S260130

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. B290948

THE PEOPLE,
Plaintiff and Respondent,

v.

TREYVON LOVE OLLO,
Defendant and Appellant.

Court of Appeal of California
Second District
No. B290948

Superior Court of California
Los Angeles County
No. KA115677
Hon. Steven Blades

Petition for Review

RACHEL LEDERMAN, SBN 130192
Rachel Lederman & Alexsis C. Beach,
Attorneys
558 Capp Street
San Francisco, CA 94110
ph 415-282-9300
rachel@bllaw.info

Attorney for appellant Treyvon Love Ollo

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PETITION FOR REVIEW

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the State of California:

Appellant respectfully petitions for review, following the published decision of the Court of Appeal, Second Appellate District, Division Two, filed Dec. 5, 2019, affirming the judgment. A copy of the opinion of the Court of Appeal is attached as Attachment "A."

ISSUE PRESENTED FOR REVIEW

When a drug user voluntarily ingests drugs provided by a defendant, and those drugs result in an overdose or other injury, is the defendant *always* subject to the sentence enhancement for personal infliction of great bodily injury (Pen. Code, § 12022.7), regardless of the specific facts?

NECESSITY FOR REVIEW

A conflict exists between the Courts of Appeal on this question, as the Court of Appeal recognized in its opinion. (Opinion, p. 2.) In the instant case, Division Two of the Second District Court of Appeal held that drug providers are liable for personal infliction of great bodily injury under Penal Code section 12022.7 *whenever* the persons to whom they furnish drugs are subjected to great bodily injury due to their drug use. Division Two disagreed with Division Six of the Second District's decision in *People v. Slough* (2017) 11 Cal.App.5th 419, which held that

the enhancement did not apply to a drug dealer who simply handed off drugs to a user and did not perform or participate in any way in administering the drugs to the user. Division Two relied on the Sixth District Court of Appeal's decision in *People v. Martinez* (2014) 226 Cal.App.4th 1169, a drug overdose case in which the appellate court upheld application of the enhancement to a drug provider. But the opinion in the instant case goes much further than *Martinez*, in that the *Martinez* court relied on an analysis of the particular, egregious facts of that case.

Thus, review is necessary to secure uniformity of decision and settle important questions of law of statewide application and constitutional dimension. (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

STATEMENT OF THE CASE

This is a heartbreaking case in which teen drug use turned deadly because what the teenagers thought was a small amount of cocaine, was actually fentanyl, an exponentially more potent synthetic opioid.

Appellant, age eighteen, texted his sixteen-year-old girlfriend, R., that he had some "coke", and she came over that night. Appellant gave her some white powder that he believed to be cocaine, but which was actually fentanyl. R. cut the powder into lines and ingested a single line nasally. Appellant did not partake. R. passed out within half an hour and died at some point during the night of fentanyl overdose, while appellant slept in the same bed.

On April 26, 2018, a jury convicted appellant of furnishing a controlled substance, fentanyl, to a minor (Health & Saf. Code, § 11353); and found true an allegation of personal infliction of great bodily injury (GBI) (Pen. Code, § 12022.7, subd. (a)).

On May 21, 2018, the trial court sentenced appellant to twelve years in prison, consisting of the upper term of nine years, plus three years for the personal infliction of GBI enhancement. Appellant appealed.

On December 5, 2019, the Second District Court of Appeal, Division Two, affirmed the judgment. Appellant did not seek review. The opinion is attached as Attachment A.

ARGUMENT

This Court Should Grant Review And Hold That When A Drug User Voluntarily Ingests Drugs Provided By A Defendant, And Those Drugs Result In An Overdose Or Other Injury, The Question of Whether the Defendant Is Subject To Sentence Enhancement For Personal Infliction Of Great Bodily Injury Is Fact Specific; And That The Trial Court's Preclusion of This Defense Violated Due Process.

A. *Proceedings Below*

The trial court denied appellant's counsel's motion to dismiss the GBI enhancement. (Pen. Code, § 1118.1.) (3 RT 646–647.) Trial counsel argued that there was insufficient evidence to support the enhancement based on *People v. Slough*, *supra*, 11 Cal.App.5th 419. In that case, the appellate court found that the defendant's act of providing the fatal dose of drugs was not sufficient to support a GBI enhancement. The trial court found that the instant case was more similar to *People v. Martinez, supra,* 226 Cal.App.4th 1169, in which the the victim died after the defendant had repeatedly given her drugs while the two drank alcohol. (3 RT 649–650.) The trial court then precluded appellant's counsel from arguing in his summation that the prosecution had not proven the personal infliction element of the GBI enhancement based on the victim's volitional act of taking the drugs, finding that such argument was precluded by *Martinez*. (3 RT 651–655.)

The Court of Appeal held that "a defendant's act of furnishing drugs and the user's voluntary act of ingesting them constitute concurrent direct causes, such that the defendant who so furnishes personally inflicts great bodily injury upon his victim when she subsequently dies from an overdose." (Opinion, pp. 6–7.) The Court of Appeal disagreed with *Slough*, finding that the factual differences between *Slough* and *Martinez* were not significant to its analysis, because in its opinion, the user's voluntary act of ingesting the drugs *never* precludes a finding of personal infliction by the drug provider.

> …[A] concurrent direct cause of an injury remains such even if the act and injury are separated by time and space. By placing dispositive weight on the temporal and spatial distance between the defendant's conduct of furnishing and the victim's act of ingesting, *Slough* contravenes this principle of direct concurrent causation. *Slough* …effectively treats the victim's ingestion as an intervening or superseding cause (albeit an entirely foreseeable one). Because superseding cause is a concept relevant to proximate causation, it is irrelevant to the very different question of direct causation.

(Opinion, p. 8, citations omitted.)

Thus, the Court of Appeal upheld the trial court's decision to preclude appellant's counsel from arguing that the prosecution had not proven the personal infliction element of the enhancement, and held in effect that "drug dealers are liable for additional prison time *whenever* the persons to whom they furnish drugs are subjected to great bodily injury due to their drug use." (Opinion, p. 8, emphasis added.)

B. *The Personal Infliction Sentence Enhancement (12022.7(a)) Does Not Automatically Apply To Drug Providers Whenever The Drug User Overdoses Or Otherwise Suffers GBI, Absent Further Facts.*

Section 12022.7(a) provides that "[a]ny person who *personally inflicts* [GBI] on any person other than an accomplice 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 years." (Italics added.) The meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning. Commonly understood, the phrase "personally inflicts" means that someone "in person", that is, directly and not through an intermediary, causes something damaging or painful to be endured. (*Martinez, supra*, 226 Cal.App.4th at p. 1184.) In enacting section 12022.7, the Legislature intended to impose an additional penalty for causing GBI only on those principals who perform the act that directly inflicts the injury. The defendant must directly cause the injury, not just proximately cause it. Accordingly, one who merely aids, abets, or directs another to inflict the physical injury is not subject to the enhanced penalty of section 12022.7. (*Slough, supra*, 11 Cal.App.5th at p. 423, citing *People v. Cole* (1982) 31 Cal.3d 568 and *People v. Guzman* (2000) 77 Cal.App.4th 761.)

Although section 12022.7(a) is broadly construed, "our Supreme Court has made clear that proximate cause does not equate with personal infliction and that '[t]he Legislature is aware of the difference.'" (*Slough, supra*, at p. 424, citations omitted, quoting *People v. Bland* (2002) 28 Cal.4th 313, 336.)

In *Slough*, the victim died of a drug overdose and the jury found the defendant, who had supplied heroin to the victim at the victim's request, personally inflicted GBI within the meaning of section 12022.7. (*Slough, supra*, at p. 422.) The Court of Appeal reversed the GBI finding and, in doing so, it distinguished Martinez, supra. Martinez gave his victim more than a dozen methadone and hydrocodone pills while the two drank alcohol together. In concluding the evidence was sufficient to support the GBI enhancements, the *Martinez* court reasoned that "More than one person may be found to have directly participated in inflicting a single injury." (*Martinez*, 226 Cal.App.4th at p. 1185.) "Appellant may not have forced [the victim] to take a lethal quantity of drugs, but he supplied her with them knowing that the drugs were more dangerous when combined with alcohol. Appellant continued to supply drugs to [the victim] as he watched her continue to consume alcohol and become [more] intoxicated.... Appellant's act of personally providing [the victim] a lethal quantity of drugs while she was in an intoxicated state was the direct cause of [the victim's] death." (*Id.* at p. 1186.)

The *Slough* court emphasized that "[i]n *Martinez*, the defendant repeatedly supplied drugs to the victim while observing her increasing intoxication; the furnishing was akin to administering. [Slough], by contrast, played no part in [his victim]'s ingestion of the drugs. He neither performed nor participated in the act that directly inflicted the injury, so the GBI enhancement cannot apply." (*Slough*, 11 Cal.App.5th at p. 425.)

The *Slough* Court further explained that the contrasting "result in *Martinez* is also consistent with the requirement that

the personal infliction of GBI occur 'in the commission of a felony....' (Pen. Code, § 12022.7, subd. (a).) In Martinez, defendant's acts were ongoing when the injury was inflicted; in *Slough*, the drug dealer and user went their separate ways after exchanging money for drugs and the dealer was not present when the user ingested the overdose. Thus, the crime of furnishing the drug had concluded and was complete when the GBI occurred. The appellate court reasoned that for the enhancement to apply to Slough, "the statute would have to read 'in the commission or as a consequence of the commission' of a felony." The *Slough* Court also pointed out that any concern that a seller or furnisher of illegal drugs cannot otherwise be punished for GBI or death proximately resulting from the use of the drugs is allayed by the potential to charge a homicide. (*Slough*, at p. 425, fn. 3.)

In the instant case, although appellant was with R. when she took the drug, she self-administered only a single small dose, and died at some point later. Appellant did not give her more and more as in *Martinez*, did not know the true nature of the substance, nor were the two drinking or R. increasingly drunk when appellant provided her with the drug.

However, the Court of Appeal concluded that these specific facts were irrelevant because "a defendant's act of furnishing drugs and the user's voluntary act of ingesting them constitute concurrent direct causes, such that the defendant who so furnishes personally inflicts great bodily injury upon his victim when she subsequently dies from an overdose – in every case." (Opinion, pp. 6–7.)

The Court based this in part on precedent it construed as holding that when the acts of more than one person combine to

inflict great bodily injury, each of those persons has directly caused that injury and each has personally inflicted that injury. (E.g., *People v. Modiri* (2006) 39 Cal.4th 481, 486 [multiple assailants engaged in a group attack.]) The Court also relied on cases holding that a defendant may be liable for personal infliction under section 12022.7 even if the injury is inflicted accidentally (*People v. Guzman, supra,* 77 Cal.App.4th at p. 764); and even if the injury occurs some time after the defendant's act (*People v. Cross* (2008) 45 Cal.4th 58, 66, 68–69 [defendant's act of engaging in sexual intercourse may be a direct cause of subsequent conception and pregnancy]). (Opinion, p. 6.)

However, none of these cases applied the personal infliction enhancement to general fact patterns in a blanket fashion. *Modiri* held only that those who participate directly and substantially in a group beating should not be *immune* from a personal-infliction finding for the sole reason that the resulting confusion prevents a showing or determination of this kind. (*People v. Modiri*, 39 Cal.4th at pp. 496–497.) The *Modiri* court's analysis is specific to group beatings where it may be difficult to determine who struck the fatal blow. *Modiri* still requires that the physical force personally applied by the defendant must have been sufficient to produce great bodily injury either (1) by itself, or (2) in combination with other assailants, excluding persons who merely assist someone else in producing injury, and who do not personally and directly inflict it themselves. (*Id.* at p. 494.) Thus, the inquiry is fact-intensive.

The Opinion also cites *People v. Guzman* for the proposition more than one person can personally inflict the same injury. In *Guzman*, the defendant, while intoxicated, made an unsafe left

turn in front of another vehicle, which as a result crashed into Guzman's car, and a passenger in the other vehicle was injured. The Court of Appeal upheld imposition of the personal infliction enhancement because Guzman's volitional act was the direct cause of the collision and therefore the direct cause of the injury. More than one person may be found to have directly participated in inflicting a single injury. (*People v. Guzman*, *supra*, 77 Cal.App.4th at p. 764.) However, the *Guzman* Court did not hold that the enhancement necessarily applies to *all* drivers who are at fault in car accidents involving injury. For example, in *People v. Valenzuela*, also cited in the opinion, the appellate court held that the defendant's admission that he drove recklessly and proximately caused GBI was insufficient to prove personal infliction without proof that the defendant "directly, personally, himself" inflicted the injury. (*People v. Valenzuela* (2010) 191 Cal.App.4th 316, 322.)

People v. Cross, cited in the opinion, dealt with the question of what constitutes GBI, holding that in *some* cases, a jury can reasonably find pregnancy of a 13-year-old to constitute GBI. (*People v. Cross*, *supra*, 45 Cal.4th 58, 66.) Again, the question is fact-specific: *Cross* did *not* hold that *every* act of unlawful sexual intercourse that results in pregnancy is necessarily subject to the personal infliction enhancement.

Another basis the Court of Appeal gave for upholding application of the enhancement because "this conclusion is consistent with the purpose of section 12022.7 to punish (and hence deter) those defendants who themselves directly cause the injury; indeed, "[a] contrary [conclusion] would mean that those

who" personally furnish drugs that cause a fatal overdose "would often evade enhanced punishment." (Opinion p. 7, quoting *Modiri, supra*, 39 Cal.4th at p. 486.)

On the contrary however, applying the enhancement to all drug providers whenever the drugs cause injury is an incongruous result, because it would always punish any unwitting drug buyer who shares what he thinks is a safe quantity of cocaine more severely than the drug dealer who substituted the lethal dose of fentanyl for cocaine, or the manufacturer flooding the market with inexpensive fentanyl. The dealer or manufacturer would never subject to a personal infliction enhancement in this kind of case because they did not give the drug directly to the person who died.

The Court of Appeal also based its conclusion on section 12022.7, subdivision (g), which spells out specific crimes to which the personal infliction enhancement is inapplicable (murder, manslaughter, or arson). The Court reasoned that "Were we to conclude that a victim's voluntary ingestion of a drug furnished by another breaks the causal chain as a matter of law, we would effectively be adding the crime of furnishing controlled substances to subdivision (g)'s list." (Opinion, p. 7.) This reasoning is flawed because appellant does not contend that one who gives or sells drugs to another person who then overdoses *never* personally inflicts GBI. Rather, appellant contends that this question depends on the facts.

Thus, in *Martinez*, appellant supplied the victim with drugs knowing that the drugs were more dangerous when combined with alcohol, and continued to supply her with more drugs as he watched her continue to consume alcohol and become

increasingly intoxicated. "Appellant's act of personally providing Ms. Groveman a lethal quantity of drugs while she was in an intoxicated state was the direct cause of Ms. Groveman's death." (*Martinez*, 226 Cal.App.4th at p. 1186.). As the *Slough* court observed, Martinez' "furnishing was akin to administering." (*Slough*, 11 Cal.App.5th at p. 425.) By contrast in *Slough*, the defendant handed off drugs to the user in exchange for money. After that, they each went their separate ways. "Slough played no part in [the user]'s ingestion of the drugs. He neither performed nor participated in the act that directly inflicted the injury, so the GBI enhancement cannot apply. (*Ibid.*)

The instant case is more similar to *Slough* than to *Martinez*, in that appellant simply gave R. the drug and was not drinking with her or repeatedly giving her more and more drugs while she was increasingly drunk and thus losing volitional control and becoming more and more susceptible to overdose from the combination of drugs and alcohol. Moreover, the felony of providing her with drugs had concluded and was complete at the time that R. tragically died.

Accordingly, this Court should grant review and hold that when a drug user voluntarily ingests drugs provided by a defendant, and those drugs result in overdose or other injury, the question of whether the defendant is subject to sentence enhancement for personal infliction of GBI depends on the specific facts. The Court should also find that precluding appellant from arguing at trial that the evidence was insufficient to support personal infliction of GBI violated appellant's constitutional right to due process. (See *Herring v. New York*

(1975) 422 U.S. 853, 865; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734; *U.S. v. Kellington* (9th Cir. 2000) 217 F.3d 1084, 1099–1100.)

CONCLUSION

For the foregoing reasons, this Court should grant review and depublish the opinion. (A separate request for depublication is being filed herewith pursuant to Rule 8.1125.)

Respectfully submitted,

Dated: January 14, 2020 By: /s/ Rachel Lederman

Attorney for appellant
Treyvon Love Ollo

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **2,976** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.504(d) or by Order of this Court.

Dated: January 14, 2020 By: /s/ Rachel Lederman

Attachment A – B290948
Opinion

Filed 12/5/19

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TREYVON LOVE OLLO, Defendant and Appellant.	B290948 (Los Angeles County Super. Ct. No. KA115677)

APPEAL from a judgment of the Los Angeles Superior Court, Steven D. Blades, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Colleen M. Tiedemann, 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 part II of the Discussion.

* * * * * *

A criminal defendant furnishes controlled substances to another, who dies from ingesting those drugs. Is that defendant immune from criminal liability for personally inflicting great bodily injury upon the drug user by virtue of the user's voluntary ingestion of the drugs? The courts do not agree on how to answer this question: *People v. Martinez* (2014) 226 Cal.App.4th 1169 (*Martinez*) says "no," while *People v. Slough* (2017) 11 Cal.App.5th 419 (*Slough*) says "yes." We conclude that *Martinez* has the better argument. Because we also reject the sentencing challenges raised by the defendant in this case (in the unpublished portion of our decision), we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In late June 2017, Treyvon Love Ollo (defendant), then 18 years old, invited his 16-year-old girlfriend Reina over to his house. He told her that he "ha[d] some coke that [he] got last night." Reina came over, and the couple retreated to defendant's bedroom and had sex.

Defendant then provided Reina with a white, powdery substance that he thought was cocaine, but which had a "[weird] smell." Reina cut the powder into lines using defendant's driver's license, and snorted it up her nose. She passed out within 30 minutes.

As it turns out, the white powdery substance was not cocaine. It was fentanyl. Like cocaine, fentanyl is a controlled substance, but one that is 50 to 100 times more potent than heroin.

Reina died from a fentanyl overdose later that night.

When defendant awoke the next morning, he found her dead. At first, he tried to get a friend to help him put her corpse in an Uber to transport it to a hospital. However, when no one would agree to help, he called 911.

II. Procedural Background

The People charged defendant with the crime of furnishing, giving, or offering to furnish or give a controlled substance to a minor (Health & Saf. Code, § 11353). The People further alleged that defendant personally inflicted great bodily injury upon Reina (Pen. Code, § 12022.7, subd. (a)).[1]

The jury was instructed on two possible theories of criminal liability—namely, that defendant (1) furnished or gave drugs to Reina, and (2) offered to furnish or give drugs to Reina.

The jury found defendant guilty of furnishing or giving drugs to Reina, and found true the allegation that he had personally inflicted great bodily injury upon her.

The trial court sentenced defendant to 12 years in prison. On the furnishing count, the court imposed an upper-term sentence of nine years. To that, the court added another three years for the personal infliction enhancement. The court also imposed a $300 restitution fine (§ 1202.4, subd. (b)), a $30 criminal conviction assessment (Gov. Code, § 70373), and a $40 court operations assessment (§ 1465.8, subd. (a)(1)).

Defendant filed this timely appeal.

DISCUSSION

I. Personal Infliction of Great Bodily Injury

During the conference regarding jury instructions, defendant indicated his intention to argue, in closing, that

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

Reina's voluntary ingestion of the drugs was an "intervening cause" that precluded his liability for personally inflicting great bodily injury upon her. The court ultimately ruled that this argument was "contrary to the law" and prohibited defendant from making it.

Although closing argument is a critical part of a criminal trial because it provides the parties with "the opportunity finally to marshal the evidence . . . before submission of the case to judgment" (*Herring v. New York* (1975) 422 U.S. 853, 862), trial courts enjoy "'great latitude'" in regulating the permissible scope of closing argument (*People v. Edwards* (2013) 57 Cal.4th 658, 743), and on that basis may preclude any argument that is contrary to the law (*People v. Baldwin* (1954) 42 Cal.2d 858, 871).

This case accordingly presents the question: Does a drug user's voluntary ingestion of drugs provided by a defendant, when those drugs result in an overdose or other injury, preclude a finding that the defendant personally inflicted great bodily injury under section 12022.7?

Because the answer to this question turns largely on the construction of section 12022.7, our review is de novo. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 234.)

A. *Personal infliction and causation, generally*

Section 12022.7, subdivision (a) empowers a trial court to impose "an additional and consecutive" three-year prison term if a defendant "personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony." (§ 12022.7, subd. (a).)

A defendant "personally inflicts" great bodily injury if he directly causes the injury—that is, if the defendant "himself" "actually" "inflicts the injury" by "directly perform[ing] the act

that causes the physical injury." (*People v. Cole* (1982) 31 Cal.3d 568, 572-573, 579 (*Cole*); *People v. Modiri* (2006) 39 Cal.4th 481, 495 (*Modiri*) [requiring a "direct physical link between [defendant's] own act and the victim's injury"].) Under this definition, it is not enough to show that the defendant "proximately cause[d]" the great bodily injury—that is, it is not enough to show that the defendant's conduct was a "substantial factor contributing" to the injury because that conduct "set[] in motion the chain of events" that "natural[ly]" ripened into the injury. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 346-347 (*Rodriguez*); see also, *People v. Bland* (2002) 28 Cal.4th 313, 336 (*Bland*) ["Proximately causing and personally inflicting harm are two different things."].) It is also not enough to show that the defendant aided and abetted the person who directly caused the injury. (*Cole*, at p. 571.) Requiring this direct causal link furthers the enhancement's underlying purpose of imposing a greater penalty upon (and thereby deterring) persons who inflict such grievous injuries. (*People v. Guzman* (2000) 77 Cal.App.4th 761, 764 (*Guzman*) [direct causation requirement serves "the goal of deterring the infliction of great bodily injury"]; see also *Cole*, at p. 571; *People v. Ahmed* (2011) 53 Cal.4th 156, 162 [section 12022.7 aims to "punish more severely" those who engage in such conduct].)

At times, there can be more than one direct cause of a victim's great bodily injury. (*Modiri*, *supra*, 39 Cal.4th at p. 493 ["The term 'personally' . . . 'inflicts' . . . does not mean exclusive[ly] . . ."].) When the acts of more than one person combine to inflict great bodily injury, each of those persons has directly caused that injury and each has personally inflicted that

injury. (E.g., *Modiri*, at p. 486 [multiple assailants engage in a "group attack"; each has personally inflicted great bodily injury]; *People v. Corona* (1989) 213 Cal.App.3d 589, 594 [same]; *Guzman*, *supra*, 77 Cal.App.4th at p. 764 [defendant, while intoxicated, turned vehicle into oncoming traffic and was struck by a third party; defendant personally inflicted great bodily injury]; cf. *People v. Valenzuela* (2010) 191 Cal.App.4th 316, 323 [causal mechanism for injury sustained as a result of collision of cars unknown; no personal infliction].) This is true, even when one of the persons contributing to the injury is the victim herself. (E.g., *People v. Elder* (2014) 227 Cal.App.4th 411, 420-421 [victim injured while "struggling and attempting to pull away [from]" defendant; defendant personally inflicted injury]; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1185, 1210-1211 [same]; cf. *Rodriguez*, *supra*, 69 Cal.App.4th at pp. 346, 351 [victim injured after hitting his head while trying to tackle the defendant; defendant did not personally inflict injury]; *People v. Jackson* (2000) 77 Cal.App.4th 574, 575-576, 580 [victim injured tripping over curb while walking away from the defendant; defendant did not personally inflict injury].) What is more, a defendant whose act is one of many concurrent direct causes of an injury is liable for personal infliction under section 12022.7 even if that injury is inflicted accidentally (*Guzman*, at p. 764) and even if the injury occurs days, weeks or even months after the defendant's act (*People v. Cross* (2008) 45 Cal.4th 58, 66, 68-69 (*Cross*) [defendant's act of engaging in sexual intercourse may be a direct cause of subsequent conception and pregnancy]).

B. *Personal infliction and causation, as applied*

Applying the above stated law, we conclude that a defendant's act of furnishing drugs and the user's voluntary act of

ingesting them constitute concurrent direct causes, such that the defendant who so furnishes personally inflicts great bodily injury upon his victim when she subsequently dies from an overdose.

We reach this conclusion for three reasons. First, this conclusion is consistent with the precedent cited above, which holds that a defendant directly causes—and hence, personally inflicts—great bodily injury when his conduct, together with the victim's, accidentally produces that injury. *Martinez* came to the same conclusion with similar reasoning. (*Martinez*, *supra*, 226 Cal.App.4th at pp. 1184-1186.) Second, this conclusion is consistent with the purpose of section 12022.7 to punish (and hence deter) those defendants who themselves directly cause the injury; indeed, "[a] contrary [conclusion] would mean that those who" personally furnish drugs that cause a fatal overdose "would often evade enhanced punishment." (*Modiri*, *supra*, 39 Cal.4th at p. 486.) Lastly, this conclusion is consistent with the plain language of section 12022.7, subdivision (g), which spells out the specific crimes to which the personal infliction enhancement is inapplicable—namely, murder, manslaughter, or arson as defined in sections 451 or 452. Were we to conclude that a victim's voluntary ingestion of a drug furnished by another breaks the causal chain as a matter of law, we would effectively be adding the crime of furnishing controlled substances to subdivision (g)'s list. This we cannot do. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 ["no court has the '"power to rewrite [a] statute . . ."'"].)

In reaching this conclusion, we part ways with *Slough*. *Slough* purported to distinguish (and hence preserve) *Martinez* on the ground that the defendant in *Slough* merely "handed off [the] drugs" to the victim, "went [his] separate way[]," and thus "played no part in [the victim's] ingestion of the drugs," while the

defendant in *Martinez* both supplied the drugs and stuck around while the victim ingested them. (*Slough*, *supra*, 11 Cal.App.5th at p. 425.) Although it is possible to draw this factual distinction between *Slough* and *Martinez*, that distinction is not in our view analytically significant. As noted above, a concurrent direct cause of an injury remains such even if the act and injury are separated by time and space. (*Cross*, *supra*, 45 Cal.4th at pp. 66, 68-69.) By placing dispositive weight on the temporal and spatial distance between the defendant's conduct of furnishing and the victim's act of ingesting, *Slough* contravenes this principle of direct concurrent causation. *Slough* also effectively treats the victim's ingestion as an intervening or superseding cause (albeit an entirely foreseeable one). Because superseding cause is a concept relevant to proximate causation (e.g., *People v. Brady* (2005) 129 Cal.App.4th 1314, 1324-1325, 1328; *People v. Schmies* (1996) 44 Cal.App.4th 38, 49), it is irrelevant to the very different question of direct causation (*People v. Autry* (1995) 37 Cal.App.4th 351, 363 [it is improper to "label[] a concurrent cause as a superseding cause"]; see also, *Bland*, *supra*, 28 Cal.4th at p. 336). For much the same reason, we decline defendant's invitation to find other factual distinctions between this case and *Martinez*.

We recognize that our disagreement with *Slough* means that, under our holding, drug dealers are liable for additional prison time whenever the persons to whom they furnish drugs are subjected to great bodily injury due to their drug use. Policy makers may come to a different conclusion about whether this is a desirable result. However, our Legislature has—for now, at least—already weighed in by choosing not to declare this enhancement inapplicable to crimes related to the distribution of

controlled substances. (§ 12022.7, subd. (g).) We must defer to that legislative judgment.

Because the victim's voluntary ingestion of the drugs furnished by defendant did not absolve him of his direct causal role in her injury, the argument that it did is contrary to the law and was properly barred by the trial court.

II. Sentencing Errors

Defendant argues that the trial court erred in (1) imposing the upper-term sentence of nine years on the furnishing count based on impermissible factors, and (2) imposing the restitution fine and assessments without first holding an ability-to-pay hearing, in violation of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

A. *Imposition of upper-term sentence*

The trial court imposed the upper-term sentence of nine years on the furnishing count, and justified this selection by citing six aggravating factors: (1) "[t]he crime involved great violence" insofar as the victim died, (2) the crime involved an underage victim, (3) defendant engaged in "despicable" behavior in enlisting a friend to put the victim's corpse in an Uber, (4) defendant "took advantage of the position of trust and confidence that the victim had in him," (5) defendant was on probation at the time of the crime, and (6) defendant's "prior performance on probation was not satisfactory."

Defendant argues that the court erred in relying upon the first three aggravating factors because the first factor is duplicative of the great bodily injury enhancement, the second is duplicative of an element of the underlying crime (namely, that the controlled substance was furnished to a minor), and the third

is not a permissible aggravating factor under California Rules of Court, rule 4.421.

We reject defendant's argument for two reasons.

First, defendant cannot now object to the imposition of the upper term because he did not object to this "discretionary" "sentencing choice[]" before the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 356.)

Second, any error was not prejudicial. Defendant is correct that the trial court abused its discretion (1) in treating a fact underlying a sentencing enhancement and a fact constituting an element of the offense as aggravating factors (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d); *People v. Forster* (1994) 29 Cal.App.4th 1746, 1758), and (2) in treating a fact not enumerated in Rule 4.421 or any other statute as an aggravating factor (Cal. Rules of Court, rule 4.421(c)). (See generally, *People v. Sandoval* (2007) 41 Cal.4th 825, 847 [abuse of discretion review].) However, these errors with respect to the first three factors were not prejudicial because "a single factor in aggravation suffices to support an upper term" (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Coleman* (1989) 48 Cal.3d 112, 163) and the trial court relied on three other aggravating factors when imposing the upper term. Those other factors are supported by substantial evidence, as defendant's long-time friendship with Reina and their intimacy meant he occupied a "position of trust and confidence" with the victim that caused her not to question the safety of the drugs he furnished, he was on probation, and his admission to acquiring and offering drugs meant he was violating the law, such that his performance on probation was "not satisfactory." These other factors are also legally valid. (Cal. Rules of Court, rule 4.421(a)(11) [occupying a

position of trust], 4.421(b)(4) [being on probation], 4.421(b)(5) [unsatisfactory performance on probation].)

Defendant offers two further arguments. Citing *People v. Young* (1983) 146 Cal.App.3d 729, 734 and *People v. Moreno* (1982) 128 Cal.App.3d 103, defendant asserts that a trial court may only impose the upper term if his offense is "'distinctively worse'" than the ordinary commission of the offense. He is wrong. *Young* and *Moreno* do not support his position because they deal with whether a fact that is an element of an offense may sometimes be used as an aggravating factor; they do not speak to reliance on aggravating factors that are not subject to a "dual use." None of the last three factors the trial court cites are used elsewhere. Defendant next contends that his trial counsel was constitutionally ineffective. However, it is well settled that counsel is not ineffective for failing to make an argument that lacks merit. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.) Because the trial court's imposition of an upper term sentence rested on three valid aggravating factors, and the trial court in no way indicated that its imposition of the upper term depended on any of the invalidated factors or on the totality of all six factors, any objection to the trial court's reliance on the invalid factors would have been meritless.

B. *Imposition of restitution fine and assessments*

Relying upon *Dueñas*, defendant contends that the trial court's imposition of the $300 restitution fine and $70 in assessments without an ability-to-pay hearing (1) violated due process and (2) constituted cruel and unusual punishment. These are constitutional questions that we review de novo. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

We reject defendant's due process-based argument for two reasons. First, the sole basis for defendant's argument is *Dueñas*, *supra*, 30 Cal.App.5th 1157. However, we have rejected *Dueñas*'s reasoning. (See *People v. Hicks* (2019) 40 Cal.App.5th 320.) Second, even if *Dueñas* were good law, the trial court's failure to conduct an ability-to-pay hearing when imposing $370 in monetary obligations was harmless because defendant will earn more than twice that amount as prison wages prior to his release. (Accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 139 ["The idea that [defendant] cannot afford to pay $370 while serving an eight-year prison sentence is unsustainable."].)

We also reject defendant's argument that the $370 in monetary obligations constitutes cruel and unusual punishment. Whether such an obligation is excessive for these purposes turns on whether it is "grossly disproportional to the gravity of [the] defendant's offense." (*United States v. Bajakajian* (1998) 524 U.S. 321, 334, superseded by statute on other grounds as stated in *United States v. Jose* (2001) 499 F.3d 105, 110.) Factors relevant to gross disproportionality include "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. [Citations.]" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Under this standard, a defendant's ability to pay is *a* factor, not *the only* factor. (*Bajakajian*, at pp. 337-338.) Applying these factors, we conclude that the minimum monetary obligations totaling $370 are not grossly disproportionate to his crime of furnishing a controlled substance to his 16-year-old girlfriend that resulted in her death from a drug overdose.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 558 Capp Street, San Francisco, CA 94110. I served document(s) described as Petition for Review as follows:

By U.S. Mail

On January 14, 2020, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Treyvon Ollo BG-54550
Ironwood State Prison
P.O. Box 2199
Blythe, CA 92226

Fredricco McCurry
P.O. Box 3695
Van Nuys, CA 91407

District Attorney
211 West Temple, Ste 200
Los Angeles, CA 90012

Los Angeles Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street
Los Angeles, CA 90012

I am a resident of or employed in the county where the mailing occurred (Oakland, CA).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 14, 2020 By: /s/ Rachel Lederman

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Ollo**
Case Number: **TEMP-OS33JV1X**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **rlederman@beachledermanlaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	B290948_PR_Ollo

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LAAWT General Office of the Attorney General	DocketingLAAWT@doj.ca.gov	e-Serve	1/14/2020 4:34:04 PM

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1/14/2020
Date

/s/Rachel Lederman
Signature

Lederman, Rachel (130192)
Last Name, First Name (PNum)

Rachel Lederman
Law Firm