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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
CHRISTOPHER CAIN,  
Defendant and Appellant.

F065958  
(Super. Ct. No. BF136946A)

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
CHERI LATISA GLOVER,  
Defendant and Appellant.

F066309  
(Super. Ct. No. BF136946C)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Matthew H. Wilson, under appointment by the Court of Appeal, for Defendant and Appellant Christopher Cain.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant Cheri Latisa Glover.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

After a joint trial, a jury found Christopher Cain and Cheri Latisa Glover guilty of the first degree murder of Joe Wooten. (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 189.) The jury also found true the special allegation that Cain personally and intentionally discharged a firearm, which proximately caused death to another person within the meaning of section 12022.53, subdivision (d).

On appeal, Cain contends the true finding regarding the firearm allegation must be reversed because there was insufficient evidence that he fired the weapon that caused Wooten's death. He further contends his murder conviction should be reversed, challenging the legal sufficiency of the prosecution's evidence on cell phone records and toolmark identification.

In her appeal, Glover contends that she received ineffective assistance of counsel when her attorney failed to request an instruction on voluntary intoxication. She raises two additional arguments, which Cain joins: (1) the trial violated the prohibition against ex post fact laws by imposing a restitution fine of \$240 and (2) the parole revocation fine was unauthorized. The Attorney General concedes Glover's last argument.

On its own motion, the court consolidated the appeals filed by Cain and Glover. Glover's appeal initially was designated case No. F066309 and is now consolidated with Cain's appeal under case No. F065958.

We accept the Attorney General's concession and modify the judgments to delete the parole revocation fines. We affirm the judgments in all other respects.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

### **PROCEDURAL HISTORY**

On September 8, 2011, the Kern County District Attorney filed an information against Cain, Kevin Glover (Kevin Sr.<sup>2</sup>), and Glover. Cain was charged with murder (§ 187, subd. (a); count 1) and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2). Kevin Sr. was charged with murder (§ 187, subd. (a); count 3) and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 4). Glover was charged with murder (§ 187, subd. (a); count 5). It was alleged that all three defendants intentionally killed Wooten while lying in wait (§ 190.2, subd. (a)(15)) and that Cain and Kevin Sr. personally and intentionally discharged a firearm, which proximately caused great bodily injury or death to another person (§ 12022.53, subd (d)).

The three defendants were tried together. A jury was sworn in on August 7, 2012, and witness testimony began the next day. The jury began deliberations on August 24, 2012. Seven days later, the jury reached verdicts with respect to Cain and Glover.

The jury found Cain guilty of first degree murder (count 1) and found true the allegations that he intentionally killed the victim while lying in wait and that he personally and intentionally discharged a firearm, which proximately caused death to another person. The jury also found Cain guilty of possession of a firearm by a felon (count 2). The jury found Glover guilty of first degree murder (count 5) and found true the allegation that she intentionally killed the victim while lying in wait. The jury could not reach a verdict as to Kevin Sr., and the court declared a mistrial as to him.

The trial court sentenced Glover to life without the possibility of parole and imposed various fines and fees. Cain was sentenced to life without the possibility of parole plus 25 years to life pursuant to section 12022.53, subdivision (d), for count 1.

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<sup>2</sup> Codefendant Kevin Glover, who is not a party to this appeal, and appellant Cheri Latisa Glover were married and have a son together named Kevin Glover, Jr. For brevity, we refer to appellant Cheri Latisa Glover as Glover, codefendant Kevin Glover as Kevin Sr. and their son as Kevin Jr. No disrespect is intended.

The court imposed an additional determinate term for count 2, which was stayed pursuant to section 654. Cain was also ordered to pay various fines and fees.

### **FACTS**

#### ***The shooting***

In the early hours of December 3, 2009, Sergeant Scott Faulkenberry of the Bakersfield Police Department was on duty in his patrol car at 20th Street. Around 2:45 a.m., he heard what sounded like six or seven gunshots, and soon after, a radio call reported shots fired at 504 28th Street, northeast of his location.

Faulkenberry was the first officer at the scene, arriving at roughly 2:55 a.m. He did not observe any vehicles leaving the area. He found a white Ford station wagon partially in the driveway at 504 28th Street. The engine was running, the headlights were on, and the doors were closed. It appeared there were several bullet strikes on the driver's side of the vehicle. The front left tire was flat. A Black male, later identified as Wooten, was in the driver's seat; he appeared to be unresponsive and severely injured. No money, wallet, or drugs were found on his person.

West of 504 28th Street, close to the intersection of 28th Street and San Dimas Street, officers found numerous shell casings. On the south side of 28th Street, police found eight casings spread from the middle of the road out toward the south curb line in front of 527 28th Street. They were all Aguila brand .38-caliber Super casings. Directly across the street from 527 28th Street, 14 casings were located in a tight area on the north curb line of 28th Street. These were .40-caliber Smith & Wesson casings of various brands (Speer, RP, and Federal). The police also found a piece of copper jacketing in the roadway, midway between the area where the shell casings were found and where the victim's vehicle was found.

A forensic pathologist performed an autopsy of Wooten. She observed two wounds on the left back, lower shoulder area. One injury was an entrance gunshot wound, and the other appeared to be a graze wound. These were the only significant

wounds she noticed from external examination. From internal examination, she determined that a projectile went through the left lung, left pulmonary artery and left bronchus, hit the aorta, continued through the right pulmonary artery and right bronchus, continued through the upper lobe of the right lung, and became lodged in the soft tissues of the right armpit. The pathologist concluded that the cause of Wooten's death was a gunshot wound to the chest.

### ***Initial investigation***

Detective Patrick Hayes was the lead detective on the case. When he arrived at the 500 block of 28th Street around 3:45 or 4:00 a.m., the police already had placed yellow barrier tape across 28th Street at San Dimas Street. The residence at 504 28th Street was east of San Dimas Street at a dead end, so there was no other cross street. Neighbors heard gunfire, but no one had seen the shooting. Hayes noticed Glover and Kevin Sr. standing on the front porch of 504 28th Street. Hayes was told that someone may have information about the victim, who had not yet been identified. He walked toward San Dimas Street and spoke to Odelia Brisby. She showed Hayes a photograph of Wooten on her cell phone, and Hayes recognized Wooten as the shooting victim. Brisby told Hayes that Wooten was involved in drug sales.

Hayes then walked back to 504 28th Street. He identified the residents of the house as Glover, her daughter Shaniqua Eckford, and her son Kevin Jr. Kevin Sr. (who did not live at the house) was no longer there. Hayes talked to Glover in her living room. At first, she said she did not recognize the car in her driveway and did not know who was in the car. Eventually, she admitted that she knew Wooten and she owed him \$850 for crack cocaine. Glover also stated that she had ridden in the white Ford station wagon with Wooten earlier that evening. She said she had been at an apartment complex on 33rd Street, where Brisby and Wooten lived. Glover was walking from the complex

when Wooten pulled up and gave her a ride to her house. She told Hayes that she agreed to pay Wooten the money she owed at midnight using her EBT card,<sup>3</sup> which was at her house. When she and Wooten arrived at her house, however, Glover could not find her EBT card. Glover said Wooten became upset and yelled, and then he left her house around 12:15 a.m. She told Hayes that she went to sleep and was awakened by gunfire.

Hayes asked Glover if she called anyone between the time Wooten left her house and the shooting. Initially, she said she did not call anybody, but as time went on, she admitted that she called a number of people, including Wooten. The handset for the telephone in the house showed the name Eddie Hayward.

The police obtained a search warrant on the morning of the shooting and conducted a search of Glover's house. One unspent Aguila .38-caliber Super cartridge was found in a plastic baggie inside an empty camera box. This was the same brand and caliber as the shell casings found on the south side of 28th Street. The camera box was found in the northwest bedroom of the house on a dresser top. Glover told Hayes she did not know how the cartridge got in her bedroom.

Hayes interviewed Brisby at the police station on December 7, 2009. At trial, Brisby testified under a grant of use immunity. She testified that, in December 2009, Wooten was her boyfriend and they worked together selling drugs. Brisby had known Glover for about a year before the shooting. Wooten and Brisby sold Glover drugs and extended her credit.

On December 2, 2009, Glover owed Wooten and Brisby money for drugs. Wooten and Brisby went to Glover's house sometime between 10:00 a.m. and 2:00 p.m. that day. Wooten was driving a white Ford Taurus station wagon. He parked the vehicle

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<sup>3</sup> Hayes understood that certain government benefits are credited to EBT cards (Electronic Benefit Transfer cards), which work like a credit or ATM card. (See *Cleary v. County of Alameda* (2011) 196 Cal.App.4th 826, 834.)

in the driveway, near where it was later found after the shooting. Wooten told Glover she better have his money, and Glover said she would call when “her money came on her card.” Wooten told Glover that Brisby would beat her up if she did not pay him. Brisby testified that Glover’s children, Eckford and Kevin Jr., were home when Wooten and Brisby were at Glover’s house.

Wooten and Brisby lived in an apartment on 33rd Street, about four or five blocks from Glover’s house. Later that day, Brisby saw Glover at their apartment complex. Wooten gave Glover more drugs. Brisby heard Glover tell Wooten she would pay him at midnight when there was money on her card.

Brisby testified that Wooten left their apartment around 9:00 or 10:00 p.m. and never returned home. Wooten had Brisby call Glover, and Glover said she would call when she had the money. Glover’s daughter Eckford also called Brisby to say her mother would have the money. Eckford cried and said that she hoped this was the last time and asked Brisby to stop selling drugs to her mother.

Around 11:00 p.m. or midnight, Brisby was talking to Wooten on the phone when he said he needed to get off the phone. Wooten’s cell phone apparently did not disconnect because Brisby then overheard Wooten and Glover yelling at each other. Brisby continued to listen, and it sounded like Wooten was talking on another telephone with someone else. Something in the conversation seemed to calm Wooten down. Later, someone called Brisby and told her that Wooten was “laid out” on 28th Street. She ran to 28th Street and spoke to the police. She could see down the street to Glover’s house and saw the car door open and Wooten slumped over in the front seat.

Brisby knew that Wooten cheated on her with Arlene Sanders. On cross-examination, Brisby denied that Wooten had an apartment on Garnsey Lane with Sanders.

Brisby was aware of a gang on 28th Street known as Grape Street. She testified that Kevin Jr. ran around with Grape Street gang members. He was always with Jerome

Evans, a gang member known as Rony. Kevin Jr. also tried to sell Brisby and Wooten a gun, but they did not buy it. Wooten did not carry a gun and did not belong to the Grape Street gang.

### *Cain's girlfriend*

In October 2010, Cain was arrested in Palmdale, California, by the Los Angeles County Sheriff's Department. A .40-caliber Glock semiautomatic handgun was found in his possession. A Los Angeles County Sheriff's detective contacted Hayes. As a result of this contact, Hayes interviewed Cain's former girlfriend, Lidia Gomez, in December 2010. Gomez told Hayes that she had traveled with Cain to Bakersfield on two occasions. She could not remember what month the trips occurred, but said it was about a year ago (around December 2009) and it had been cold.

At trial, Gomez testified that she lived in Palmdale and had dated Cain for eight years. They did not live together, but he would stay at her house. She went to Bakersfield with Cain twice. The second trip was two weeks after the first trip. On both occasions, Cain met with Glover.

On the second trip, Gomez and Cain drove to a duplex, and Gomez waited in the car while Cain and Glover went in the house. When Cain returned to the car, he was upset and said, "that mother fucker think he can get away with shit." Cain and Gomez returned to Palmdale. After they got home, Cain said, "I'll be gone for a couple of days. Don't call me. I'll call you." Cain drove off, and Gomez heard from Cain again about a week or week and one-half later. From her own observation, Gomez knew that Cain carried a firearm every day. On both trips to Bakersfield, Gomez observed that Glover had a green Mustang.

Gomez testified that, not long after the second trip to Bakersfield, Gomez overheard a phone conversation Cain was having in the garage. She did not know who Cain was talking to. Cain "was kind of laughing about it," and he said, "Did you see that

mother fucker; how when he hit the corner we blast him?” Cain also said, “did you see how his neck was on the steering wheel?”

### *Glover’s arrest and interview*

On May 20, 2011, 17 months after the shooting, Glover was arrested, and Hayes recorded an interview with her at the police station. The interview lasted about two hours, and an edited recording of the interview was played for the jury. Glover said she was smoking drugs on 33rd Street the day before the shooting. She said Wooten had been to her house “threatening my kids.” Wooten took Glover home. Glover said that Eckford told her that Brisby had called and said something like, “why is he tripping over her to like go kill her over two hundred dollars.”<sup>4</sup> Wooten left the house. Glover said her children were scared, they all went to lie down, and then they heard gunfire.

At first, Glover denied talking to Wooten after he left her house, and she could not remember if she tried to call him. After Hayes told her that someone from Glover’s house called Wooten just before he was shot, Glover said her son or daughter may have called him and her son used to buy drugs from Wooten. She also told Hayes that Kevin Sr. came by to check on the kids after the shooting.

Later in the interview, Glover admitted she had called Wooten. She said she was calling to tell him she was going to have his money and she kept calling because he kept hanging up. She said she called Brisby and told her she had \$200 for Wooten. Then Glover admitted she did not have \$200 and told Hayes that she called Wooten because a lady across the street wanted to buy drugs. At one point, Glover said, “So, um uh I don’t remember why I was calling him back. My son wanted some weed maybe that was ... I don’t know[.] I don’t remember.” Later, Glover said she sold some weed she had in the house and had \$15 to buy drugs from Wooten. When she called Wooten, he said he was

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<sup>4</sup> Later during the interview, Glover explained that she owed Wooten for \$200 worth of dope and \$650 was interest.

right around the corner. Glover told Hayes she spoke to Wooten about 20 or 30 minutes before the shooting. She admitted that her statement about a lady across the street wanting dope was a lie; the dope was for her. Throughout the interview, Glover denied involvement in the shooting.<sup>5</sup> She stated, “I was [too] high in my head to be even trying to think of anything like [setting up Wooten].”

### ***Kevin Sr.’s girlfriend***

Anna Torres was in relationship with Kevin Sr., and, in December 2009, they lived together in an apartment on Morin Court in Bakersfield. Kevin Sr. was still married to Glover, but they were separated. Torres testified that on the evening of December 2, 2009, Kevin Sr. was home in their apartment. He received a call on his cell phone. Torres did not know what was said during the call. Kevin Sr. told her he had to leave to see what was going on with his son, and he left the apartment.

Their apartment was searched by the police about a year after the shooting. No ammunition or firearms were found in the search. Torres testified that the relationship between Kevin Sr. and Glover was not good, but he had a good relationship with Eckford and Kevin Jr. Torres recalled seeing Cain twice. On both occasions, Cain visited Kevin Sr. in the apartment he shared with Torres.

### ***Physical evidence***

The Glock .40-caliber handgun found in Cain’s possession when he was arrested in 2010 was later provided to a criminalist working for the Kern County District Attorney’s Office who specialized in firearms and toolmarks. He test-fired the handgun and compared a spent cartridge casing from the handgun to the 14 spent .40-caliber casings recovered from the north side of 28th Street. The criminalist found similarities

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<sup>5</sup> For example, she said, “I did not try to get that man killed. I’m not going to kill nobody over two hundred dollars.” And, a few minutes before the interview ended, she said, “I called that man a lot, but I didn’t call that man to come over [to] my house ... for something to happen to him.”

between all 14 spent casings and the test cartridge casing and testified that it was his expert opinion that the 14 casings found on 28th Street were fired from the .40-caliber Glock handgun found in Cain's possession.

A crime lab technician processed Wooten's white station wagon for evidence and found one projectile (or bullet) in the dashboard of the vehicle. It appeared to have traveled from the passenger's side from the side view mirror, through the door, and into the dashboard. She also found two pieces of copper jacketing in the vehicle. One piece was found on the driver's seat and another piece was underneath the driver's seat, on the floor.

Supervising criminalist Gregory Laskowski examined Wooten's station wagon for bullet strikes. He identified at least five bullet strikes to the vehicle and was able to conduct trajectory analysis as to four of the strikes. (He was unable to conduct proper analysis of a bullet strike to the driver's side front tire.) On the driver's side (left side) of the vehicle, there were two strikes on the left lower portion of the rear door window. Using trajectory rods, he analyzed the bullet paths of the two strikes. The first bullet appeared to pass from the left rear passenger window through the passenger compartment, then travel near the left side of the driver's seat, across the top of the steering wheel, and impact the interior of the windshield. The second bullet caused a hole just above the seal of the rear passenger window into the driver's compartment. Laskowski could not find a terminal point for this bullet strike. He also located a bullet strike on the passenger's side (right side) of the vehicle. This bullet entered into the door and passed through the side of the dashboard. The terminal point was the dashboard, where a projectile was found. A fourth bullet strike was a glancing angle hit to the taillight.

### ***Cell phone evidence***

Jason Furnish, an investigator for the district attorney, testified about Cain's and Kevin Sr.'s cell phone activity on December 2 and 3, 2009. Furnish analyzed their call

records, including the times calls were made and received and the cell towers and antennas used for each call.

The call activity suggested that Cain's cell phone was in the Palmdale area until at least 5:14 p.m. on December 2, 2009. The records indicated the cell phone moved northbound around 6:40 p.m. Ten calls from 7:41 p.m. to 10:22 p.m. showed Cain's cell phone traveling near the interchange of I-5 and Highway 99, northbound on Highway 99, and then toward the area of the 500 block of 28th Street in Bakersfield. There was no call activity on Cain's cell phone after 10:22 p.m. until 11:56 p.m. Calls from 11:56 p.m. to 1:18 a.m. showed Cain's phone traveling from Bakersfield southbound on Highway 99 and I-5 to south of Frazier Park and then turning around and heading northbound. (During this time period, the southernmost cell tower utilized by Cain's phone was a tower south of Frasier Park used at 12:22 a.m.) By 1:08 a.m. on December 3, 2009, Cain's cell phone was in the Bakersfield area again. From 1:19 a.m. to 2:44 a.m., there were six call activities on Cain's phone—all calls to or from Kevin Sr.'s cell phone. These six calls utilized two cell towers, both of which provided coverage for the 500 block of 28th Street. Then Cain's cell phone appeared to travel north of the area and then southbound on Highway 99. At 4:30 a.m., Cain's cell phone was in the Lancaster/Palmdale area, and by 5:30 a.m., Cain's cell phone was in Palmdale.

Analysis of Kevin Sr.'s cell phone records showed that his phone moved throughout the Bakersfield area during the day on December 2, 2009. A call from Kevin Sr.'s phone at 2:27 a.m. on December 3, 2009, began utilizing a cell tower that covered the 500 block of 28th Street and ended utilizing another cell tower located near Highway 58. At 2:44 a.m., Kevin Sr.'s cell phone utilized a cell tower that covered the 500 block of 28th Street in a call to Cain's cell phone. Kevin Sr.'s cell phone did not appear to leave the Bakersfield area between about 8:00 a.m. on December 2 and 7:00 a.m. December 3, 2009.

On cross-examination, Furnish agreed that his analysis was not pinpoint GPS location analysis. He is only able to suggest an area where a cell phone may have been during a call activity. In an urban area, optimum coverage would be an area within about 1.5 miles of a cell tower. Thus, the cell tower utilized by Kevin Sr.'s phone at 2:44 a.m. covered an area from Columbus Street (north of 40th Street) to Central Park (at 19th Street).

*Defense witnesses*

Cain called Sanders as a witness to undermine Brisby's testimony. In December 2009, she had been in a relationship with Wooten for about one and one-half months. Since November 2009, Wooten was staying with Sanders at a house on Garnsey Lane. Wooten lived with Brisby, but Sanders understood that Wooten was leaving Brisby for her and he was in the process of moving in at Garnsey Lane. On December 2, 2009, Sanders woke up with Wooten, and he dropped her off at class in the morning. At some point, she heard a telephone conversation between Wooten and Brisby. Brisby said to Wooten, "I hate you, bitch" and "I hope you die like your mom." Around 12:30 a.m. on December 3, 2009, Wooten left the house and then returned about 15 to 45 minutes later. When he returned, Wooten was angry. Sanders thought he was in for the night. He lay down, and his phone kept ringing. Wooten left again around 2:30 a.m. That was the last time Sanders saw him. He had his wallet with him.

Kevin Sr. called Brent Stratton, a detective assigned to the gang unit, as a witness. The purpose of this evidence was to suggest that gang members, not defendants, were involved in the shooting. Stratton testified that the Grape Street Crips is a criminal street gang from Los Angeles, and there are members who live and operate in Bakersfield. Grape Street Crips gang members control the 500 block of 28th Street. Stratton had spoken to Jerome Evans, who goes by the name Rony, and he had admitted membership in the Grape Street Crips.

An anonymous caller reported that gang members were selling drugs and carrying stolen weapons at 527 28th Street. In the evening of December 2, 2009, Stratton went to 527 28th Street. Eddie Haywood, Jr. opened the front door. Stratton saw packaged marijuana, sandwich baggies, and a scale. Haywood, Jr. tried to run, and Stratton arrested him. Stratton opined that Haywood, Jr. was an associate of the Grape Street Crips. No guns or ammunition was found at 527 28th Street. When the police arrived at 527 28th Street, Brandon Brewster jumped over a fence to the back of 531 28th Street. Because Brewster was on parole, the police conducted a search of 531 28th Street. Stratton believed Brewster was also a Grape Street Crips associate. The police found two loaded firearms at this address, but the firearms were not .40- or .38-caliber weapons.

In the evening of December 3, 2009, after the shooting and less than 24 hours after the first search, Stratton conducted another search of the residences. In the second, more thorough search of 527 28th Street, the police located firearms and ammunition. The ammunition included 27 Aguila brand .38-caliber Super cartridges. They did not find a .38-caliber firearm. They also found .45-caliber ammunition and a magazine, but no .45-caliber handgun. In the second search of 531 28th Street, the police located 14 .40-caliber Smith & Wesson cartridges of various brands.

Stratton further testified that Haywood, Jr. and Brewster were in custody at the time of the shooting. Shanta Evans lived at 531 28th Street, and Jerome Evans is her brother.

Glover called Eckford, Kevin Jr., and Glover's mother as witnesses. Eckford testified that Kevin Sr. had been her stepfather since she was a baby. She called him dad and he treated her like a daughter. She identified Cain as "uncle Cain," although he was not related to her. Cain was someone Eckford could count on, and Cain was very close with Glover and Kevin Sr. Glover and Kevin Sr. were still married in 2009, but they did not live together and they were not getting along.

Eckford testified that her mother had been sober for a long time, but she relapsed in 2009. Glover started disappearing, and sometimes she would shake. Before the shooting, Glover disappeared. Eckford explained, “She just didn’t come back for two days.” Eckford received calls from Brisby saying that if Glover did not pay the money owed by a certain time, she might get killed or somebody would take care of her. Eckford had no way of contacting her mother. The calls from Brisby were constant for two or three days before the shooting.

On December 2, 2009, Kevin Sr. visited in the morning, and Eckford told him Glover had been missing for a couple days. He did not offer to help, but told her to call when Glover came home. At some point during the day, Eckford called her grandmother (Glover’s mother), Catherine Morgan, who lived in Twentynine Palms. She told Morgan that Glover was in a lot of trouble and asked her to send money. Morgan said she would bring the money tomorrow. Eckford told Brisby that the money was coming the next day.

Glover came home around 11:30 p.m. or midnight with Wooten. Kevin Jr. was not home yet. According to Eckford, Glover appeared dirty, like she had not showered in a couple of days, her hair was “real messed up and matted,” she had no shoes on, and there was big tear in her pants.<sup>6</sup> Wooten was angry and told Glover she needed to hurry up and he wanted his money. Eckford told him she would have the money for him the next day, but he said he wanted his money now. Eckford was scared. Wooten said he needed to talk to somebody about getting his money. Eckford called Cain. She asked him to wire money as soon as possible. Wooten did not ask to speak to Cain, and they did not talk to each other. Cain asked what the money was for, and Eckford said she

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<sup>6</sup> Brisby testified, however, that when Glover was at the apartment complex on 33rd street, she “looked alright.” “She still had her appearance up. She didn’t look all smoked out or tweaked out or nothing.”

needed things for her daughter. (Eckford was six or seven months pregnant at the time of the shooting.) Eckford told Wooten that Cain promised to wire the money in the morning, and he left. Kevin Jr. was not home at this point. She did not know when Kevin Jr. came home because she and Glover were asleep.<sup>7</sup>

Eckford and Glover shared a bedroom. Eckford gave Glover two Seroquels, which had been prescribed to Glover. They went to bed around 1:00 a.m. Eckford did not leave the bedroom until she heard gunshots, and she did not see Glover leave the room. When she heard the shots, Eckford woke Glover up by shaking her. She called 911. She described Glover as “still kind of high” at that time.

She also testified that they used to have a green Mustang, but they lost it when it was impounded in July 2009.<sup>8</sup>

Kevin Jr. testified that Glover struggled with addiction, but she had been sober for some time in 2009. He did not see her for about three days before the shooting. Wooten was his marijuana dealer. On December 2, 2009, Kevin Jr. left the house in the morning and went home around 1:30 a.m. When he got home, his mother and sister were asleep in their bed. He called Wooten from the home phone and asked for a “20 sack.” Wooten said he would be there. Kevin Jr. testified that it was not unusual to call for marijuana at 1:30 in the morning. By the time of the shooting, he had given up waiting for Wooten and had gone to lie down.

On cross-examination, Kevin Jr. denied killing Wooten. He saw Wooten every day and there was no problem between them. He also testified that he found a bullet in the alley and he hid it in a camera box in a plastic baggie in his mother’s closet.

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<sup>7</sup> Later, however, Eckford testified that Kevin Jr. was in the house when the shooting occurred, and she saw him in the house around 2:00 a.m.

<sup>8</sup> Brisby, on the other hand, thought Glover still had the green Mustang in December 2009, but it was not running.

Morgan corroborated Eckford's testimony about asking her for money. She testified that Eckford called her and asked for money because Glover owed somebody. Eckford sounded scared on the phone. Morgan told her she would have to go to the bank and she would be there the next day.

### **DISCUSSION**

#### ***I. Sufficiency of evidence that Cain personally discharged a firearm causing death***

Section 12022.53, subdivision (d), provides, "any person who, in the commission of a [specified] felony [including murder] ... personally and intentionally discharges a firearm and proximately causes great bodily injury ... or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Cain contends the true finding as to the special allegation under section 12022.53, subdivision (d), must be reversed because there was insufficient evidence that Cain fired the weapon that caused Wooten's death. The Attorney General agrees with Cain's assessment of the state of evidence, asserting that Cain "correctly argues that there was no definitive evidence regarding whether a .38 or .40 bullet killed Wooten." She argues, however, that the jury's finding that Cain proximately caused death may be upheld under *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*). In that case, our Supreme Court held: "[S]ection 12022.53[, subdivision ](d) does not require that the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Id.* at p. 338.)

We reject Cain's contention, but not for the reason offered by the Attorney General. Instead, we conclude there was sufficient evidence for the jury to find that a .40-caliber bullet fired by Cain killed Wooten.

In deciding a challenge to the sufficiency of the evidence, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses

substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. (*Ibid.*) If the evidence supports the trier of fact’s findings, ““the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” (*People v. Bean* (1988) 46 Cal.3d 919, 933.) Where the evidence of guilt is primarily circumstantial, the standard of review is the same. (*People v. Holt* (1997) 15 Cal.4th 619, 668.)

In this case, the prosecutor addressed the special allegation that Cain and Glover personally and intentionally discharged a firearm, which proximately caused death to another person. The prosecutor did not rely on *Bland* to argue that both Cain and Glover proximately caused Wooten’s death. Instead, he recognized that only one bullet caused Wooten’s death and argued that it was Cain who fired that shot. In his rebuttal statement, he told the jury:

“Now, only one bullet killed Joe Wooten. [The forensic pathologist] came in and testified to that. [¶] We have two shooters out there, and Greg Laskowski said that the bullet that was the second bullet to go through the driver’s side rear window after it penetrated through the window passed through the driver’s seat area. The reasonable inference is that’s the bullet that killed him so the reasonable inference is that the bullets from the north side of the street caused the fatal shot.

“And so who is shooting on the north side of the street, who is leaving those .40 caliber cartridges behind ...? The man with the gun. And that’s pretty important, because we actually did find one of the guns here, and it was with Christopher Cain.

“So ... it would be appropriate to find that [special allegation] true, and you sign right here. [¶] That means that the other shooter out there, you can’t find that to be true, because only one bullet killed Joe Wooten. We don’t have multiple gunshot wounds.”

The prosecutor further told the jury that if it had reasonable doubt as to who fired the fatal shot, then it should find not true the special allegation of intentional discharge of a firearm causing death as to both Cain and Kevin Sr.

We agree with the prosecutor that there was sufficient evidence to find that Cain fired the shot that killed Wooten. The forensic pathologist testified that the cause of Wooten's death was a single gunshot wound to the chest. The projectile went through his left lung, left pulmonary artery and left bronchus, hit the aorta, continued through his right pulmonary artery and right bronchus, through the upper lobe of his right lung, and became lodged in the soft tissues of his right armpit.

Laskowski identified five bullet strikes to Wooten's station wagon. One projectile hit the front driver's tire and could not be analyzed. Another was a glancing strike to the taillight. There were three bullet strikes that appeared to be caused by projectiles that entered the passenger compartment of the vehicle. One entered from the passenger's side (right side). This projectile traveled through the door and entered the dashboard, which was its terminal point. The other two projectiles entered from the driver's side (left side) of the vehicle. One passed from the rear passenger's window, near the left side of the driver's seat and traveled across the top of the steering wheel. The terminal point of this projectile was the interior of the windshield. Laskowski could not find the terminal point of the second projectile that entered the vehicle from the driver's side.

From this evidence, the jury could reasonably conclude that Laskowski could not find the terminal point for the second projectile that entered the vehicle from the driver's side because this was the projectile that killed Wooten and lodged in his right armpit. The facts that Wooten was driving and the projectile that killed him traveled a path from left to right across his body further supports the inference that he was killed by someone facing the driver's side of the vehicle rather than the passenger's side. The evidence showed that 28th Street at 504 was a dead end, so to reach Glover's house, Wooten had to drive eastbound from San Dimas Street. Given that 14 .40-caliber shell casings were

found on the north side of 28th Street near San Dimas Street, the jury could reasonably deduce that someone shooting a .40-caliber weapon on the north side of the street fired the bullet that caused Wooten's death.

Cain was found with a .40-caliber handgun that matched the .40-caliber casings recovered from the north side of 28th Street. The evidence also showed Cain had a close relationship with Glover and Kevin Sr., his cell phone traveled from Palmdale to Bakersfield the evening before the shooting, and his cell phone was in the area of the 500 block of 28th Street around the time of the shooting. This was sufficient evidence for the jury to infer that Cain was the shooter on the north side of 28th Street. Accordingly, there was sufficient evidence to support the jury's finding that Cain personally and intentionally discharged a firearm, which proximately caused Wooten's death.

## ***II. Sufficiency of evidence supporting murder conviction***

Cain next contends his murder conviction should be reversed because the evidence to support it was legally insufficient. We disagree.

Cain identifies the evidence used against him: The .40-caliber Glock firearm found in his possession 10 months after the shooting was test-fired and determined to be the weapon that produced the shell casings found on the north side of 28th Street. Cell phone records showed that his phone traveled from Palmdale to Bakersfield the day before the shooting and that his phone was in the area of the shooting at the time of the shooting. Other evidence showed that Cain was close friends with Kevin Sr., Glover and Glover's family, and his ex-girlfriend described a telephone conversation that could be interpreted as him talking about shooting Wooten.

Cain then argues:

“But that was also the extent of the evidence. There were no eyewitnesses to the shooting. There were no confessions. This was a circumstantial evidence case that rested almost entirely on the testimony of expert witnesses about scientific probabilities. And that scientific evidence, with respect to ballistics and toolmarks and in regard to identifying towers

used by cell phone calls, has been questioned in recent years. So that, combined with a strong defense case suggesting that gang members had the incentive and wherewithal to commit such an offense, should, in appellant's view, cause this Court to conclude that the evidence to support the murder conviction was legally insufficient."

Cain cites two articles and a federal district court order to support his position that the evidence linking his cell phone to the crime scene should be questioned. He acknowledges that the trial court in this case held that expert testimony on cell phone towers was admissible, and he does not challenge this ruling. He simply asserts, "[T]he latest scientific findings, as discussed in the ABA article and elsewhere, should cause this Court to doubt the reliability of the evidence regarding cell phone towers and their ability to track a particular call to a particular tower."

Cain similarly questions the reliability of the criminalist's testimony matching the casings from 28th Street with the .40-caliber Glock firearm found in Cain's possession. He cites a National Research Council report titled "Strengthening Forensic Science in the United States: A Path Forward" (NAS report), but he recognizes that several courts have admitted toolmark evidence despite challenges to such evidence that specifically rely on the NAS report. (See, e.g., *United States v. Otero* (D.N.J. 2012) 849 F.Supp.2d 425, 430, 437–438.) As with the cell phone expert evidence, the trial court in this case ruled the criminalist's testimony admissible, and Cain does not challenge this ruling.

Given that Cain does not challenge the admissibility of the experts' testimony on cell phone records and toolmark identification, we conclude there was sufficient evidence to support Cain's conviction of murder. As discussed above, the evidence was sufficient for the jury to find that Cain killed Wooten by shooting a .40-caliber weapon at Wooten's vehicle from the north side of 28th Street.

We note that Cain's attorney vigorously cross-examined Chris Snow, the criminalist who test-fired the .40-caliber Glock. In cross-examination, Snow agreed that he only looked at one type of mark, breech face marks, and did not examine extractor

markings or ejector rod markings. Snow also testified there have been cases where subclass characteristics of a type of firearm (such as a defect in the breech face of a certain number of firearms produced) have been mistaken for individual characteristics of a single firearm. Cain's attorney also raised some of the findings of the NAS report in his cross-examination of Laskowski. With respect to the cell phone evidence, Cain's attorney cross-examined Furnish and established that the optimum range for a cell tower in an urban area is about one and one-half miles, but it can extend farther than that. Furnish agreed that a cell phone may not necessarily utilize the cell tower in closest proximity if, for example, the closest cell tower is already subject to heavy usage. The jury was able to consider the expert testimony of Snow, Laskowski, and Furnish in light of cross-examination. On appeal, Cain seems to ask this court to reevaluate the evidence, but it is not our role to second-guess the jury.

Finally, as the Attorney General points out, the scope of direct appeal is limited to the record of the proceedings below. (*People v. Bean, supra*, 46 Cal.3d at p. 944.) The articles Cain cites in his opening brief<sup>9</sup> are not part of the record and are not considered in this appeal.

### ***III. Ineffective assistance counsel***

Glover contends she received ineffective assistance of counsel because her attorney did not request an instruction on voluntary intoxication to negate the mental states of knowledge, premeditation, and specific intent. We conclude Glover has failed to establish that her attorney's performance fell below an objective standard of reasonableness.

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<sup>9</sup> The exception is the NAS report, which was included as part of Cain's motion in limine to exclude the firearms examiner.

**A. *Glover's defense***

Glover was charged with premeditated murder, and it was further alleged that she intentionally killed the victim while lying in wait. The prosecution's theory was that Glover asked Wooten to come to her house, knowing that Cain and Kevin Sr. would be waiting to kill him. In his closing statement, the prosecutor asserted: "[Glover] finally admitted she was the one calling, calling, calling to get Joe Wooten to come over there, because she knew they were out there. When [Cain and Kevin Sr.] came over and waited for [Wooten], when she finally got him to come over, they killed him, and he ended up in [her] driveway."

In response, Glover's trial attorney argued there was no evidence that Glover aided and abetted the murder of Wooten. He told the jury that, in order to convict Glover, it must be convinced beyond a reasonable doubt that (1) Glover knew Wooten was going to be murdered by Cain and Kevin Sr. and (2) she did something to help carry that out.

With respect to the first prong, Glover's attorney argued there was no evidence she had knowledge of the alleged shared intention of Cain and Kevin Sr. to kill Wooten. Her attorney suggested that if anyone intended to kill, they would *not* have told Glover about the plan in advance. He argued: "If you know [Glover], yesterday's lunch on her shirt was there. You wouldn't tell her anything. You wouldn't tell her even the most minor of secrets if your life was on the line with that. [¶] So she didn't know."

With respect to the second prong, Glover's attorney noted there were no telephone records showing that she called Wooten after he left her house. Thus, the telephone records did not establish that Glover did anything to aid and abet the murder allegedly committed by Cain and Kevin Sr.

Her attorney also argued the prosecution's theory did not make sense. He called Eckford and Morgan as witnesses, and they both testified that Eckford asked Morgan for the money to pay off Wooten, and Morgan agreed to drive up with the money the next

day. Eckford also testified that she told Wooten she would have the money for him the next day. Therefore, he argued, Glover had no reason to kill Wooten; her debt was going to be paid off the next day. Further, Eckford and Kevin Jr. both testified that Glover and Kevin Sr. did not have a good relationship. Eckford described their relationship as “[h]orrible,” and Kevin Jr. described it as “rocky.” Given that Glover did not like her estranged husband, it made no sense that they would plan a murder together.

In addition, Glover’s attorney urged the jury to consider the evidence tending to show that persons other than defendants could have been responsible for Wooten’s death. He suggested the murder was gang-related. He pointed out that Wooten, a crack dealer and parolee, was shot and killed right in front of a gang house and, further, the same day as the shooting, the police found guns and ammunition in the gang house, including .38- and .40-caliber rounds matching the shell casing found after the shooting. Her attorney argued that Wooten was robbed since he was found without money or a wallet. He also suggested Wooten could have gotten in a fight or it could have been a drug deal gone bad.

***B. Ineffective assistance of counsel***

The United States and California Constitutions guarantee the right to effective assistance of counsel to one charged with a crime. This protects a defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684–687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant ....” (*People v. Dennis* (1998) 17 Cal.4th 468, 540.)

“Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel’s conduct from counsel’s perspective at the time.

[Citation.] A court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance. [Citation.]” (*People v. Dennis, supra*, 17 Cal.4th at p. 541.) “In general, reviewing courts defer to trial counsel’s tactical decisions in assessing a claim of ineffective assistance, and the burden rests on the defendant to show that counsel’s conduct falls outside the wide range of competent representation. [Citations.] In order to prevail on such a claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. [Citations.]” (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

“When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [citation], the case is affirmed [citation]. In such cases, the ineffective-assistance claim is more appropriately made in a petition for habeas corpus. [Citations.]” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.)

### ***C. Voluntary intoxication***

Under former section 22, evidence of voluntary intoxication does *not* negate the capacity to form any required mental state (including knowledge and intent). (Former § 22, subd. (a).)<sup>10</sup> However, evidence of voluntary intoxication may be relevant to the

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<sup>10</sup> Former section 22 provided:

“(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

issues of whether “the defendant *actually* formed a required specific intent, [and], when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.” (Former § 22, subd. (b), italics added.)

In the case of a defendant charged as an aider and abettor, the California Supreme Court has held that “the intent requirement for aiding and abetting liability is a ‘required specific intent’ for which evidence of voluntary intoxication is admissible under section 22.” (*People v. 1998*) 18 Cal.4th 1114, 1131 (*Mendoza*.) Intoxication may be relevant to the issues of knowledge and intent (that is, whether the defendant had *knowledge* that someone else intended to commit a criminal act and whether the defendant *intended* to encourage and facilitate that crime). (*Id.* at pp. 1126–1131.) The *Mendoza* court recognized, of course, that intoxication by itself does not negate liability as an aider and abettor. “Anyone, including a drunk person, who knowingly and intentionally aids and abets a criminal act is guilty. Intoxication is relevant only to show the person did *not* act knowingly and intentionally.” (*Id.* at p. 1130.)

#### ***D. Analysis***

Glover contends her trial attorney was inadequate because he did not request a pinpoint instruction on voluntary intoxication. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) She relies on evidence that she used crack and Seroquel the night of the shooting and argues “the crux of [her] case was her knowledge and intent yet the

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“(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

“(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.” (Former § 22, as amended by Stats. 1995, ch. 793, § 1.)

The statute was renumbered section 29.4 and amended effective January 1, 2013. (Stats. 2012, ch. 162, § 119.)

instructions were insufficient to permit the jury to fully consider the extent her intoxication played in her ability to form the required mental states.”

In this case, the record contains no explanation for why Glover’s attorney did not request a pinpoint instruction on voluntary intoxication. Therefore, we will reject Glover’s ineffective assistance claim ““unless there simply could be no satisfactory explanation”” for his conduct. (*People v. Babbitt, supra*, 45 Cal.3d at p. 707.) The Attorney General offers a possible explanation for her trial attorney’s decision not to request such an instruction: Since Glover’s defense was that she did not participate in Wooten’s murder at all, he may have reasonably determined that asserting Glover was too intoxicated to form any intent was inconsistent with the theory that she was not involved in the murder. We agree this is a reasonable explanation for Glover’s attorney’s conduct.

Glover cites *Mendoza* as supporting her claim, but her own defense stands in contrast to the defense theory in *Mendoza*. In that case, the defendant Valdez drank eight to ten beers and was involved in fight at a warehouse party, during which his friend was injured. After taking his friend to the hospital, Valdez—still intoxicated—woke up his friend Valencia and said he wanted to go back to the party and fight. (*Mendoza, supra*, 18 Cal.4th at p. 1119.) They retrieved Valencia’s loaded semiautomatic rifle and went back to the warehouse. They confronted two party guests outside, and then Valencia fired his rifle at least 11 times at the warehouse, killing one and injuring five others. (*Id.* at p. 1120.) At trial, Valdez denied that he made any signal for Valencia to fetch his rifle, denied intending for the warehouse to be shot, and denied knowing that Valencia was going to fire the rifle. An expert testified on the effects of alcohol on memory. (*Id.* at p. 1121.)

In *Mendoza*, the defendant clearly participated in the crime, but claimed he did not intend the result. Here, Glover denied *any* involvement in the shooting of Wooten. Glover’s defense theory was that she had no knowledge of any plan to kill Wooten, not

that she was too intoxicated to recognize that Cain and Kevin Sr. were planning to kill him. An instruction on voluntary intoxication would have been inconsistent with her defense. Further, Glover's attorney may have believed that a united defense was the best tactic. In his closing statement, he generally tried to avoid suggesting that Cain or Kevin Sr. was involved in the shooting and argued that Wooten most likely was killed by gang members at 527 or 531 28th Street. After all, if the jury were unable to find Cain and Kevin Sr. guilty of the shooting, it almost certainly could not find Glover guilty of aiding and abetting. Her attorney may have been concerned that giving a voluntary intoxication instruction might suggest to the jury that Cain and Kevin Sr. may have talked about ambushing Wooten in Glover's presence, but she was too intoxicated to understand their intentions. Any suggestion that Cain and Kevin Sr. might be guilty, however, would make it more likely that the jury could find Glover guilty too.

We also note that, in *Mendoza*, an expert was called to testify on the effects of intoxication. (*Mendoza, supra*, 18 Cal.4th 1114 at p. 1121.) Glover's attorney reasonably could have determined that, in order to argue that voluntary intoxication affected Glover's knowledge and intent, he would have to present an expert on the effects of crack cocaine and Seroquel. He could have concluded that this testimony and argument risked confusing the jury and distracting from Glover's primary argument that the prosecution failed to prove its case.

In sum, on this record, we conclude that Glover's trial attorney could have decided not to request a pinpoint instruction on voluntary intoxication as a rational trial tactic. Consequently, we reject Glover's claim of ineffective assistance of counsel. (See *People v. Ray, supra*, 13 Cal.4th at p. 349.)

#### ***IV. Restitution fine***

At Glover's sentencing hearing, the court ordered her to pay "a restitution fine of \$240 as required by ... Section 1202.4[, subdivision (b)]." Similarly, at Cain's

sentencing hearing, the court ordered him to pay “a restitution fine of \$240 under ... Section 1202.4[, subdivision (b)].”

Glover asserts the trial court in the present case “clearly intended to impose the minimum fine.” She contends that, because the minimum restitution fine under section 1202.4, subdivision (b)(1), was \$200 at the time of the offense, the trial court violated ex post facto prohibitions when it imposed a fine of \$240, which was the statutory minimum fine at the time of sentencing.

Glover is correct that, in December 2009, section 1202.4 specified a minimum restitution fine of \$200. (Former § 1202.4, subd. (b)(1) (Stats. 2008, ch. 468, § 1).) The statute also allowed a maximum restitution fine of \$10,000 and provided that, within these limits, the “fine shall be set at the discretion of the court and commensurate with the seriousness of the offense.” (*Ibid.*) The minimum restitution fine increased to \$240 starting on January 1, 2012. (§ 1202.4, subd. (b)(1).)

Glover is also correct that the version of section 1202.4 in effect at the time the offense was committed, not the version in effect at the time of sentencing, applies in her case. (*People v. Souza* (2012) 54 Cal.4th 90, 143; *People v. Saelee* (1995) 35 Cal.App.4th 27, 31 [increased minimum fine “cannot be applied to a defendant whose offenses were committed before the effective date of the amendment”].)

Nevertheless, we reject her claim that the imposition of a restitution fine of \$240 in this case violates the prohibition against ex post facto laws.

“Under the United States Constitution, ““any statute [1] which punishes as a crime an act previously committed, which was innocent when done; [2] which makes more burdensome the punishment for a crime, after its commission, or [3] which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.”” [Citations.] The ex post facto clause of the state Constitution is in accord. [Citation.]” (*People v. Saelee, supra*, 35

Cal.App.4th at p. 30.) “A restitution fine qualifies as punishment for purposes of the prohibition against ex post facto laws. [Citations.]” (*Id.* at pp. 30–31.)

Here, Glover was not subject to a “““more burdensome””” punishment after the commission of the crime. (*People v. Saelee, supra*, 35 Cal.App.4th at p. 30.) The restitution fine of \$240 imposed by the court was well within the permissible range (\$200-\$10,000) under the applicable statute. (Former § 1202.4, subd. (b)(1) (Stats. 2008, ch. 468, § 1).) Accordingly, the imposition of the \$240 restitution fine, by itself, does not constitute an ex post facto violation.

Glover’s argument relies on the assumption that the trial court *intended* to impose the statutory minimum and, therefore, it erred by imposing an amount greater than the applicable statutory minimum of \$200. The trial court, however, did not state an intention to impose the statutory minimum when it set the restitution fine amount, and Glover points to nothing in the record to support her assumption. On this record, we disagree with Glover’s assumption that the trial court intended to impose the statutory minimum fine, but applied the wrong version of section 1202.4. (See *People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [in appellate review, “the trial court is presumed to have known and applied the correct statutory and case law in the exercise of its official duties”].)

Since Cain challenges his restitution fine “[f]or the reasons stated in Cheri Glover’s argument,” his challenge also fails. Finally, neither Glover nor Cain objected to the amount of the restitution fine with the trial court. As a result, they have forfeited any argument that the trial court abused its discretion in setting the amount of the restitution fine. (*People v. Scott* (1994) 9 Cal.4th 331, 352–353.)

#### **V. Parole revocation fine**

At Glover’s sentencing hearing, the court imposed and suspended a parole revocation fine of \$240 under section 1202.45. At Cain’s sentencing hearing, the court

imposed and suspended a parole revocation fine of \$240 under section 1202.45 as to count 2.

Glover and Cain contend, and the Attorney General concedes, these fines are unauthorized because Glover and Cain were sentenced to life without the possibility of parole.

The applicable version of section 1202.45 provides, in relevant part: “In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount,” which “shall be suspended unless the person’s parole is revoked.” (Former § 1202.45 (Stats. 2007, ch. 302, § 15).)

However, imposition of a revocation fine is impermissible where the defendant’s sentence does not include a period of parole. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380.) Since Glover and Cain were each sentenced to life without the possibility of parole, we accept the Attorney General’s concession. “We shall therefore order the fine stricken and the judgment modified to so reflect.” (*Ibid.*)

#### ***VI. Cain’s appellate arguments applied to Glover***

Glover joins the arguments set forth in Cain’s opening brief to the extent they benefit her. We have concluded that Cain’s arguments do not entitle him to relief, and we see no benefit to Glover in considering his arguments applied to her appeal.

**DISPOSITION**

The judgments of Cain and Glover are modified to strike the parole revocation fines. As modified, the judgments are affirmed. The superior court is ordered to prepare amended abstracts of judgment for Cain and Glover and to transmit copies to the appropriate authorities.

\_\_\_\_\_  
Kane, J.

WE CONCUR:

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Levy, Acting P.J.

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Franson, J.