Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 9/24/2020 at 9:26:00 AM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/24/2020 by Karissa Castro, Deputy Clerk

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TREYVON LOVE OLLO,

Defendant and Appellant.

Case No. S260130

Second Appellate District, Case No. B290948
Los Angeles County Superior Court, Case No. KA115677
Hon. Steven D. Blades, Judge

ANSWERING BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
COLLEEN M. TIEDEMANN
Deputy Attorney General
State Bar No. 208787
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6599
Fax: (916) 731-2122
Email: DocketingLAAWT@doj.ca.gov
Colleen.Tiedemann@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Issue Presented 5
Introduction 5
Statement of the Case 6
A. The Crime 6
B. The Trial 7
C. The Appeal 12
Argument 13
The Trial Court Properly Prohibited Appellant from Arguing That Voluntary Ingestion Alone Precludes a Personal Infliction Finding 13
A. Section 12022.7 Requires Direct, Rather Than Proximate, Causation 14
B. The *Martinez* and *Slough* Decisions 19
C. The Trial Court's Ruling Properly Reflected That Voluntary Ingestion Is One Fact for the Jury to Consider, But Does Not Itself Preclude a Personal Infliction Finding 23
D. The Trial Court's Ruling Was Consistent with Established Law, Including Both *Slough* and *Martinez* 27
Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

People v. Cervantes
(2001) 26 Cal.4th 860 23

People v. Cole
(1982) 31 Cal.3d 568 .... 15, 16

People v. Cross
(2008) 45 Cal.4th 58 .... 18, 19, 24

People v. Elder
(2014) 227 Cal.App.4th 411 .... 17, 18, 24

People v. Guzman
(2000) 77 Cal.App.4th 764 .... 17, 18, 24, 25

People v. Holmberg
(2011) 195 Cal.App.4th 1310 15

People v. Knoller
(2007) 41 Cal.4th 139 26

People v. Marshall
(1996) 13 Cal.4th 799 26

People v. Martinez
(2014) 226 Cal.App.4th 1169 ....*passim*

People v. Mendoza
(2007) 52 Cal.4th 686 25

People v. Modiri
(2006) 39 Cal.4th 481 .... 16, 17

People v. Ollo
(2019) 42 Cal.App.5th 1152 .... 12, 13, 27

TABLE OF AUTHORITIES
(continued)

Page

People v. Roberts
(1992) 2 Cal.4th 271 .... 14, 23

People v. Rodriguez
(1999) 69 Cal.App.4th 341 14

People v. Schmies
(1996) 44 Cal.App.4th 38 14

People v. Slough
(2017) 11 Cal.App.5th 419 .... *passim*

STATUTES

Health & Saf. Code
§ 11353 .... 7, 12

Pen. Code
§ 1118.1 8
§ 1192.7, subd. (c)(8) 16
§ 12022.7 .... *passim*
§ 12022.7, subd. (a) .... *passim*
§ 12022.7, subd. (f) 14
§ 12022.7, subd. (g) 14, 25

OTHER AUTHORITIES

CALCRIM
No. 240 .... 14, 15
No. 3160 16

CALJIC
No. 17.20 16

ISSUE PRESENTED

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?

INTRODUCTION

Appellant, Treyvon Love Ollo, provided his 16-year-old girlfriend, Reina, with a lethal dose of fentanyl after having sex with her at his house. He was present when she used his identification card to divide the white powder into two lines, one for appellant and the other for herself. Appellant watched as Reina snorted her line and then passed out half an hour later. The following morning, after spending the night lying next to Reina, appellant found her dead from an overdose of the drugs he had provided.

Appellant was charged with furnishing a controlled substance to a minor, and a great bodily injury enhancement was alleged. At trial, defense counsel advised the court that he intended to argue during closing that Reina's act of voluntarily ingesting the drugs precluded a finding that appellant personally inflicted great bodily injury upon her. Following a discussion of relevant authority, the trial court ruled that defense counsel could not make his proposed argument to the jury because it was contrary to law.

The judgment should be affirmed. An enhancement under Penal Code section 12022.7 requires that a defendant "personally

inflict" great bodily injury upon the victim, which requires direct, rather than merely proximate, causation. The existence of direct causation is a question of fact for the jury, and a victim's voluntary ingestion of drugs is not necessarily determinative of that question, but is one factor for the jury to consider. Therefore, the trial court properly prohibited defense counsel from arguing that Reina's voluntary ingestion of the drugs, on its own and regardless of any other factors, precluded a finding that appellant personally inflicted great bodily injury.

STATEMENT OF THE CASE

A. The Crime

On June 29, 2017, eighteen-year-old appellant sent his sixteen-year-old girlfriend, Reina, a message telling her that he had cocaine. (1CT 83, 95; 2RT 328.) Reina arrived at appellant's house at around 5:00 p.m. (1CT 94, 100.) The two had sex, and then Reina used appellant's identification card to separate the cocaine into lines. (1CT 95-96, 101, 110.) Appellant told police the cocaine's smell and color were different from that of the cocaine appellant usually purchased. (1CT 111.) Reina snorted a single line at 6:00 or 7:00 p.m., and passed out half an hour later. (1CT 96, 101.) Appellant checked on Reina at 9:00 p.m. and she was still breathing. (1CT 97.) He fell asleep next to her between 9:30 and 10:00 p.m. (1CT 97-98, 102.)

Appellant woke up the next morning at 8:00 or 9:00 a.m. and tried to wake Reina up. (1CT 98, 102.) She was non-responsive, cold, and stiff. (1CT 98.) There was blood and discharge coming out of her nose and mouth, which appellant tried to wipe off.

(1CT 99.) He took a walk around the house and tried to wake her up again. (1CT 99-100.) Appellant sent messages to a friend asking for help putting Reina in an Uber to take her to a hospital. (1CT 86-88.) Appellant's friend did not want to get involved. (1CT 86-88.) Appellant sent a message to another friend stating, "Aye foo that coke killed my lady." (1CT 90; 2RT 407.) Appellant eventually called 911 at 9:33 a.m. (2RT 306, 403-404, 413.) He later sent a message to a third friend stating, "That coke killed my lady." (1CT 90; 2RT 408.)

Reina was pronounced dead at the scene. (2RT 312.) A white powdery substance collected from the dresser near Reina's body tested positive for fentanyl. (2RT 327-329, 363.) Toxicology samples taken during the autopsy were likewise positive for fentanyl. (2RT 372; 3RT 641.) The cause of death was fentanyl intoxication. (3RT 638.) During an interview with police, appellant admitted that it was unwise to give drugs to a young woman. (1CT 100.) He also told police that Reina had been a heavy user of crystal methamphetamine since she was 14-years-old. (1CT 106.)

B. The Trial

Appellant was charged with furnishing a controlled substance to a minor (Health & Saf. Code, § 11353), and it was alleged that in the commission of this crime he personally inflicted great bodily injury upon Reina in violation of Penal Code

section 12022.7, subdivision (a).[1] (1CT 50-52.) A jury trial followed.

After the prosecution presented its case in chief, appellant moved under Penal Code section 1118.1 to dismiss both the charged count and the great bodily injury allegation. (3RT 646.) The court denied the motion. (3RT 646.) Following a brief discussion about jury instructions, defense counsel sought clarification regarding the court's denial order. (3RT 649.) He stated, "So understanding the court has denied the motion to dismiss the [great bodily injury] allegation, but I still think I should be able to argue whether the facts meet the elements." (3RT 649.) The court stated as follows:

> Let me get to that. I read both of your cases. [*People v. Slough* (2017) 11 Cal.App.5th 419], two-to-one decision. It's important because there was a judge there that dissented, or justice. Here in *Slough* you've got somebody who sold the drugs to the victim, just a sale. The victim took off, went home, went someplace else, took the drugs and died. The court there felt there really wasn't this causation and found that he couldn't have the GBI. One judge or justice dissented.
>
> In [*People v. Martinez* (2014) 226 Cal.App.4th 1169] you have facts that are really more closely similar to our case. The defendant gave the victim drugs, didn't sell them. They were both sleeping in the same bed. The victim is found dead in the bed. And there the court said pretty clearly that, reading at page 1186, "Appellant may not have forced Ms. Groveman to take a lethal qua[nt]ity of drugs, but he supplied her with them knowing that the drugs were more dangerous

---

[1] All further statutory references are to the Penal Code unless otherwise stated.

> when combined with alcohol. Appellant continued to supply drugs to Ms. Groveman."
>
> That's not really what we have here. I just think between these two cases the *Martinez* case is more analogous to the facts in our case. And I think that without reading the entire cases on the record, the court did say on page 1185, "Simply put, appellant's argument that the enhancement is inapplicable because [the victim] made a volitional choice that directly caused her death is unavailing." So I think that's what we have here. The fact that she may have apparently did take the drugs on her own volition, I don't think that negates the possibility of a GBI.

(3RT 649-650.)

The court explained that defense counsel could argue that Reina was responsible for her own death because she brought the drugs to appellant's house and took them herself. But under *Martinez*, he could not alternatively argue that if the jury decided appellant gave the drugs to Reina, there was insufficient evidence to support the great bodily injury allegation because Reina voluntarily took them. (3RT 652.) Defense counsel disagreed, and the following colloquy occurred:

> THE COURT: In the *Martinez* case the defendant admitted giving the drugs to the victim. Here we don't have that. So the defendant's defense is he didn't give the drugs to the victim, right?
>
> [DEFENSE COUNSEL]: That is what we're maintaining.
>
> THE COURT: So if the jury believes that, then he can't be found guilty—they can't find the GBI to be true.
>
> [DEFENSE COUNSEL]: Correct.

> THE COURT: Because they can only find that he offered her the drugs, which does not implicate the GBI right? Or, or and, that she brought her own drugs.
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: If she brought her own drugs, then your argument there can, like I said earlier, she brought her own drugs, she took them on her own, he is not responsible for that. What you want to argue is that, even if he gave her the drugs, he can't be responsible for the GBI because she took them on her own, but that's not going to be your defense.

(3RT 653-654.)

Defense counsel responded that he should be able to argue to the jury that if it found appellant gave the drugs to Reina, there was insufficient evidence to support the great bodily injury allegation because Reina voluntarily ingested the drugs. (3RT 653.) The trial court disagreed:

> THE COURT: At what point can you argue something that case law has already determined is inapplicable?
>
> [DEFENSE COUNSEL]: It's determinant for that particular fact pattern, which I believe is distinguishable from the fact pattern we have here based on the type of drugs and the duration of what was going on.
>
> THE COURT: But again you read this sentence simply put, appellant's argument that the enhancement is inapplicable, that's your argument, right? Because the victim made a volitional choice that directly caused her death. That's going to be your argument. She made a choice that directly caused her death.
>
> [DEFENSE COUNSEL]: Or I can simply—

THE COURT: The court here said that's unavailing. Not available. Can't do it. That's the way I interpret it. I think it's contrary to the law. Again I realize there [are] factual distinctions and you have your case and all of that, and unfortunately there's no case that's directly on point, but they said that even if a person voluntarily takes drugs, that does not preclude a defendant from being found guilty of personally inflicting great bodily injury.

[DEFENSE COUNSEL]: Doesn't preclude, but I can still argue.

THE COURT: But you can't argue the contrary to that. They're saying here, the fact that she voluntarily took the drugs doesn't mean he didn't personally inflict great bodily injury. So you can't turn that around and say, she voluntarily took the drugs, therefore he can't be found guilty or in violation of great bodily injury. That's inconsistent. So you know, you might be right, I might be wrong, but my best view is to stick with what I mentioned earlier. I think if your argument is going to be that she brought the drugs, then, yeah, she took them on her own, that's fair game. If your argument is going to be he gave her the drugs—if you believe he gave her the drugs, he's not responsible because she voluntarily took them, I don't think that can be done because I think it's in contravention to this case.

(3RT 654-655.)

During closing argument, the prosecutor argued that the evidence proved that appellant texted Reina and told her he had cocaine. (3RT 687-688, 690.) When she arrived at his house, the two had sex and then appellant gave the substance, which was actually fentanyl, to Reina. (3RT 688, 690, 694.) Defense counsel argued that there was no evidence appellant gave the substance to Reina. (3RT 702, 908.)

The jury convicted appellant of furnishing or giving away drugs to a minor (Health & Saf. Code, § 11353). It also found true the allegation that appellant personally inflicted great bodily injury upon Reina (§ 12022.7, subd. (a)). (1CT 137-138; 3RT 928-932.) Appellant was sentenced to a total term of 12 years in prison consisting of the upper term of nine years plus an additional three years for the great bodily injury enhancement. (1CT 179-181; 3RT 1209.)

C. The Appeal

On appeal, appellant argued that the trial court erred when it limited defense counsel's argument. The Court of Appeal affirmed, holding in the published portion of its opinion 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." (*People v. Ollo* (2019) 42 Cal.App.5th 1152, 1158.) The court reasoned:

> First, this conclusion is consistent with the precedent [holding] that a defendant directly causes and—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." [(*People v. Modiri* (2006) 39 Cal.4th 481, 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.

(*Ollo*, *supra*, 42 Cal.App.5th at p. 1158.) The Court of Appeal concluded that the trial court correctly barred defense counsel from arguing to the jury that Reina's voluntary ingestion of the drug immunized him from liability as that argument would have been contrary to law. (*Id.* at p. 1159.)

ARGUMENT

THE TRIAL COURT PROPERLY PROHIBITED APPELLANT FROM ARGUING THAT VOLUNTARY INGESTION ALONE PRECLUDES A PERSONAL INFLICTION FINDING

Appellant argues that the act of providing drugs to a person who subsequently overdoses should not automatically result in a great bodily injury enhancement and that the question, instead, is to be determined on all the facts. (OBM 13-18.) Respondent agrees. Section 12022.7 requires that a defendant directly inflict great bodily injury upon the victim. The existence of direct causation is a question of fact for the jury and no single factor is necessarily determinative. In the instant case the trial court properly prohibited defense counsel from arguing to the jury that a victim's voluntary ingestion of drugs necessarily precludes a finding of direct causation because that argument is contrary to law.

A. Section 12022.7 Requires Direct, Rather Than Proximate, Causation

Penal Code section 12022.7, subdivision (a), states, "Any person who personally inflicts great bodily injury 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." Great bodily injury as used in this statute means "a significant or substantial physical injury." (§ 12022.7, subd. (f).) The enhancement does not apply to murder, manslaughter, and certain types of arson, or where the infliction of great bodily injury is an element of the offense. (§ 12022.7, subd. (g).)

"To 'personally inflict' an injury is to directly cause an injury, not just proximately cause it." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347.) The familiar standard of proximate causation requires that a criminal injury be "not so remote as to fail to constitute the natural and probable consequence of the defendant's act." (*People v. Roberts* (1992) 2 Cal.4th 271, 319.) "A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (CALCRIM 240; see also *People v. Schmies* (1996) 44 Cal.App.4th 38, 48 [proximate cause exists where defendant's act or omission sets in motion a chain of events the natural and probable consequence of which is the injury].) The intervention of some other force that is itself a normal, foreseeable result of the defendant's act or omission does not break causation under the proximate cause standard. (*Schmies*, *supra*, 44 Cal.App.4th at p. 49.) But where independent or concurrent causes are

present, the defendant's act or omission must have been a "substantial factor" in causing the injury in order to support criminal liability, meaning it must have been more than negligible or theoretical. (CALCRIM No. 240; *People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1321.)

The causation requirement of the great bodily injury enhancement under section 12022.7, however, is more demanding. The Legislature's use of the word "personally" limits the imposition of the enhancement "to those who directly perform the act that causes the physical injury to the victim." (*People v. Cole* (1982) 31 Cal.3d 568, 579 [addressing a former version of section 12022.7].) In other words, "the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*Id*. at p. 572.) In *Cole*, for example, the defendant and an accomplice broke into the victim's home. The defendant told the accomplice to kill the victim. The accomplice hit the victim in the arm and head with a rifle. The defendant blocked the victim's escape but did not strike him. On appeal, the defendant argued he was not subject to an enhancement under a former version of section 12022.7 because he did not directly cause the victim's injury. (*Id*. at pp. 570-571.) This Court agreed: "The purpose of the statute is to deter the infliction of great bodily injury. A construction limiting its scope to the person who himself inflicts the injury serves that purpose; each member of a criminal undertaking will know that,

regardless of the urgings of his confederates, if he actually inflicts the injury he alone will pay the increased penalty." (*Id.* at pp. 572-573, citations omitted.)

At the same time, direct infliction of great bodily injury under section 12022.7 does not require that the defendant's actions be the exclusive cause of the injury. In *People v. Modiri*, *supra*, 39 Cal.4th 481, the defendant participated in a group beating. The evidence demonstrated that the defendant was one of several people who hit and kicked the victim, and a witness testified she later heard appellant say he broke a bottle over the victim's head during the attack. (*Id.* at p. 487-489.) Appellant was convicted of felony assault and the jury found true an allegation that he personally inflicted great bodily injury upon the victim under section 1192.7, subdivision (c)(8), which "made the assault conviction a 'serious felony' for purposes of punishment in a future prosecution." (*Id.* at p. 489.)[2] On appeal, this Court addressed "whether the group beating principles routinely given to juries (CALJIC No. 17.20; see CALCRIM No. 3160) for present and future sentencing purposes, conflict with the requirement that the defendant 'personally inflict[] great bodily injury' (§ 1192.7(c)(8); see § 12022.7(a)), as construed and applied by the courts." (*Id.* at p. 491.) This Court determined there was no conflict, reasoning:

---

[2] As this Court explained in *Modiri*, "Much like the enhancement in section 12022.7(a), section 1192.7(c)(8) defines a serious felony to include one in which 'the defendant personally inflicts great bodily injury' on the victim." (*Modiri*, *supra*, 39 Cal.4th at p. 492.)

> [N]othing in the terms “personally” or “inflicts” in section 1192.7(c)(8), necessarily implies that the defendant must act alone in causing the victim’s injuries. Nor is this terminology inconsistent with a group melee in which it cannot be determined which assailant, weapon, or blow had the prohibited effect. By its own terms, the statute calls for the defendant to administer a blow or other force to the victim, for the defendant to do so directly rather than through an intermediary, and for the victim to suffer great bodily injury as a result.

(*Id*. at p. 493.) Thus, concurrent causes do not preclude a personal infliction finding. (*Guzman*, *supra*, 77 Cal.App.4th at p. 764 [“[m]ore than one person may be found to have directly participated in inflicting a single injury.”]; *People v. Elder* (2014) 227 Cal.App.4th 411, 419 [“a defendant is not absolved of liability for an enhanced sentence under section 12022.7 where others are involved at the time the injury is inflicted.”].

Nor do a victim’s contributory actions preclude a finding that a defendant personally inflicted the injury. In *Elder*, the defendant and the victim engaged in a struggle during a kidnapping and robbery. The victim grabbed the defendant’s hooded sweatshirt, and when the defendant tried to get out if it the victim’s finger became stuck and was injured. (*Elder*, *supra*, 227 Cal.App.4th at pp. 414-415, 417.) On appeal, appellant argued that a great bodily injury enhancement under section 12022.7 should “be stricken because there was no substantial evidence that he directly performed the act that caused injury to the victim’s finger.” (*Id*. at p. 417.) The Third District Court of Appeal disagreed: “Given that more than one person may be found to have directly participated in inflicting an injury, the fact

that the victim here grabbed defendant as he struggled to get away, does not absolve defendant from responsibility for the injury he caused by struggling and pulling away." (*Id*. at p. 420.)

The same is true where the injury was inflicted accidentally. In *Guzman*, the defendant was driving while intoxicated. (*Guzman*, *supra*, 77 Cal.App.4th at p. 763.) He "made an unsafe turn in front of another vehicle," which caused a collision that injured his passenger. (*Ibid*.) On appeal, the defendant argued that "he did not personally inflict the great bodily injury on" his passenger. (*Id*. at p. 764.) Rather, "the other driver involved in the accident is the person who directly performed the act that caused the injury." (*Ibid*.) The Fifth District Court of Appeal rejected this argument:

> Here, appellant turned his vehicle into oncoming traffic. This volitional act was the direct cause of the collision and therefore was the direct cause of the injury. Appellant was not merely an accomplice. Thus, appellant personally inflicted the injury on Ms. Quinonez. Further, the accidental nature of the injuries suffered does not affect this analysis. The 1995 amendment to section 12022.7 deleted the requirement that the defendant act "with the intent to inflict the injury."

(*Ibid*.)

In addition, neither the use of force nor the immediate manifestation of great bodily injury is required to support a section 12022.7 enhancement. In *People v. Cross* (2008) 45 Cal.4th 58, the defendant impregnated his 13-year-old stepdaughter and was convicted of committing a lewd act on a child under the age of 14, with a great bodily injury enhancement

under section 12022.7, subdivision (a). (*Id.* at pp. 62-63.) On appeal, the defendant argued "that only a pregnancy resulting from forcible rape can result in great bodily injury." (*Id.* at p. 64.) This Court disagreed, noting that no authority "holds that medical complications or the use of force is required to support a finding of great bodily injury. And section 12022.7 makes no mention of any such limitation." (*Id.* at p. 65.) And by holding that "a pregnancy without medical complications that results from unlawful but nonforcible sexual conduct with a minor" supported a great bodily injury enhancement under section 12022.7, subdivision (a) (*Cross*, *supra*, 45 Cal.4th at p. 61), this Court also impliedly held that the victim's injury need not occur immediately after the defendant's illegal actions. Rather, it can manifest at some later time.

B. The *Martinez* and *Slough* Decisions

Two Court of Appeal decisions have applied these principles, reaching different conclusions concerning the sufficiency of the evidence on different facts, in cases where the defendant furnished a drug and the victim overdosed after voluntarily ingesting it.

In *People v. Martinez, supra,* 226 Cal.App.4th 1169, the defendant and the victim met at a bar. There was evidence that the victim was intoxicated and the defendant admitted to police that he saw her consume multiple drinks. The defendant gave the victim several methadone pills at the bar, which she ingested. He later admitted that he knew methadone was more powerful when it was combined with alcohol. The defendant eventually

took the victim home to her apartment and the two had sex. The defendant left in the morning. The victim was found dead shortly thereafter. (*Id.* at pp. 1173-1176.) The "cause of death was methadone, hydrocodone and alcohol intoxication." (*Id.* at p. 1178.) Following a court trial, the defendant was convicted of involuntary manslaughter and three counts of furnishing a controlled substance. The court found true a great bodily injury allegation as to two of the furnishing counts pursuant to section 12022.7. (*Id.* at 1172.)

On appeal, the defendant argued there was insufficient evidence to support the great bodily injury enhancement because the victim volitionally took the drugs and thereby caused her own death. (*Martinez, supra*, 226 Cal.App.4th at p. 1185.) In a unanimous opinion, the Sixth Appellate District rejected this argument, noting, "[m]ore than one person may be found to have directly participated in inflicting a single injury." (*Ibid.*) The court concluded there was sufficient evidence that appellant personally inflicted great bodily injury on the victim:

> 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 intoxicated, so intoxicated that appellant felt she was not in any condition to drive and he drove her car to her apartment. 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 [her] death. As the trial court found, "[The victim] would not have died had [appellant] not provided her with all the drugs that he had that night."

(*Id*. at p. 1186.)

In *People v. Slough*, *supra*, 11 Cal.App.5th 419, the defendant was affiliated with a heroin delivery service and "acted as a 'middleman' on behalf of friends and acquaintances who wanted to purchase heroin." (*Id*. at p. 421.) The victim had purchased drugs from the defendant in the past. He texted the defendant and asked him to contact the delivery service. The defendant did so and told the victim to meet him at a gas station. Surveillance video showed the defendant and appellant entering the gas station's market, walking to a hallway out of view, and then making a purchase at the register. (*Id*. at pp. 421-422.) The victim returned home and was later found unresponsive in a bathroom. A belt, needle, and heroin were all nearby. He died two days later of "acute heroin intoxication" after being taken off life support. (*Id*. at 422.) Following a jury trial, the defendant was found guilty of selling or furnishing heroin and a great bodily injury allegation was found true. (*Ibid*.)

On appeal, the defendant argued there was insufficient evidence to support the great bodily injury enhancement. The Second Appellate District agreed in a divided opinion. Noting the difference between "proximate cause" and section 12022.7, subdivision (a)'s, requirement of "personal infliction" (*id*. at 424), the majority explained:

> [T]he evidence in this case is insufficient to support a finding that appellant personally inflicted GBI. He sold heroin to [the victim], but his performance of that act did not directly cause [the victim's] injuries. The act that did so—[the victim's] ingestion of the drugs—occurred at a different time and location where

> appellant was not present. That [the victim] would not have suffered GBI but for appellant selling him the drugs merely demonstrates that appellant was a proximate cause of the injury, which is not enough to sustain a finding of personal infliction.

(*Ibid*.)

The *Slough* majority distinguished the holding in *Martinez*, pointing to the fact that in *Martinez* there was a direct connection between the defendant's act of providing the victim with drugs and the victim's death. (*Slough*, *supra*, 11 Cal.App.5th at pp. 424-425.) It observed:

> Here, there is no such direct factual connection between the furnishing of the drugs and the user's ingestion. Appellant handed off drugs to [the victim] in exchange for money. After that, they each went their separate ways. In *Martinez*, the defendant repeatedly supplied drugs to the victim while observing her increasing intoxication; the furnishing was akin to administering. Appellant, by contrast, played no part in [the 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.

(*Id*. at 425.)

Justice Yegan dissented, arguing that the majority's opinion conflicted with the "legislative direction" of section 12022.7 by essentially adding the sale of heroin to the crimes that are excluded under subdivision (g). (*Slough*, *supra*, 11 Cal.App.5th at p. 426 (dis. opn. of Yegan, J.).) In Justice Yegan's view, the defendant's act of selling heroin to the victim directly caused the victim's death. (*Ibid*.) For a drug dealer, "[d]eath, whether instantaneous or after repeated use, is to be expected. The

possibility of overdose is always present." (*Ibid.*) That the defendant and the victim "went their separate ways after the transaction" and that the defendant was not present when the victim died "did not relieve [the defendant] from liability for infliction of great bodily injury." (*Ibid.*) Justice Yegan concluded that the defendant "sold the victim what was tantamount to a 'time bomb'" and that this furnishing "was an actual cause, a legal cause, and a proximate cause of the death." (*Id.* at pp. 426-427.)

C. The Trial Court's Ruling Properly Reflected That Voluntary Ingestion Is One Fact for the Jury to Consider, But Does Not Itself Preclude a Personal Infliction Finding

The issue presented in this case asks whether furnishing drugs to a person who overdoses after voluntarily ingesting them *always supports* an enhancement for the personal infliction of great bodily injury. But the trial court ruled on the opposite question: whether voluntary ingestion *necessarily precludes* the enhancement. (3RT 653-655.) The trial court was correct. Voluntary ingestion is but one factor for the jury to consider in determining whether a defendant personally inflicted great bodily injury; it neither mandates such a finding by itself nor precludes the finding.

Causation is ordinarily a question of fact to be decided by the jury, "though in some instances undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus." (*Roberts*, *supra*, 2 Cal.4th at p. 320, fn. 11; accord, *People v. Cervantes*

(2001) 26 Cal.4th 860, 871-872.) Voluntary ingestion does not inherently make causation so remote as to remove the question from the jury's purview. As the decisions discussed above illustrate, "personal infliction" of great bodily injury does not require the application of force or the immediate manifestation of the injury (*Cross*, *supra*, 45 Cal.4th at pp. 61, 65), and may be shown even when the injury is self-inflicted by the victim (*Elder*, *supra*, 227 Cal.App.4th at p. 420) and was not intended by the defendant (*Guzman*, *supra*, 77 Cal.App.4th at p. 763). Taking these concepts together, it follows that a victim's voluntary ingestion of a substance that results in great bodily injury does not necessarily preclude a finding that the defendant who furnished the substance personally inflicted the injury.

For instance, in the case of a defendant who poisons a drink that is then voluntarily ingested by the victim, it could hardly be said that the defendant did not personally inflict an injury, even though she did not directly apply force and even though the victim contributed to the injury in some sense by volitionally drinking the poison. The typical drug furnishing case ending in an overdose will often involve additional variables, but the analysis is fundamentally no different, as *Martinez* and *Slough* indicate. On one end of the spectrum might be a situation in which the defendant's interaction with the victim is brief and purely transactional and where some intervening chain of events—such as passage of the drugs through other hands before being ingested by the victim—attenuates the defendant's furnishing of the drugs from the ultimate injury. In such a case,

a jury might reasonably conclude that there was no personal infliction of great bodily injury. On the other end of the spectrum might be a situation in which the defendant furnished a large quantity of highly dangerous drugs to a victim and helped the victim consume them. A jury could reasonably conclude in that case that the defendant personally inflicted the injury. In each instance the victim voluntarily ingested the drug, but that factor alone was not determinative.

Treating voluntary ingestion as just one factor for the jury's consideration, and not as a preclusive factor in itself, is consistent with the purpose of the statute and the legislative intent motivating it. The statute is designed to punish a defendant more severely when the consequences of a felony that otherwise would not involve great bodily injury are more egregious because of the defendant's injurious actions. (See *Guzman*, *supra*, 77 Cal.App.4th at p. 765.) The Legislature has excepted some crimes from the operation of this enhancement, but not the crime of furnishing a controlled substance. (Pen. Code, § 12022.7, subdivision (g).) Moreover, the Legislature repealed the intent requirement originally contained in the statute. There is nothing in this scheme to suggest that voluntary ingestion, in itself, precludes a personal infliction finding.

In light of the foregoing, the trial court's ruling, that the defense could not argue Reina's voluntary ingestion precluded the great bodily injury enhancement, was correct. "'Although counsel have broad discretion in discussing the legal and factual merits of a case, it is improper to misstate the law.'" (*People v. Mendoza*

(2007) 52 Cal.4th 686, 702 [alterations omitted].)[3] And contrary to the premise of appellant's contention (OBM 13-18), the trial court did not preclude a defense argument on causation generally. What the court focused on was defense counsel's proposal to tell the jury that "the victim made a volitional choice that directly caused her death," which would be contrary to the authority holding that "even if a person voluntarily takes drugs, that does not preclude a defendant from being found guilty of personally inflicting great bodily injury." (3RT 654.) When defense counsel responded, "Doesn't preclude, but I can still argue," the court clarified, "But you can't argue contrary to that. … [Y]ou can't turn around and say, she voluntarily took the drugs, therefore he can't be found guilty or in violation of great bodily injury." (3RT 654-655.)

As this exchange shows, the trial court prohibited counsel from arguing that voluntary ingestion in itself precluded a personal infliction finding; the court did not prohibit an argument, based on other facts, that there was no personal infliction. That ruling was consistent with the law. Since defense counsel's proposed argument was incorrect as a matter of law, the trial court properly prohibited it.

---

[3] A trial court generally may exercise its discretion to limit the time and scope of closing argument in order to ensure "that argument does not stray unduly from the mark." (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855.) If a court misapplies the law, however, the ruling is necessarily an abuse of discretion. (See *People v. Knoller* (2007) 41 Cal.4th 139, 156.)

D. The Trial Court's Ruling Was Consistent with Established Law, Including Both *Slough* and *Martinez*

In the course of its opinion, the Court of Appeal below observed that it disagreed with the decision in *Slough*, implying that *Slough* was inconsistent with its holding in this case. (*Ollo*, *supra*, 42 Cal.App.5th at p. 1158.) In the Court of Appeal's view, the various distinctions the *Slough* court made between the facts in that case and those in *Martinez* were not "analytically significant." (*Ibid*.) It thought that *Slough* improperly gave dispositive weight to the victim's voluntary ingestion, treating that single fact as an intervening or superseding cause that precluded a personal infliction finding. (*Ibid*.)

But neither *Martinez* nor *Slough* held that voluntary ingestion is a determinative factor when evaluating the sufficiency of the evidence for a great bodily injury enhancement in a drug overdose case. Rather, both decisions pointed to a number of factors that are relevant when conducting such an analysis. *Martinez* held there was sufficient evidence where the defendant personally gave drugs to the victim, was present when she ingested the drugs, knew the victim was already intoxicated at the time he gave her the drugs, knew the drugs were more potent when combined with alcohol, and continued to give the drugs to the victim as she became more intoxicated. (*Martinez*, *supra*, 26 Cal.App.4th at p. 1186.) *Slough*, on the other hand, noted the brief, purely transactional nature of the interaction between the defendant and the victim there, and contrasted that with the facts of *Martinez*, where "the defendant repeatedly

supplied drugs to the victim while observing her increasing intoxication." (*Slough*, *supra*, 11 Cal.App.5th at p. 425.)

Facts apart from voluntary ingestion such as those identified in *Slough* are relevant to the personal infliction question and, for purposes of a sufficiency-of-the-evidence analysis, may place different factual scenarios toward different ends of the analytical spectrum. (See Arg. C, *ante*.) Thus, it does not appear that *Martinez* and *Slough* conflict with each other, much less with the present case, which presents no sufficiency-of-the-evidence issue.

For purposes of answering the question presented by this case, it is therefore not necessary to disapprove either *Slough* or *Martinez*. Because the portion of the court's opinion below discussing *Slough* might reflect confusion on that point, however, this Court may choose to clarify that there is neither a conflict between those cases nor a conflict between *Slough* and the trial court's decision in this case.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

CONCLUSION

The judgment should be affirmed.

Dated: September 24, 2020 Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General

COLLEEN M. TIEDEMANN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

LA2020600159
63609792.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 6,267 words.

Dated: September 24, 2020

XAVIER BECERRA
Attorney General of California

COLLEEN M. TIEDEMANN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

<u>DECLARATION OF ELECTRONIC SERVICE</u>
<u>AND SERVICE BY U.S. MAIL & E-MAIL</u>

Case Name: *People v. Treyvon Love Ollo*
No.: **S260130**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On <u>September 24, 2020</u>, I electronically served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on <u>September 24, 2020</u>, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable Steven D. Blades,
Judge
Los Angeles County Superior Court
Pomona Courthouse South
400 Civic Center Plaza
Department A
Pomona, CA 91766

On <u>September 24, 2020</u>, I electronically served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy via this Court's TrueFiling system addressed as follows:

Rachel Lederman
Attorney at Law
rachel@bllaw.info

On September 24, 2020, I served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

Michelle Graves
Deputy District Attorney
Courtesy copy by e-mail

California Appellate Project
capdocs@lacap.com

On September 24, 2020, I caused one electronic copy of the **ANSWERING BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 24, 2020, at Los Angeles, California.

Marianne A. Siacunco	*/s/ Marianne A. Siacunco*
Declarant	Signature

LA2020600159
63613639.docx

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/24/2020 by Karissa Castro, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. OLLO**
Case Number: **S260130**
Lower Court Case Number: **B290948**

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: **colleen.tiedemann@doj.ca.gov**

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

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S260130_ABM_People

Service Recipients:

Person Served	Email Address	Type	Date / Time
Rachel Lederman Attorney at Law 130192	rachel@bllaw.info	e-Serve	9/24/2020 9:25:59 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

9/24/2020
Date

/s/Marianne Siacunco
Signature

Tiedemann, Colleen (208787)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm