulted the victim with a deadly weapon in a manner endangering life and resulting in death," and no justifying or mitigating circumstances are shown, malice may be implied].)

miscarriage of justice." (*People v. Hinton* (2006) 37 Cal.4th 839, 865.) If a misstatement of law or improper comment or question occurs during the course of trial and the court reacts by admonishing the jury to disregard it, appellate courts presume the jury followed the court's instructions. (*Id*. at p. 871; *People v. Michaels* (2002) 28 Cal.4th 486, 528; *People v. Samayoa* (1997) 15 Cal.4th 795, 843.) Only rarely is an improper statement or question deemed so egregious that an admonition cannot cure it. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Price* (1991) 1 Cal.4th 324, 447.)

Here, the prosecutor preceded the statement by explaining to the jury that malice "is shown by the means used, . . . [t]he manner in which it was done, . . . the circumstances surrounding the killing, and any . . . statements that were made." She also discussed the evidence indicative of express malice -- "[H]e used a semiautomatic weapon, a shot to the head" -- and the evidence from which malice could be implied -- "[Appellant] loaded a gun. He knew that gun could kill. He had training for weapons. He handled a gun in the military. . . . He put the magazine in, and he chambered a round. He pulled that slide back and got it ready, and he fired the gun, knowing the dangers, knowing who was in the house, and he fired it not once, not twice, but three times. He did an act. He knew it was dangerous, and he did it anyway." In response to defense counsel's objection to the prosecutor's statement, the court admonished the jury to be guided by the court's instruction on the definitions of murder and malice and reiterated that counsel's argument was not the law.

The instructions themselves informed the jury that the prosecution bore the burden of proving every element of each crime beyond a reasonable doubt and that to establish murder, the prosecution "must prove" that "the defendant committed an act that caused the death of another person; and . . . when the defendant acted, he had a state of mind called malice aforethought . . . ." The jurors were

specifically instructed that if they concluded appellant committed the acts, "'that conclusion is only one factor to consider along with all the other evidence" and was "not sufficient by itself to prove that the defendant is guilty of attempted murder or attempted voluntary manslaughter.'" Defense counsel emphasized those instructions in her closing: "The only presumption in those jury instructions is the presumption of innocence. Nowhere does it say that second degree murder is presumed. In order to convict [appellant] of second degree murder, you have to be convinced beyond a reasonable doubt, and the prosecutor needs to prove it." On this record, we see no likelihood the jury was confused concerning the burden of proof and no possibility of prejudice to appellant.

Appellant attaches undue significance to the fact that when defense counsel misstated the law with regard to provocation, the court supplemented the instructions, informing the jury that "provocation must be such that an average sober person would be so inflamed that he or she would lose reason and judgment," rather than simply giving an admonition. Appellant contends: "[T]he court's affirmative instruction as to the appropriate resolution of counsels' legal dispute over the intoxication evidence, coupled with the court's failure to inform the jury as to the appropriate resolution regarding counsels' legal dispute over the presumption issue, permitted the inference that in fact the prosecutor was correct and that the law does presume second-degree murder." Appellant overlooks the very real distinction between the two situations. The prosecutor's statement suggesting the jurors could presume malice or second degree murder was already contradicted by the instructions; therefore, the court's admonishment to abide by the instructions and disregard counsel's argument was sufficient to counteract any harm. In the case of defense counsel's argument, an admonition to follow the instructions would have been misleading, as the original instructions were incomplete. Having been alerted to the omission of the word "sober" by the

argument of counsel and the prosecutor's objection, the court was required to correctly instruct the jury concerning the legal standard for provocation. That the court was obliged to resolve two disparate situations differently is not evidence of unfairness or prejudice to appellant.

II

Enhancements

Appellant contends the court erred in imposing but staying sentence on the enhancements under section 12022.53, subdivisions (b) and (c) and section 12022.7, subdivision (e). Whether enhancements under these statutes should be stricken or stayed was resolved by this Court in *People v. Bracamonte* (2003) 106 Cal.App.4th 704. There, we addressed a discrepancy in the language of subdivisions (f) and (h) of section 12022.53. Subdivision (f) provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime." It further states that firearm enhancements under section 12021.5, 12022, 12022.3, 12022.4, and 12022.5 "shall not be imposed on a person in addition to an enhancement imposed pursuant to this section" and that enhancements for great bodily injury under section 12022.7, 12022.8, and 12022.9 "shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)." Subdivision (h) provides: "[T]he court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." In cases such as the present one, where multiple enhancements were alleged and found to be true by the jury, the language of subdivision (f) could be read to preclude the usual practice of imposing but staying all but one of such enhancements, while at the same time, subdivision (h) appears to forbid striking any of them.

In *Bracamonte,* we harmonized these "seemingly conflicting provisions" by concluding that where multiple enhancements were alleged and found true under section 12022.53, that provision requires the trial court (1) to impose the applicable enhancement for each firearm discharge and use allegations found true under section 12022.53 and stay the execution for all but the one imposing the longest prison term, and (2) to strike enhancements found true under the other provisions listed in subdivision (f). (*People v. Bracamonte, supra,* 106 Cal.App.4th at pp. 712-714.) *Bracamonte* was followed in *People v. Carrasco* (2006) 137 Cal.App.4th 1050, where enhancements under both subdivision (b) and subdivision (c) of section 12022.53 were found true. The court held that the subdivision (b) enhancement should have been imposed and stayed rather than stricken. (137 Cal.App.4th at pp. 1061-1062.) Appellant contends *Bracamonte* and *Carrasco* were wrongly decided, and points out that the Third District has since concluded that excess enhancements under section 12022.53 should be stricken. (*People v. Gonzalez* (2006) 146 Cal.App.4th 327, review granted Mar. 14, 2007, S149898.)

Respondent attacks a different aspect of the *Bracamonte* holding -- the conclusion that the non-section 12022.53 enhancements listed in subdivision (f) should be stricken when a section 12022.53 enhancement is imposed. Respondent contends that part of *Bracamonte's* holding has been undermined by a change in the Rules of Court. *Bracamonte* found that rule 4.447 -- which provides that trial courts should stay, rather than strike, enhancements -- did not apply to indeterminate life terms and that, in any event our interpretation of the applicable statutes took precedence over a rule of court. (*People v. Bracamonte, supra,* 106 Cal.App.4th at pp. 710-711; see *People v. Felix* (2000) 22 Cal.4th 651, 657-659 [explaining that sentences such as "25 years to life" or "life with the possibility of parole" are indeterminate].) Subsequently, the Advisory Committee added a

comment to rule 4.447, stating: "This rule applies to both determinate and indeterminate terms." (Advisory Com. com., rule 4.447.)

We are persuaded by neither appellant's argument nor respondent's. The authority relied on by appellant has been accepted for review by the Supreme Court and is no longer citable. The comment added to rule 4.447 cannot alter our interpretation of the statutes.[14] We will continue to adhere to the views expressed in *Bracamonte* until advised to do otherwise by the Supreme Court. Accordingly, we conclude the court erred in failing to strike the section 12022.7, subdivision (e) enhancement, but correctly imposed and stayed the section 12022.53 subdivisions (b) and (c) enhancements.

III

Abstract of Judgment and Presentence Credits

Both appellant and respondent agree that the abstract of judgment contains the following errors: (1) it fails to reflect 1007 days of presentence custody credits calculated by the court; (2) it fails to reflect the stay of the section 12022.53, subdivision (b) enhancement; (3) it calculated appellant's term to be 65 years to life rather than 72 years to life. In addition, both sides agree that because 2004 was a leap year, an additional day should be added to the presentence credit, bringing the total to 1008 days.

Appellant contends he was entitled to an additional 20 days of presentence custody credits reflecting the days he spent in the hospital after the shootings. This

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[14] The argument raised by respondent was rejected in the recent case of *People v. Warner* (2007) 155 Cal.App.4th 57, in which the Attorney General urged the court to disregard *Bracamonte's* holding as it applied to non-section 12022.53 enhancements and instead follow rule 4.447. The court refused: "[R]ules of court promulgated by the Judicial Council may not conflict with statutes, so if a statute and a rule of court are inconsistent[,] the statute governs." (*People v. Warner, supra,* 155 Cal.App.4th at p. 63.)

issue was addressed by the trial court, which found that because the case was filed for warrant on January 15, 2004, appellant was not arrested until January 16, 2004. As appellant presented no contrary evidence on this point, we decline to disturb the trial court's finding.

DISPOSITION

The sentence on the section 12022.7, subdivision (e) enhancement is reversed. The matter is remanded. Upon remand, the trial court is directed to strike the section 12022.7, subdivision (e) enhancement and to prepare and forward to the Department of Corrections an amended abstract of judgment reflecting the actual sentence imposed, including the 1008 days of presentence custody credits, the stay of the section 12022.53, subdivision (b) enhancement, and the total sentence of 72 years to life. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.