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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EFREN M. LEON,

Defendant and Appellant.

B230034

(Los Angeles County Super. Ct.
No. GA077653)

APPEAL from a judgment of the Superior Court of Los Angeles County, Candace J. Beason, Judge. Affirmed.

David Carico, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Efren Manuel Leon guilty in count 1 of oral copulation by use of intoxicating substance (Pen. Code, § 288a, subd. (i))¹ and in count 2 of sexual penetration by foreign object by use of intoxicating substance (§ 289, subd. (e)).² The trial court sentenced defendant to the midterm of six years in count 1 and to a consecutive term of two years as to count 2.

Defendant first argues the trial court's instructions to the jury lessened the burden on the prosecution on the issue of whether the victim was prevented from resisting the acts alleged, because the instruction are based on the erroneous reasoning in *People v. Giardino* (2000) 82 Cal.App.4th 454 (*Giardino*). Defendant also argues that the judicial construction given the phrase "prevented from resisting" by *Giardino* is unconstitutionally vague and overbroad.

We affirm the judgment.

FACTS

I. Prosecution

A. *Testimony of Millie A. and Susana R.*

On August 8, 2009, acquaintances Susana and Millie went on a girls' night out. Susana arrived at Millie's house in Bell at around 9:00 p.m. Millie testified that the women each drank an Apple Martini while at her house; Susana testified that only Millie had an Apple Martini because Susana did not like them. According to Susana, both women had a shot of Jagermeister. Susana had never had Jagermeister before that night.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² The jury failed to return a verdict in count 3, which charged attempted rape in violation of sections 664 and 261, subdivision (a)(3). Count 3 was dismissed at the time of sentencing.

The women left Millie's house at around 10:30 p.m. and drove to Pasadena in Millie's car. They parked on the third floor of a parking structure in Pasadena. Before leaving the parking structure, each of the women had a shot of Jagermeister from a bottle that Millie had in the trunk of her car.

After a short stay at a bar named "Barcelona," they walked by Club Menage, where bouncers let them enter the club without paying a cover charge or waiting in line. Club Menage had three levels—street level, a basement, and an upstairs—each with a bar and dance floor. The women ordered a shot of Jagermeister in the basement. They were not interested in dancing with men at the club. Susana had a boyfriend at the time and was not interested in meeting men. Millie and Susana danced together for 15-30 minutes and then had a second shot of Jagermeister. They danced for another 15 minutes in the basement. Both women were starting to feel drunk. Susana and Millie each drank a "Jager bomb"—a shot of Jagermeister mixed with Red Bull energy drink—while in the basement.

The women went to the upper floor of the club and danced together again. Susana and Millie both drank a second Jager bomb. Susana began to feel drunk and slur her speech. As they were dancing, Susana, who was wearing six-inch stiletto heels, began to stumble and fell to her knee. Millie became concerned because people were starting to stare at Susana. Another woman at the club became angry with Susana because the woman's boyfriend was watching Susana dance. Millie asked defendant, who was working as a security guard at the club, to tell the woman to stay away from Susana. Millie recognized defendant because she had seen him at the club about a month earlier when she was there with her boyfriend. Susana remembered seeing Millie speaking with defendant, but she "was pretty much clueless as to what was going on." Millie took Susana to a booth to sit down. A man brought over a bottle of water for her to drink. Susana remembered sitting in the booth and drinking the water, but could recall very little of what happened after that. Susana could not sit up straight and kept falling over. When Millie tried to get Susana to sit up, she flopped forward and then threw herself back.

Millie told defendant that she was leaving and asked for his assistance because Susana was passed out and Millie did not think she could get her to the car by herself. Defendant answered that he would have to talk to someone first.

Millie returned to Susana, who was lying back in the booth and looked “bad.” Defendant helped Susana get out of the booth by propping her up. Defendant put his arm around Susana’s waist and put his other hand under her armpit to hold her up. Defendant helped Susana down the stairs to the street level. Susana and defendant exited the back of the building and walked toward the parking structure, followed by Millie and another security guard. Susana was barely able to walk and needed defendant’s help to get to the parking structure. At one point, Susana collapsed and defendant carried her “like a child” in his arms. Susana appeared unconscious—her eyes were closed, her mouth was open, and her body was flaccid. Susana did not remember leaving the club, but recalled that a man wearing black who had a mustache and dark skin carried her in the parking structure.

They walked up the stairs to the third level of the parking structure. Defendant set Susana down on the hood of a car by the stairwell. She flopped forward and defendant propped her up with his hands. Millie was not sure where her car was parked at first, but then remembered that it was further up the ramp. She began to walk up the ramp with the other security guard. Defendant again picked Susana up and started to follow Millie.

As Millie was walking toward her car she could hear other voices and Susana called her name. Millie looked back and saw defendant’s head through the window of a car. Defendant looked up at Millie as if he was startled. Millie told defendant that her car was close and urged him to hurry up. Defendant looked down again.

Susana remembered being laid down on something “hard and cold,” that she briefly saw the lights in the parking structure, and that she called for Millie. She did not remember anything that happened while she was on the hood of the car.

It took several minutes for Millie to get to her car. Once she got in and backed out of her parking space, defendant carried Susana to the car. Susana was unconscious and her body was limp. Defendant put Susana in the car. Millie had to secure Susana’s seat

belt. Defendant handed Susana a business card for “Manny and Nate’s Auto Detailing and Car Wash,” which contained his name and phone number.

As Millie drove out of the parking structure, Susana began to vomit. Millie obtained a plastic bag from the trunk of her car, which Susana vomited into. Susana did not speak during the drive, which lasted approximately 25 minutes. When they arrived at Millie’s house around 2:00 a.m., Susana was still unable to walk, so Millie had to “all but carry” her inside. Susana was still vomiting. Millie put her on a mattress on the living room floor with a blanket and a bucket to vomit in. Susana did not remember getting into Millie’s car, getting sick, or going back to Millie’s house.

Susana was asleep when Millie woke up. Susana was still feeling sick when she woke up at around 9:00 a.m. She was unable to hold down any food or water.

Susana did not know she had been sexually assaulted when she left Millie’s house. Two or three days later, Detective Schuyler Sandeen of the Pasadena Police Department contacted Susana. She went to the police station to speak with the detective, who told her that she may have been sexually assaulted in the parking structure. Susana felt violated. She denied giving defendant permission to orally copulate her, put his fingers in her vagina, or otherwise sexually penetrate her vagina. She did not consent to any sexual contact with defendant. She did not make a pass at him, kiss him, or give him her phone number.

About four days after the night at the club, Millie spoke with Detective Sandeen, who requested that she come to the police station. Detective Sandeen asked Millie what happened at the club and in the parking structure. Millie identified defendant from a six-pack of photos Detective Sandeen showed her as the security guard who carried Susana. Millie had been unaware that Susana had been sexually assaulted. Millie never kissed defendant and never saw Susana kiss defendant or dance with him.

B. Other Witness Testimony

Anthony Morris worked with defendant as a security guard at Club Menage for about six months prior to the night of the charged offenses. Defendant asked Anthony to help him escort two women to the parking structure around midnight. Anthony saw defendant coming downstairs with the women and cleared a path for them to exit the club. Anthony accompanied them but did not walk close to either of the women because his girlfriend was at the club next door, and he did not want her to see him with the women. He walked behind the rest of the group. Anthony remembered that the women walked to the parking structure. He did not recall either woman stumbling or falling. Anthony saw one of the women talking to defendant. He did not see defendant and the woman touch or kiss one another. Anthony also did not recall defendant carrying either of the women to their car. Anthony followed the woman who went to get the car up the ramp. Anthony remembered hearing people in the parking structure shout, "Is she okay. Is that your girlfriend?" He heard defendant answer that they should "Mind [their] own fucking business." Defendant put the woman in the car and handed her friend a business card. Defendant never relayed to Anthony that the woman had been hitting on him or that they had kissed.

Sarah Eberhart and her friends Daniel Garcia, Heather Keefer, Valerie Moore, and Michelle Clyde also went to Club Menage that night and parked in the same parking structure as Millie and Susana. They danced until 12:30 or 1:00 a.m. and then left the club and returned to the parking structure. Sarah had not had any alcohol to drink because she was the designated driver. Her friends did drink alcohol that night.

As they were walking in the parking structure, Daniel drew attention to defendant, who was carrying a woman "like a child." The woman's body was limp and she appeared to be unconscious. The group saw defendant place the woman on the hood of a car. He positioned himself between her legs, lifted her dress, and then looked around. Defendant lowered his head to the woman's vaginal area and moved his head from side to side briefly. He appeared to be orally copulating the woman. Defendant then put his

hand between the woman's legs and moved it in and out of her vaginal area. Defendant appeared to be fondling the woman. He then unzipped his pants, stood between the woman's legs and moved his pelvis back and forth.

The group yelled at defendant to get his attention. They asked if the woman was his girlfriend and told him to stop. Defendant told them to "shut the fuck up" and mind their own business. The woman was not moving and looked like a "rag doll." Valerie tried to call the police, but her call did not go through.

Sarah observed another man and woman walking ahead of them. After about five minutes, the other woman pulled up in a car and defendant placed the woman he had been touching in the front seat. The woman's body was limp.

The group got into Daniel's car and followed the two women to tell them what they had seen. Sarah saw the woman who was driving get out of the car and walk to the trunk. Sarah tried to speak with the woman, but she ignored Sarah. Sarah flagged down Jose Chavez, a "safety ambassador," who was directing people out of the parking garage. She told him what the group had witnessed.

Jose walked to Millie's car and asked her if everything was alright. Millie responded that everything was fine. Susana looked like she was passed out. Jose asked Millie to wake her up, which she did. Jose then asked Susana if everything was fine, and she nodded her head and closed her eyes. Jose went back to the group and told Sarah that the women said everything was alright. He wrote down the license plate number of Millie's car.

Sarah drove out of the parking garage and turned the wrong way onto a one-way street. She saw a police car ahead of her and made a U-turn. The officer pulled her over. Sarah reported what she had seen in the parking garage. Detective Sandeen took statements from everyone in the car.

C. Detective Sandeen's Testimony

Detective Sandeen was working extra duty patrol at the time Sarah and her friends exited the parking structure. He observed Sarah driving the wrong way on a one-way street. Detective Sandeen spoke with Sarah and the other people in the car, who reported what they had witnessed in the parking structure.

Detective Sandeen went into Club Menage at around 2:00 a.m. and spoke with the general manager. The detective gave the general manager a description of the suspect. The general manager brought out defendant and two other security guards. Detective Sandeen told the men that he had gotten a report that a woman had been violated in the parking structure and asked if any of the men had escorted a woman into the structure. Defendant stated that he had accompanied a woman into the parking structure and that the two of them were “kissing and grabbing and messing around.” The detective then told defendant that the woman was reported to have been drunk and passed out. Defendant agreed that the girl was drunk but stated that she knew what she was doing. Defendant did not know the woman’s name and had been messing around with her “in the heat of the moment.” Detective Sandeen admonished defendant that he was supposed to be protecting the women he was escorting into the parking structure and not orally copulating them. Defendant then admitted that he had orally copulated the woman and that he had “messed up.” The detective asked defendant if he had done anything like this before, and he answered that this was the first time. The detective asked if the woman would remember the encounter, and defendant replied that he did not know. When asked if the woman was so drunk that she would not remember, defendant answered “probably” but that she knew what she was doing. Defendant stated that he had talked to the woman in the club a few times and that they had been “hooking up.”

Soon afterward, Detective Sandeen received a forwarded e-mail from the group “Block by Block,” who provided the “safety ambassadors” in Pasadena. The e-mail stated that a group of people in a car had contacted Jose to report a rape in the parking structure, and that Jose had written down the license plate number of the car that the

victim was riding in. Detective Sandeen contacted Millie and confirmed that she and Susana had been in Pasadena that night. He then contacted Susana.

Detective Sandeen interviewed Susana at the police station. He told her it had been reported that she had been sexually assaulted in the parking structure the night she went to Club Menage with Millie. He asked Susana if she had sexual contact with anyone that night, and she began to cry. No semen or DNA was collected from Susana's clothes.

D. Interview of Defendant

Detective Sandeen interviewed defendant at the police station.³ Defendant stated that he had been talking to Millie and Susana most of the night. Millie had asked him to take them to their car because some men had been following her and she was scared. Defendant walked the women to the parking structure. Susana sat on the hood of a car in the structure, and she and defendant started kissing and touching each other. Defendant admitted to touching Susana's vagina and breasts but denied that he orally copulated her. When reminded that he previously told Detective Sandeen he had engaged in oral sex with Susana, he stated, "yeah, I went down on her a little bit. Nothing big, you know." He admitted to oral copulation and digital penetration of Susana's vagina but denied having sexual intercourse with her. He said that Susana did not talk to him, but he could tell she enjoyed it. He said Susana kissed him and grabbed his penis.

Defendant first stated that Susana was walking to the parking lot and that he "was just like kind of hugging her," rather than holding her up. Detective Sandeen told defendant he had surveillance video showing defendant carrying Susana. Defendant explained he carried Susana up the parking structure stairs because her feet hurt. He said that Susana did not appear to be that drunk because she was walking on her own and talking to him.

³ A recording of the interview was played for the jury at trial.

Defendant recalled that someone in the parking structure asked what he was doing and whether Susana was his girlfriend. He replied that she was and to leave them alone.

Defendant stated to the detective that he “did wrong.” He denied that Susana was unconscious and limp, and he did not know why the witnesses would say she was. He thought she was conscious and knew what she was doing, because she was talking to him.

Defendant denied that he unzipped his pants, but after the detective told him that Susana’s underwear would be analyzed for DNA, he admitted that he did unzip his pants but did not take his penis out of his boxer shorts. He denied that he penetrated Susana’s vagina, but he admitted that his penis “probably” touched her vagina.

II. Defense

Brian Abrego, who frequented Club Menage, was at the club the night that Susana and Millie went there. He knew defendant and had seen him working on the upper floor of the club that night. He saw two women dancing together provocatively. The women refused to dance with any men in the club but did dance near defendant provocatively, with their buttocks near his crotch. Brian observed one of the women trying to kiss defendant.

Brian saw both women walk down the stairs and out the back door of the club with defendant. He walked out after them to smoke a cigarette. The three were joined by another security guard when they reached the back patio. Brian saw all four people walk toward the parking structure. He did not see either of the women fall, nor did he see defendant carry either of the women.

DISCUSSION

I. Whether the Trial Court's Instructions Prejudiced Defendant by Lessening the Burden of Proof Required of the Prosecution

A. *Instructions and Verdict*

The jury was instructed in pertinent part as follows as to counts 1 and 2:

“A person is prevented from resisting if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

“The defendant is not guilty of this crime if he actually and reasonably believed that the person was capable of consenting to [oral copulation or sexual penetration], even if the defendant's belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.” (Judicial Council of Cal. Crim. Jury Instns. (2010-2011) CALCRIM Nos. 1017 [oral copulation of an intoxicated person], 1047 [sexual penetration of an intoxicated person].)

During deliberations, the jury sent a note asking for the legal definition of consent when intoxicated. The trial court responded that the definition was contained in the instructions. By finding defendant guilty in counts 1 and 2, the jury necessarily determined that Susana was “*prevented from resisting* by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused. . . .” (§§ 288a, subd. (i), 289, subd. (e).)

B. Defendant's Argument

Defendant argues the standard CALCRIM jury instructions given by the trial court lessened the burden on the prosecution with respect to whether Susana's level of intoxication prevented her from resisting the acts alleged. The jury was instructed that Susana was "prevented from resisting" if she was not able to legally consent. (CALCRIM Nos. 1017, 1047.) To give legal consent, Susana had to have the ability "to understand and weigh the physical nature of the act[s], [their] moral character, and probable consequences." (*Ibid.*) Defendant contends the foregoing language, drawn from *Giardino*, *supra*, 82 Cal.App.4th at page 466, demands a level of reasoning and cognition greater than sections 288a, subdivision (i) and 289, subdivision (e) require. Defendant asserts that *Giardino* was wrongly decided because its interpretation of "prevented from resisting" is not supported by prior case law, legislative history, or the express language of the statute. He contends the plain meaning of "prevented from resisting" requires the victim "be so intoxicated as to be unable to offer resistance."

Alternately, defendant argues that if *Giardino* correctly defined "prevented from resisting" as lacking the capacity to give legal consent, the capacity to give legal consent does not necessitate the ability to weigh the moral dimensions of engaging in sexual activity. Defendant contends consent to sexual activity requires the capacity to make a choice and to understand "the act, its nature, and possible consequences" but not the ability to weigh and make moral judgments. Requiring the jury to determine whether the victim had the ability to weigh and make moral judgments would cause it to delve into the prohibited evidence of the victim's moral standards. Defendant argues that, as with its interpretation of "prevented from resisting," there was no support for the *Giardino* court's definition of "legal consent."

C. Standard of Review

“A trial court must instruct the jury, even without a request, on all general principles of law that are “closely and openly connected to the facts and that are necessary for the jury’s understanding of the case.” [Citation.] . . .’ [Citation.]” (*People v. Burney* (2009) 47 Cal.4th 203, 246 (*Burney*).) ““An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.’ [Citations.]” (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) The trial court may reject an instruction that incorrectly states the law, or is not supported by substantial evidence, is argumentative, duplicative, or presents a possibility of confusing the jury. (*Burney, supra*, at p. 246.)

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) “In conducting this review, we first ascertain the relevant law and then ‘determine the meaning of the instructions in this regard.’ [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court ‘fully and fairly instructed on the applicable law’ [Citation.] ““In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]” [Citation.] ‘Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ [Citation.]” (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

We evaluate instructional error as to an element of an offense for prejudice under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 22-24, to determine whether ““the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same.”” (*People v. Avila* (1995) 35 Cal.App.4th 642, 663.)

D. Analysis

Initially, we reject the Attorney General's contention that the instructional issue is forfeited by a failure to object. Section 1259 allows for appellate review of an instruction that affects the substantial rights of the accused. Moreover, the instructions in question—CALCRIM Nos. 1017 and 1047—are based on *Giardino*, which is binding authority the trial court was not free to reject. (See *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 872; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) The issue presented is a pure question of law, and had defendant objected, the trial court would have been obligated to instruct in accord with the binding language of *Giardino*.

On the merits, we disagree with defendant's criticism of *Giardino*. There have been no cases criticizing or contravening *Giardino* in the 12 years that have passed since *Giardino* was decided. To the contrary, the Court of Appeal has recently cited this specific language in *Giardino* with approval. (See *People v. Smith* (2010) 191 Cal.App.4th 199, 204-205.)

In any event, if there was instructional error as claimed by defendant, it certainly was harmless. Under the most favorable definition of "prevented from resisting" offered by defendant, i.e., that the victim "be so intoxicated as to be unable to offer resistance," there was overwhelming evidence in this case that Susana did not give actual consent and was not able to resist in any manner.

Millie testified that when the women were on the upper level of Club Menage just before leaving for the parking structure, Susana was so intoxicated that she was unable to sit up at a table without falling forward and jerking herself back. Susana was too intoxicated to walk to Millie's car and had to be carried by defendant. Millie described Susana as looking unconscious in the parking structure. She observed that Susana's body was limp, her eyes were closed, and her mouth was open. The group of five witnesses who saw defendant and Susana in the parking structure said that she looked unconscious when she was on top of the hood of the car and resembled a "rag doll." When defendant placed Susana in Millie's car she was unconscious and her body was limp. Susana

testified that she did not remember leaving the club and had only a vague memory of being carried in the parking structure. She testified that she did not consent to engage in any sexual activity with defendant and did not make a pass at him, kiss him, or dance with him. Millie testified that she never saw Susana dance with or kiss defendant. Finally, in his interview with Detective Sandeen, defendant admitted that Susana was probably so intoxicated that she would not remember the encounter. In light of the overwhelming evidence that Susana was barely conscious, if at all, we discern no reasonable possibility that the jury's verdict would have been more favorable to defendant under the statutory interpretation he suggests.

II. Whether the Definition of “Prevented from Resisting” is Unconstitutionally Vague

Defendant also argues that *Giardino*'s construction of the phrase “prevented from resisting” is unconstitutionally vague and overbroad. Defendant specifically complains that *Giardino* defined “moral character” and “probable consequences”—“the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences”—in a fashion that leaves the jury and the court guessing as to what conduct is prohibited.

A. Standard of Review

“The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution, each guarantee that no person shall be deprived of life, liberty, or property without due process of law. This constitutional command requires ‘a reasonable degree of certainty in legislation, especially in the criminal law’” (*People v. Heitzman* (1994) 9 Cal.4th 189, 199, quoting *In re Newbern* (1960) 53 Cal.2d 786, 792.)

A criminal statute is unconstitutionally vague if it does not give adequate notice to ordinary people of the prohibited conduct or if it encourages enforcement that is arbitrary and discriminatory. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) The constitution requires only reasonable certainty. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1107.) There is a strong presumption that statutes are constitutional, and a statute ““cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.”” [Citation.]” (*Ibid.*, quoting *Walker v. Superior Court* (1988) 47 Cal.3d 112, 143.)

““Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of First Amendment or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct . . . a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that “the law is impermissibly vague in all of its applications.”” [Citations.]” (*People v. Kelly* (1992) 1 Cal.4th 495, 533-534, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1201.)

B. Analysis

Defendant first contends the phrase “moral character” could be misinterpreted as permitting jurors to convict based on their personal feelings about the conduct involved rather than on the facts. A fair reading of the instructions does not support this interpretation, as the instructions do not invite jurors to consider their own morals or the morals of society in general. The victim’s personal character is not mentioned in the instructions, nor is her chastity or her virtuousness. The instructions clearly state that the jury must determine whether the victim had the *ability* to weigh the moral character of the acts given her level of intoxication. It is irrelevant whether the victim makes a good

decision or a poor one after considering the acts' morality under any given standard. What is important is that she be able to engage in the process of such a consideration. It is presumed that the jury is able to understand and adhere to the instructions given to them. (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502 (*Hernandez*).) Absent any evidence to the contrary, we presume the jury did so here and therefore did not consider the victim's morals, societal morals, or their personal morals in reaching the verdict.

Second, defendant contends the language is overbroad and infringes on privacy rights because in some cases, actual consent may not be sufficient to absolve a defendant and jurors would have to individually assess whether sexual activity while intoxicated meets a personal moral standard. This argument also fails. Although it is true that in some instances actual consent will not absolve a defendant, this would only be the case if the victim was so intoxicated that she was rendered incapable of legally consenting. The fact of intoxication alone, even if it impairs thought and significantly lowers sexual inhibitions, is not enough to find a defendant guilty. The victim must have lost her ability to exercise reasonable judgment, and the perpetrator must have either known that this was the case or reasonably should have known that it was. (See *Giardino, supra*, 82 Cal.App.4th 454 at p. 466.) Sexual conduct between two intoxicated adults who have retained the ability to legally consent is not criminalized by either statute no matter how morally offensive the conduct might be to an individual juror or society at large. The instructions do not direct jurors to look to their own moral standards or those of the victim to determine whether the victim could legally consent. Jurors need only consider whether intoxication prevented the victim from being *able* to consider the moral character of the act. It is the ability to engage in the thought process that is at issue, not the content of the issues under consideration.

Third, defendant's argument that the term "probable consequences" is so vague as to be devoid of meaning is likewise without merit. The instructions clearly state that the jury must evaluate whether the victim had the ability to *understand* and *weigh* the probable consequences of the sexual acts given her intoxication level, not discern those

probable consequences. We presume the jurors followed the plain meaning of the instruction in the absence of evidence establishing they did otherwise. (*Hernandez, supra*, 181 Cal.App.4th at p. 1502.)

Finally, defendant argues the statutes are facially void as construed by *Giardino*. Defendant contends the statute cannot be defended on the basis that defendant could have avoided its proscription by “righteous living.” Defendant points to no language in the instructions or the statutes that implicate his personal moral character, and indeed there is no such language. To be guilty of oral copulation or sexual penetration by use of intoxicating substance under section 288a, subdivision (i), and section 289, subdivision (e), the defendant must have committed the act of oral copulation or sexual penetration; the victim must have been prevented from resisting by an intoxicating substance; and her condition must have been known, or reasonably should have been known by the defendant. No assessment of whether the defendant has lived righteously is involved. We therefore hold that the statute is not facially void as defendant asserts.

Additionally, because of the overwhelming evidence detailed above that Susana was “prevented from resisting,” the jury would have found defendant guilty beyond a reasonable doubt even had the instructions not included the complained of language. Defendant suffered no prejudice.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.