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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE CLEBERT NAILS,

Defendant and Appellant.

G045131

(Super. Ct. No. 09NF1902)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed as modified.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

George Clebert Nails was convicted of attempted murder, residential burglary, assault by means of force likely to produce great bodily injury, domestic battery with corporal injury, attempted forcible sexual penetration by foreign object, and criminal threats, following a brutal attack on his former girlfriend. The jury found true allegations he personally inflicted great bodily injury under circumstances involving domestic violence and personally used a deadly weapon. The trial court sentenced Nails to life with the possibility of parole for attempted murder and a consecutive three-year term for attempted forcible sexual penetration, plus terms for the great bodily injury and weapons enhancements on both counts. The court stayed sentences on the remaining convictions pursuant to Penal Code section 654.

On appeal Nails contends: (1) the trial court erred by admitting evidence of an uncharged act of domestic violence against the same victim, occurring the day before the charged offenses; and (2) the court should have stayed sentence on one of the two great bodily injury enhancements pursuant to Penal Code section 654.¹ We reject his contentions and affirm the judgment as modified to correct custody credits and to strike one of the weapons enhancements.

FACTS & PROCEDURE

The victim, Rhonda J., became romantically involved with Nails in late 2008, and they lived together for several months, mostly in motels. In April 2009, Rhonda broke up with Nails and moved in with family friends, the Cox family. She did not see Nails again until he contacted her in July 2009 and wanted to see her.

On July 3, 2009, Rhonda met Nails at a park. A friend drove them to Nails's room at a motel in Buena Park, and Rhonda spent the next two nights with Nails.

¹ While the appeal was pending, Nails in propria persona filed a motion for new counsel on appeal, which we denied. The motion indicated Nails believes he also has a claim for ineffective assistance of trial counsel, which his appellate counsel declined to pursue on direct appeal. We note ineffective assistance of trial counsel claims are more appropriately addressed by way of a petition for writ of habeas corpus. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The first night, Rhonda, Nails, and another woman named “Lori” were at the motel room, and they drank beer and smoked methamphetamine. Rhonda and Nails had sexual intercourse that night. The next night, the Fourth of July, Henry Canchola, joined the trio, and they went to watch fireworks.

On July 5, 2009, Nails checked out of the motel, and he and Rhonda spent the morning together. They argued because Rhonda wanted to go back to the Cox family’s house, but Nails wanted them to get another motel room together.

In the afternoon, Nails and Rhonda walked to Canchola’s residence—a shack built into a tree in an industrial complex. The shack had four walls, a roof, and a locking front door. Rhonda had left her bike, which was her only means of transportation, at Canchola’s. The bike was gone, so Rhonda went looking for it. When she returned, Nails was gone. Rhonda spent that night at Canchola’s shack with Canchola and Lori. No one drank or used drugs that night.

The next morning, July 6, Nails arrived at Canchola’s shack at around 7:00 a.m. He and Rhonda spent the day together and continued to argue about Rhonda wanting to return to the Cox’s house as opposed to staying with Nails. In the afternoon, they went to the store to buy beer. While she was waiting in line, Rhonda again told Nails she was going home. Nails grabbed Rhonda’s purse and ran out of the store with it. Rhonda screamed that Nails stole her purse and yelled for someone to call the police. She followed Nails outside where they continued to argue. Rhonda said she was not going anywhere with Nails and grabbed her purse back from him. Nails threw a can of beer at Rhonda, hitting her on the back of the shoulder. Rhonda ran into the store’s restroom and locked the door. Nails followed and knocked on the door frantically telling her to come out; Rhonda refused, and eventually Nails left. Rhonda did not wait for the police to come because she was worried about an outstanding arrest warrant.

Rhonda returned to Canchola’s shack. Canchola, Lori, and some other people were there. Nails showed up a while later. After drinking a beer, he grabbed

Rhonda's hand, twisting her pinkie finger until it broke. Rhonda begged him to let go of her finger. Nails released her hand when Canchola intervened. Nails said to Rhonda, "God can't protect you from what I'm going to do to you." Canchola told them to leave.

Rhonda left Canchola's shack and began walking to the bus stop with Nails following her. Rhonda told Nails again she did not want to stay with him, and they separated. Rhonda missed her bus, and eventually ran into Canchola, who told her that she could sleep at his shack that night. Rhonda returned to Canchola's shack and slept on the floor.

The next morning, July 7, 2009, Canchola left the shack early. Rhonda locked the door after he left and went back to sleep on the bed. She was awakened by Nails knocking on the door, yelling her name. He sounded angry. Rhonda was scared, and she would not open the door.

Nails broke through a small window and crawled into the shack. He grabbed Rhonda by the neck and started choking her until she could not breathe and passed out. When she regained consciousness, Rhonda was rolled up on the floor in a fetal-type position with Nails behind her. He pulled out a razor blade knife from his pocket. He said "he was going to finish what he started, what he should have done a long time ago." Nails said he had put a new razor blade in the knife just for her. Rhonda was screaming and crying as Nails began cutting Rhonda on the back of her neck, her arm, and her leg with the knife. Rhonda crouched with her hands over her head while Nails slapped, hit, and kicked her.

When Rhonda tried to get up and flee towards the door, Nails struck her twice on the back of her head with a baseball bat, which Rhonda described as standard size, but Canchola described as being a child's bat he kept for protection. Rhonda fell to the ground, with blood gushing down her face. Nails then positioned himself between Rhonda's legs and tried to spread them apart and shove the bat into her vagina, but after Rhonda begged him not to, he stopped.

Nails sat Rhonda up and yelled at her for having not opened the door for him. He told her to change her clothes because he was going to have to take her to the hospital to get stitches. He wrapped her foot, gave her aspirin or Tylenol, and started walking her to a nearby fast food restaurant to call an ambulance. Nails told Rhonda to either say she fell off her bike or to let him do the talking. At the hospital, Nails stayed with Rhonda, telling her she “better stick to his story and not say anything else.” When Rhonda was alone with the nurse, she told the nurse, and subsequently a social worker and police officers, her injuries were not from a bicycle accident and she described Nails’s attack on her.

The emergency room physician’s assistant who attended to Rhonda testified her multiple injuries were indicative of an assault and inconsistent with a fall from a bicycle. Rhonda had two distinct lacerations on the back of her scalp consistent with blunt force trauma that required 20 staples to close. She had multiple abrasions as well as numerous superficial lacerations on her face, neck, palms, fingers, arm, knee, shin, ankle, and foot that were consistent with razor blade cuts. Her right ankle was swollen and bruised. Her right pinkie was fractured. Rhonda did not complain of any vaginal pain. A forensic and registered nurse who also examined Rhonda found multiple abrasions and scratch marks on her neck that were in a pattern consistent with a hand around her throat.

Officer Timothy Haid interviewed Rhonda at the hospital. She did not exhibit any symptoms of being under the influence of methamphetamine, but was fearful and crying. After Rhonda told him about the assault, Haid interviewed Nails in the hospital lobby. Nails said Rhonda had fallen off her bike and hit her head on a railroad track. In a patdown search of Nails, Haid found a small folding razor knife in his pocket. During a booking search, Haid found several strands of what appeared to be Rhonda’s hair with either skin or dried blood clumped together in one of Nails’s pockets, and Nails had dried blood on his hands, palms, between his fingers, and under his cuticles.

Police subsequently searched Canchola's shack. A portion of one wall was pushed in. A blood covered baseball bat, figurine, towel, clothing, bedding, and a leg of the bed were found in the residence. Swabs were taken from the evidence for DNA analysis. Rhonda's DNA generally matched (or could not be excluded as a donor to) blood found on the razor knife, the figurine, the bed, and the grip of the baseball bat. Nails's DNA was found on the razor knife, under Rhonda's fingernails, and on her breasts. The bottom of the grip area of the baseball bat was also positive for sperm cells for which Canchola could not be excluded as a contributor.

Nails testified in his defense as to the events from July 2 to July 6. He testified he and Rhonda were basically hanging out from the morning of July 3 until the evening of July 6, during which time they smoked methamphetamine and had sex. At one point, Rhonda pushed Nails out of bed causing him to hurt his shoulder.

On July 7, Nails went to Canchola's shack to pick up some belongings. When Rhonda did not answer his knock, he broke through the window and entered the shack because he was worried about her. She was passed out on the bed. Nails grabbed Rhonda and shook her to awaken her. Nails's box cutter knife somehow fell out of his pocket onto the floor and opened on its own accord. Rhonda stumbled onto the open knife and cut herself. Nails and Rhonda argued, and he slapped her face. She fell and hit her head on the corner of the bed railing, causing the cuts. Rhonda did not want Nails to call 911 because she was afraid of being arrested on an outstanding warrant, so Nails suggested she say she was injured in a bike accident. Nails denied hitting Rhonda with the baseball bat, or attempting to stick the bat into her vagina. He testified that when the police approached him at the hospital, they roughly pulled him from the bathroom, causing him to trip and injure himself.

Officer Haid testified on rebuttal that when he first spoke to Nails at the hospital he was cooperative and said Rhonda had fallen off her bike and hit her head on the railroad track. Once Nails was arrested, he became agitated and rude. Nails later told

Haid he lied about Rhonda falling off the bike because he did not want to get in trouble. He said Rhonda cut her head when he pushed her during an argument and she hit her head on the bed frame. Nails claimed the razor knife fell out of this pocket and popped open, and Rhonda rolled on to it causing the various small cuts on her body. Nails did not tell Haid that Rhonda was passed out when he first entered Canchola's shack or that Nails shook her to awaken her.

Charges, Verdict & Sentence

The information charged Nails with attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))² (count 1); residential burglary (§§ 459, 460, subd. (a)) (count 2); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 3); assault with a deadly weapon (§ 245, subd. (a)(1)) (count 4); domestic battery with corporal injury (§ 273.5, subd. (a)) (count 5); forcible sexual penetration by foreign object (§ 289, subd. (a)(1)) (count 6); and criminal threats (§ 422) (count 7). The information contained the following special allegations: the attempted murder (count 1) was willful, deliberate and premeditated (§ 664, subd. (a)); a non-accomplice was present during the commission of the burglary (count 2) (§ 667.5, subd. (c)(21)); and Nails committed a first degree burglary, personally inflicted great bodily injury, and personally used a dangerous and deadly weapon in the commission of forcible sexual penetration by foreign object (count 6) (§ 667.61, subs. (a), (b), (e), (e)(2), (e)(3) & (e)(4)). The information also contained the following enhancement allegations: personal infliction of great bodily injury (all counts) (§ 12022.7, subd. (a) [three-year enhancement]); personal infliction of great bodily injury under circumstances involving domestic violence (all counts) (§ 12022.7, subd. (e) [three, four, or five-year enhancement]); and personal use of a dangerous and deadly weapon (counts 1, 2, 3, 5 & 7) (§ 12022, subd. (b)(1) [one-year enhancement]).

² All further statutory references are to the Penal Code, unless otherwise indicated.

A jury found Nails guilty as charged on all counts, except count 6, on which it convicted Nails of attempted forcible sexual penetration as a lesser included offense to forcible sexual penetration. It found true the attendant special allegations and enhancement allegations as to each count.

The trial court sentenced Nails to life with possibility of parole plus 14 years in prison as follows: on count 1 (attempted murder) the life term, plus five years for the section 12022.7, subdivision (e), great bodily injury domestic violence enhancement and one year for the section 12022, subdivision (b)(1), personal use of a deadly weapon enhancement; and on count 6 (attempted forcible sexual penetration), a consecutive middle term of three years, plus four years for the section 12022.7, subdivision (e), great bodily injury domestic violence enhancement and one year for the section 12022, subdivision (b)(1), personal use of a deadly weapons enhancement (as we explain anon, this last enhancement term must be struck because it was not alleged as to count 6). The court imposed a concurrent two-year term on count 7 (criminal threats), and stayed the sentences on all other counts under section 654.

DISCUSSION

A. Admissibility of Beer Can Incident

Nails contends the trial court improperly admitted evidence of the beer can throwing incident that occurred the day before the charged offenses. He argues the evidence did not qualify for admission as propensity evidence under Evidence Code section 1109 because the incident was too inconsequential to constitute domestic violence, and its erroneous admission denied him a fair trial. We reject his contentions.

Preliminarily, we agree with the Attorney General that Nails's argument is waived because he did not raise it below. At the beginning of trial, there was a discussion concerning introduction of evidence about the events of July 6, 2009. The prosecutor argued it was admissible propensity evidence under Evidence Code section 1109. The defense's only comment was, "Object. 352." The trial court then

engaged in an Evidence Code section 352 analysis and concluded the evidence was highly relevant as to the events immediately preceding the July 7 charged offenses “as they related to acts of violence” and its probative value was not outweighed by its prejudicial effect. Because Nails’s only argument for exclusion was undue prejudice under Evidence Code section 352, an argument he does not renew on appeal, he has waived his argument. (See Evid. Code, § 353, subd. (a); *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1141-1142 (*Ogle*) [defendant forfeited argument that prior offense was inadmissible because it was not an act of domestic violence].) However, because the issue has been fully briefed by the Attorney General, and to forestall any claim of ineffective assistance of trial counsel, we consider the argument on the merits as well.

Evidence of a person’s past conduct generally is inadmissible to show his or her propensity to commit the charged crime, but is admissible to prove facts other than propensity, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Evid. Code, § 1101, subs. (a) & (b).) However, under Evidence Code section 1109, in “a criminal action in which the defendant is accused of an offense involving domestic violence,” evidence of other acts of domestic violence is admissible to show propensity. (Evid. Code, § 1109, subd. (a)(1).) “A trial court’s determination of the admissibility of evidence of uncharged offenses is generally reviewed for an abuse of discretion. [Citations.]” (*People v. Walker* (2006) 139 Cal.App.4th 782, 794-795 (*Walker*).)

Evidence Code section 1109 does not include a list of offenses that involve domestic violence. Instead, the statute incorporates the definition of domestic violence in section 13700 and under certain circumstances the broader definition in Family Code section 6211. (Evid. Code, § 1109, subd. (d)(3); *Ogle, supra*, 185 Cal.App.4th at p. 1144.) Section 13700 defines “domestic violence” as “abuse committed against an adult or a minor who is a . . . cohabitant . . . or person with whom the suspect . . . is having or has had a dating or engagement relationship” (§ 13700, subd. (b)); “[a]buse”

means “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another” (§ 13700, subd. (a)).

Applying these definitions, Nails’s conduct on July 6, 2009, could be found to constitute domestic violence. Nails contends the beer can throwing incident could not constitute an act of domestic violence because he did not throw the can with great speed; he threw it from behind Rhonda so she never actually saw him throw it; the can merely bounced off Rhonda’s shoulder, and there was no evidence the impact caused Rhonda pain or injury. Furthermore, Nails argues Rhonda left the scene without waiting for the police because she had an outstanding arrest warrant and not because she feared Nails.

We will not disturb the trial court’s exercise of its discretion in coming to a different conclusion. Nails had been arguing with Rhonda throughout the day about her desire to return to the Cox’s house as opposed to his desire that she remain with him. At the store, when Rhonda again told Nails she was going home, he grabbed her purse and ran out of the store with it. Rhonda screamed for someone to call the police and followed Nails outside where they continued to argue. Rhonda again said she would not stay with Nails and grabbed her purse back from him, at which time he threw the can of beer at her, striking her with it. Rhonda ran away and locked herself in the restroom, followed by Nails who was knocking at the door frantically trying to get her to come out. Rhonda would not come out until she was told Nails had gone. Under all the circumstances, the trial court could reasonably conclude that a jury could find Nails’s act of throwing the beer can at Rhonda was not some inadvertently misplaced friendly toss of a beer to a friend on a hot afternoon, or some playful gesture on Nails’s part, but was an attempt by Nails to either injure Rhonda or to place her in fear of injury if she did not comply with his demands that she remain with him. Accordingly, the trial court did not abuse its discretion in admitting the evidence under Evidence Code section 1109.

Nails’s assertion admission of the evidence violated his constitutional rights is similarly without merit. First, the California Supreme Court has “long observed that ‘[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a [] defendant’s constitutional rights.’ [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 26.) Further, the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) As we explain above, the trial court did not abuse its discretion by admitting the uncharged offense evidence pursuant to Evidence Code section 1109. And the trial court properly instructed the jury on the permissible use of uncharged offense evidence. (CALCRIM No. 852.) Accordingly, Nails has not established any fundamental unfairness.

B. Sentencing Issues

1. Great Bodily Injury Enhancements/Section 654

Nails contends the trial court improperly imposed section 12022.7, subdivision (e), enhancements for inflicting great bodily injury under circumstances involving domestic violence on both the attempted murder count and the attempted forcible sexual penetration count. He asserts section 654 precludes imposition of more than one great bodily injury enhancement when the convictions cover a single victim and a single incident. We find no abuse of discretion in the trial court’s sentencing choice.

Section 654, subdivision (a), provides in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision” The statute “precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]” (*People v. Deloza* (1998) 18 Cal.4th 585, 591 (*Deloza*).) If a defendant is convicted under two statutes for one act or indivisible course of conduct,

section 654 requires that the sentence for one conviction be imposed, and the other imposed and then stayed. (*Deloza, supra*, 18 Cal.4th at pp. 591-592.) “Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences. [Citation.]” (*Deloza, supra*, 18 Cal.4th at p. 592.)

In sentencing Nails, the trial court imposed the term of life with the possibility of parole on the attempted murder count (count 1), plus the upper term of five years for the section 12022.7, subdivision (e), great bodily injury/domestic violence enhancement and one year for the section 12022, subdivision (b)(1), personal use of a deadly weapon enhancement. The court found the first degree burglary count (count 2), the aggravated assault counts (counts 3 and 4), and the domestic battery count (count 5), and enhancements related to those counts, all arose from the same pattern of conduct as the attempted murder count and section 654 applied to those counts and enhancements. The court then imposed a consecutive middle term of three years on the attempted forcible sexual penetration count (count 6), impliedly finding that offense had separate intent and objectives from the attempted murder offense, plus a consecutive middle term of four years for the section 12022.7, subdivision (e), great bodily injury domestic violence enhancement and one year for the section 12022, subdivision (b)(1), personal use of a deadly weapon enhancement. The court concluded section 654 did not apply to the criminal threats count (count 7), and imposed a concurrent two-year term on that count.

Nails does not challenge his separate punishment on the attempted murder and attempted forcible sexual penetration convictions. Rather, he challenges the imposition of two great bodily injury enhancements arguing there was only one victim and only one assault upon her, which precludes more than one enhancement.

Recently, in *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*), our Supreme Court addressed the applicability of section 654 to sentence enhancements related to the

defendant's *conduct* in committing the offenses.³ *Ahmed* involved imposition of two enhancements (firearm use and great bodily injury), on a single offense (assault with a firearm). The Supreme Court outlined the approach for determining when multiple sentence enhancements may be imposed. It explained a court must first examine the specific sentencing statutes to determine if multiple enhancements are allowed. If so, the court should stop there, and need not consider the more general provisions of section 654, because a specific statute prevails over a more general one. (*Ahmed, supra*, 53 Cal.4th at pp. 160-161, 162, 164.) If the specific sentencing statutes do not resolve the issue, section 654 applies, but differently than it applies to substantive crimes, because the inquiry is what aspect of the crime the enhancement addresses. (*Ahmed, supra*, 53 Cal.4th at pp. 161, 164-165.) “[W]hen applied to multiple enhancements for a single crime, section 654 bars multiple punishment for the same aspect of a criminal act.” (*Ahmed, supra*, 53 Cal.4th at p. 164.) Accordingly, in *Ahmed*, the trial court could impose both applicable enhancements on the single offense because the enhancements related to different aspects of the crime.

Here, we need not move past the first step of *Ahmed*—i.e., the specific sentencing statutes. Section 12022.7, subdivision (e), provides, “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 in the state prison for three, four, or five years.” Section 12022.7, subdivision (h), provides that the sentencing court “may not impose more than one” such term “*for the same offense.*” (Italics added.)

Here, there is no “same offense” because the great bodily injury enhancements are attached to different counts, attempted murder and attempted forcible

³ The Supreme Court had earlier held in *People v. Coronado* (1995) 12 Cal.4th 145, at pages 156-158, that section 654 does not apply to sentence enhancements attributable to the *nature* of the offender (e.g., a recidivist).

sexual penetration, which the court implicitly found had independent criminal objectives. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) Section 1170.1, subdivision (g), provides in pertinent part: “When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the *commission of a single offense*, only the greatest of those enhancements shall be imposed for that offense.” (Italics added.) Although we are dealing with “the same victim,” this is not a situation involving “the commission of a single offense.” Because sections 12022.7 and 1170.1 provide the answer to whether the great bodily injury enhancement may be imposed on both offenses for which Nails was sentenced, we need not consider section 654. (*Ahmed, supra*, 53 Cal.4th at p. 168.) Nails’s reliance on the section 654 analysis of *People v. Reeves* (2001) 91 Cal.App.4th 14, is misplaced as it predates our Supreme Court’s directive in *Ahmed, supra*, 53 Cal.4th 156, that section 654 is inapplicable if the specific sentencing statutes allow for multiple enhancements.

2. *Personal Use of Deadly Weapon Enhancement Count 6*

Although not raised by Nails or the Attorney General, we observe the trial court incorrectly imposed a one year enhancement term under section 12022, subdivision (b)(1), for personal use of a deadly weapon as to the attempted forcible sexual penetration by a foreign object count (count 6). The information contained special allegations under section 667.61, subdivisions (a), (b), and (e) [life sentence for certain sex offenses], that as to count 6 Nails personally used a dangerous and deadly weapon within the meaning of section 12022 in the commission of forcible sexual penetration by a foreign object. But the information did not specifically allege a section 12022 enhancement for personal use of a deadly weapon as to count 6—the weapons use enhancement was alleged only as to counts 1, 2, 3, 5, and 7.⁴ Section 1170.1, subdivision (e), requires all enhancements must be alleged in the accusatory pleading,

⁴ The reason for the omission from the information is apparent—section 12022, subdivision (b)(1), precludes the enhancement when use of the deadly or dangerous weapon is an element of the offense.

and because it was not, the one-year section 12022, subdivision (b)(1), enhancement imposed on count 6 must be struck.

3. *Presentence Custody Credit*

As the Attorney General points out, with no opposition from Nails, the trial court awarded Nails presentence custody credits twice, even though custody credit for multiple offenses arising from the same case may only be given once. The Attorney General is correct. Under section 2900.5, subdivision (b), “[c]redit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.” (See also *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414-1415.) The trial court awarded Nails 704 days of custody credit on his indeterminate abstract of judgment for attempted murder *and* on his determinate abstract of judgment. This error must be rectified by amending the determinate abstract of judgment to delete presentence custody credits.

DISPOSITION

The judgment is modified to strike the personal use of a deadly weapon enhancement (§ 12022, subd. (b)(1)), on count 6. As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended determinate abstract of judgment reflecting no presentence custody credits and to forward a certified copy to the Department of Corrections and Rehabilitation.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.