APPENDIX A

Filed 12/13/19

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. NAVJOT SINGH et al., Defendants and Appellants.	H044283 (Santa Clara County Super. Ct. No. B1578227)

In March 2015, defendants Navjot Singh and Gurminder Sekhon kidnapped Jane Doe, a passenger in Singh's cab, and sexually assaulted her over the course of the day before throwing her out of the cab on the side of a busy road. A jury convicted defendants of numerous crimes based on the incident, including rape in concert, rape of an intoxicated person, rape of an unconscious person, and kidnapping to commit a sexual offense. Jurors also found true an allegation that defendants kidnapped Doe and a separate allegation that they kidnapped Doe for the purpose of committing rape. The trial court sentenced Sekhon to a 15-years-to-life prison term and Singh to a prison term of 30 years to life, consecutive to three years. On appeal, defendants raise claims of insufficiency of the evidence, evidentiary error, ineffective assistance of counsel, instructional error, and cumulative error. Sekhon also contends, and the Attorney General concedes, that the trial court erred in failing to award him presentence conduct credit. We reject defendants' challenges to their convictions, but we agree that Sekhon is

entitled to presentence conduct credit. Therefore, we affirm the judgment as to Singh and we modify the judgment as to Sekhon and affirm it as modified.

I. BACKGROUND

A. Factual Summary

1. The Events of March 21 and 22, 2015

On the evening of March 21, 2015, Jane Doe drank a bottle of wine at the Willow Glen home she shared with her boyfriend. Doe, an alcoholic, was in the midst of a relapse. She and her boyfriend fought and, sometime late in the evening, she stormed out with an unopened bottle of wine and her dog. She got in her car and drove to the end of the street, where she parked and waited for her boyfriend to call. When he didn't she decided to go to a friend's house in Los Altos. Along the way, she realized she didn't know how to get there. She pulled off Highway 280 at El Monte and parked on the side of the road.

At 3:00 a.m. the following morning, Los Altos Police Officer Ryan Langone contacted Doe because her car was obstructing the roadway. Her vehicle was parked half in the bike lane and half in the roadway in the northbound lane of El Monte, about two miles from the Highway 280 exit. Langone saw an unopened bottle of wine in the car but did not observe any indication that Doe was under the influence. She seemed tired and he thought she might have been sleeping prior to his arrival. He advised her to move her vehicle and he drove away.

Three hours later, Santa Clara County Sheriff's Deputy Ryan Omori contacted Doe because her vehicle was again parked in the roadway. At that time, her car was parked on El Monte at Highway 280.[1] The car was partially in the lane that serves as the off-ramp from northbound 280. Omori saw an open bottle of wine on the floor behind the front passenger seat; he estimated that it was 90 percent full. Doe told him she had

[1] Doe testified that she did not recall moving her vehicle between the two police contacts and that she was parked safely on the side of the road.

just opened the bottle and had a drink from it. Omori had Doe exit the vehicle. He checked her eyes for horizontal and vertical gaze nystagmus, which are indicative of intoxication. He observed neither. According to Omori, Doe's balance was steady, her speech was not slurred, her eyes were not red or watery, and she displayed no other signs of intoxication. Despite the absence of any symptoms of alcohol intoxication, Omori suggested that Doe have someone come pick her up. He made that suggestion because she was "incoherent" and "evasive" during their interaction. When Doe was unable to reach anyone on her cell phone, Omori asked for permission to call her a cab. She agreed. An orange cab arrived and Doe got in. Omori, "satisfied that she was taking [his] recommendation," left the scene.

Doe testified that the cab driver, whom she identified as Singh, would not let her bring her dog in the cab so she left the dog in her car. Doe wanted to drive herself home. Therefore, she told Singh she would pay him $10 to pull around the corner, wait for the police to leave, and return her to her car. He agreed. While they waited, Singh suggested that they go get a drink. Doe said yes. Singh drove to a CVS, which was closed, then to a Safeway. Doe went inside because she wanted to buy some food for her children, who would be visiting her that day. She also picked out a bottle of Hennessy, at Singh's request. Doe was not permitted to purchase the alcohol because she did not have her ID. She went outside and got Singh, who came into the store and bought the items. A receipt obtained from the Safeway shows the transaction was completed at 7:54 a.m. Surveillance video from the Safeway was played at trial. That video depicts Doe attempting to complete the transaction, followed by Singh and Doe together purchasing the items.

Doe and Singh returned to the cab and both sat in the backseat. Doe took a sip from the bottle of Hennessy and a sip from a bottle of Diet Coke. Doe testified that she remembered only bits and pieces of the day from that point. Her next memory was of being on her back in the backseat with Singh on top of her with his penis inside her

2. Physical, GPS, and Cell Phone Evidence

Officers found Doe's wallet in the front seat of the cab. They found a Corona bottle cap in the backseat. In the trunk they found a 12-pack of Corona with a single bottle left and some groceries.

A Garmin GPS device was found in the cab as well. Data from the Garmin device showed that the cab arrived at a Safeway in Mountain View at 7:36 a.m. on March 22, 2015. It remained in that location until 8:53 a.m., at which point it moved to a nearby Target, where it parked on the side of the building away from the entrance. According to the Garmin GPS data, the cab did not move again until 12:44 p.m. It then drove to a location near the home defendants shared on Agate Drive, and then to 100 San Lucar Court, where it arrived at 1:19 p.m. The cab stayed at the San Lucar Court location, which is in an industrial area, until 2:02 p.m., at which time the cab drove to a 7-Eleven. It remained there for a few minutes and then returned to the San Lucar Court location, where it stayed until 6:02 p.m.

Cell phone data showed that Singh called Sekhon at 12:20 p.m. and again at 1:02 p.m. and 1:05 p.m.

Aura Cardona, a Sexual Assault Response Team (SART) nurse, performed a SART exam on Doe in the early morning hours of March 23, 2015. Cardona testified that Doe had abrasions on her right leg above her knee, a bruise on her left buttock, scratches or scrapes on her abdomen, a large raised area on the right side of her temple, and an abrasion on the bridge of her nose. Doe did not have any vaginal tearing or bleeding. Cardona explained that the absence of such injuries does not rule out rape because the vaginal canal is elastic, moist, and vascular and those characteristics prevent injury.

3. DNA Evidence

Brooke Barloewen, supervising criminalist at the Santa Clara Criminal Laboratory, testified as an expert in DNA analysis. Sperm was present on a vaginal swab

taken from Doe. There were multiple contributors to the DNA on that swab and it was very likely that Doe and Singh were two of those contributors. Doe's DNA was found on penile and scrotal swabs taken from Singh. There were multiple contributors to the DNA found on a scrotal swab taken from Sekhon and it was very likely that Doe and Sekhon were two of those contributors.

4. Toxicology Evidence

The parties stipulated that Doe's blood was drawn at 8:03 p.m. on March 22 and that her blood alcohol content (BAC), at that time, was 0.17. Alice King, a criminalist and supervisor in the toxicology unit at the Santa Clara County Crime Laboratory, opined that Doe's BAC would have been 0.21 two hours earlier, at about 6:00 p.m. King testified that the "majority of . . . people" would be "staggering" with a BAC of 0.21, but that the symptoms of alcohol intoxication would be less apparent in someone with a high tolerance for alcohol.

According to King, Doe's BAC should have been zero based on her account of how much she drank in the preceding 24 hours. Bill Posey, who testified for the prosecution as an expert in forensic toxicology, likewise opined that Doe's BAC should have been zero had she consumed only the wine, Hennessy, and Corona that she testified to ingesting.

A private laboratory, Central Valley Toxicology, also analyzed Doe's blood and urine samples. Her urine contained 50 milligrams of GHB per liter. Expert forensic toxicologist Posey testified that while GHB naturally occurs in all people, the amount present in Doe's urine was too high to be consistent with natural occurrence. Posey further testified that GHB, which is not available by prescription in the United States, is an illicit recreational drug. It is a central nervous system depressant that causes memory loss, loss of muscle control, and—at high doses—unconsciousness. According to Posey, GHB "can totally incapacitate an individual in a short period of time. . . . [T]ypically,

within th[e] first three to six hours, the [person] is not going to be up moving around a lot" and will be like a "floppy baby."

The parties stipulated that Singh's blood was drawn at 11:10 p.m. on March 22; his BAC at that time was 0.10. King opined that Singh's BAC would have been 0.20 at about 6:00 pm. She said that someone with a high alcohol tolerance could drive a car with that BAC.

The parties stipulated that Sekhon's blood was drawn at 10:30 p.m. on March 22; his BAC at that time was 0.24. King opined that Sekhon's BAC would have been 0.33 at about 6:00 pm. She testified that at that BAC level most people are "severe[ly] intoxicat[ed]." However, she opined that someone with a high tolerance could function normally with a BAC of .33.

B. Procedural History

The Santa Clara County District Attorney filed a first amended information on October 5, 2016, charging both defendants with penetration by a foreign object in concert (Pen. Code, § 264.1; count 4)[2]; rape in concert (§ 264.1; count 5); rape of an intoxicated person (§ 261, subd. (a)(3); count 6); rape of an unconscious person (§ 261, subd. (a)(4); count 7); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); count 8); and kidnapping to commit a sexual offense (§ 209, subd. (b)(1); count 9). Counts 4 and 5 included kidnapping allegations (§ 667.61, subds. (a)-(e)). Counts 6 and 7 included allegations that defendants kidnapped Doe for the purpose of committing rape (§ 667.8, subd. (a)). The first amended information also charged Singh with forcible rape (§ 261, subd. (a)(2); count 1); forcible sexual penetration (§ 289, subd. (a)(1); count 2); and forcible sodomy (§ 286, subd. (c)(2)(A); count 3). Each of those three counts included kidnapping allegations (§ 667.61, subds. (a)-(e)).[3]

---

[2] All further statutory references are to the Penal Code unless otherwise noted.

[3] The first amended complaint also charged two other counts, which were later dismissed at the prosecutor's request.

The case proceeded to a joint trial in October 2016. The jury began deliberating on the morning of October 31, 2016 and returned its verdicts the following afternoon. The jury found Singh guilty of rape (count 1), rape in concert (count 5), rape of an intoxicated person (count 6), rape of an unconscious person (count 7), assault by means of force likely to produce great bodily injury (count 8), and kidnapping to commit a sexual offense (count 9). Jurors acquitted Singh of forcible sexual penetration (count 2), forcible sodomy (count 3), and penetration by a foreign object in concert (count 4). The jury found Sekhon guilty of rape in concert (count 5), rape of an intoxicated person (count 6), rape of an unconscious person (count 7), and kidnapping to commit a sexual offense (count 9). The jury acquitted Sekhon of penetration by a foreign object in concert (count 4) and assault by means of force likely to produce great bodily injury (count 8). Jurors found not true allegations associated with counts 1 and 5 that defendants kidnapped Doe and moved her in a manner that substantially increased the risk of harm to her for purposes of section 667.61, subdivisions (a) and (d). Jurors found true allegations associated with counts 1 and 5 that defendants kidnapped Doe for purposes of section 667.61, subdivisions (e)(1) and (e)(7). And jurors found true allegations associated with counts 6 and 7 that defendants kidnapped Doe for the purpose of committing rape for purposes of section 667.8.

At a December 16, 2016 sentencing hearing, the trial court sentenced Singh to an aggregate term of 30 years to life, consecutive to three years. At the same hearing, the court sentenced Sekhon to a total prison term of 15 years to life. Defendants timely appealed.

II. DISCUSSION

A. Sufficiency of the Evidence to Support the Kidnapping Enhancements and Convictions for Kidnapping to Commit a Sexual Offense

Defendants were convicted of kidnapping to commit rape, in violation of section 209, subdivision (b)(1), as charged in count 9. And the jury found true

allegations that defendants kidnapped Doe in violation of section 207, 209, or 209.5 (§ 667.61, subds. (e)(1) & (e)(7)) and that they kidnapped Doe in violation of section 207 or 209 for the purpose of committing rape (§ 667.8). Defendants argue that these convictions and true findings are not supported by sufficient evidence. In particular, they say there was insufficient evidence to support the force or fear and lack of consent elements of kidnapping. Separately, Sekhon argues that the findings that he kidnapped Doe for the purpose of committing rape (§ 667.8) are unsupported by the evidence because there is insufficient evidence that he participated in any kidnapping *before* committing rape. And Sekhon argues that the finding that he kidnapped Doe for purposes of section 667.61, subdivision (e)(1) is unsupported by substantial evidence because there is no evidence of a factual nexus between the kidnapping and the sex offense.

1. Standard of Review and Legal Principles

In evaluating sufficiency of the evidence challenges, "we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement [or offense] beyond a reasonable doubt." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.) Substantial evidence is "evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

To prove the crime of simple kidnapping in violation of section 207, subdivision (a), " 'the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance.' " (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1368.) Section 209, subdivision (b)(1)

provides that "[a]ny person who kidnaps or carries away any individual to commit . . . rape . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." That provision's use of the words "kidnaps or carries away" has been construed as incorporating the elements of section 207. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 327 (*Daniels*).)

2. There was Sufficient Evidence of the Use of Force or Fear

With respect to the force or fear element, this court held in *Daniels* that "section 209, subdivision (b)(1) is violated when a defendant takes and carries away an incapacitated person to commit rape even if the defendant uses only the force necessary to accomplish such a taking and carrying away." (*Daniels, supra*, 176 Cal.App.4th at p. 333.)

Under *Daniels*, there plainly is sufficient evidence of the force or fear element. GPS evidence established that the cab changed locations a number of times throughout the day. Eyewitness testimony and surveillance video support the inference that Doe and Singh were in the cab as it traveled around Mountain View and Sunnyvale. And eyewitness testimony, as well as GPS and cell phone evidence, support the inference that Sekhon was in the cab for most of the afternoon, including while it traveled from the location near Agate Drive to San Lucar Court, from that location to 7-Eleven and back again, and then to the location where Singh threw Doe out of the cab. Substantial evidence supports the inference that Doe was incapacitated beginning shortly after she and Singh returned to the cab from Safeway until shortly before Singh threw her out of the cab. Specifically, that inference is supported by Doe's testimony about gaps in her memory and her inability to move her arms, the toxicology evidence that GHB was found in her system, and the expert testimony about the incapacitating effects of that drug.

Defendants argue that we should decline to follow *Daniels* because, in their view, it improperly rewrote section 209 to remove the force or fear element. *Daniels* "relaxe[d] but [did] not eliminate the force requirement" in order to effectuate the purpose of

section 209 and avoid an absurd result. (*Daniels*, *supra*, 176 Cal.App.4th at p. 332.) In doing so, it relied on California Supreme Court precedent relaxing the force requirement of section 207 in cases involving infants and small children. (*Daniels*, *supra*, at pp. 330-331, discussing *In re Michele D.* (2002) 29 Cal.4th 600.) We agree with the reasoning of *Daniels* and decline to deviate from it. For the foregoing reasons, we conclude there was sufficient evidence of force or fear.

3. There was Sufficient Evidence of Lack of Consent

Defendants next contend that there was insufficient evidence that Doe did not consent to the movements. That argument is baseless. As defendants highlight, Doe willingly entered the cab, rode to Safeway, and reentered the cab. But, as discussed above, the evidence strongly supports the inference that she was incapacitated for all of the subsequent movements such that she was unable to consent to them. (*Daniels*, *supra*, 176 Cal.App.4th at p. 333.) Where " 'the victim's initial cooperation is obtained without force or the threat of force, kidnap[p]ing [nevertheless] occurs *if the accused* " '*subsequently restrains his victim's liberty by force* and compels the victim to accompany him further.' " ' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1017 (*Hovarter*).) Substantial evidence supported the conclusion that that is precisely what occurred here.

4. There was Sufficient Evidence That Sekhon Participated in Kidnapping for the Purpose of Rape

Sekhon maintains that the kidnapping for the purpose of rape enhancements (§ 667.8) attached to counts 6 and 7 are unsupported by the evidence because there is insufficient evidence that he participated in any kidnapping *before* raping Doe. According to Sekhon, the enhancement applies only if the kidnapping precedes the rape and the evidence established that he "first met Singh and [Doe] at the location where he later had intercourse with her."

In fact, the evidence strongly supports the inference that Sekhon raped Doe at a location other than where Singh first picked him up. The evidence showed that the cab left the Mountain View Target at 12:44 p.m. and drove to a location near defendants' shared residence on Agate Drive. Singh called Sekhon twice just after 1:00 p.m. From the location near defendants' home, the cab drove to an industrial area on San Lucar Court. The cab remained parked there from 1:19 p.m. until 6:02 p.m., except for a brief trip to 7-Eleven around 2:00 p.m. The foregoing evidence strongly supports the inferences that Singh drove to the location near his Agate Drive residence to pick up Sekhon, who also lived there, and then drove to the secluded San Lucar Court location to continue the sexual assault of Doe. A rational jury reasonably could have concluded that Sekhon aided in transporting an incapacitated Doe without her consent from the location near Agate Drive to the San Lucar Court location, where he then raped her. Therefore, even assuming Sekhon's construction of section 667.8 is correct his sufficiency of the evidence challenge fails.

5. Section 667.61, Subdivision (e)(1) Does Not Require a Nexus Between the Kidnapping and the Sex Offense

Sekhon says that the finding that he kidnapped Doe for purposes of section 667.61, subdivision (e)(1) is unsupported by the evidence because there is insufficient evidence that he kidnapped Doe before raping her. As discussed in section II.C.2 below, "[t]he plain language of section 667.61(e)(1) is unambiguous and certain." (*People v. Luna* (2012) 209 Cal.App.4th 460, 466 (*Luna*).) It "requires a finding only that the defendant kidnapped the victim of the sexual offense." (*Id.* at p. 464.) Therefore, the prosecution was not required to show any nexus between the crimes, including that the kidnapping preceded the rape. Moreover, as discussed above, there was substantial evidence that Sekhon kidnapped Doe before raping her. Accordingly, his sufficiency of the evidence challenge to the true finding under section 667.61, subdivision (e)(1) fails.

B. Claims of Evidentiary Error

Defendants argue that the trial court erred in excluding four pieces of evidence they sought to admit at trial. We address each in turn.

1. Legal Principles and Standard of Review

Only relevant evidence is admissible. (Evid. Code, § 350.) The Evidence Code defines "relevant evidence" broadly as "evidence . . . having *any tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210, italics added.) " '[T]he trial court has broad discretion to determine the relevance of evidence.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) A trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' " (*Hovarter, supra*, 44 Cal.4th at pp. 1007-1008.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Benavides* (2005) 35 Cal.4th 69, 88.)

"[W]e review errors in the application of the 'ordinary rules of evidence' . . . under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.] Under this standard, if a trial court erroneously excludes evidence, a defendant must show on appeal that it is reasonably probable he or she would have received a more favorable result had that evidence been admitted. [Citations.]" (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 750.)

2. Jane Doe's "Going to Get Laid" Statement

a. Background

Singh moved to introduce a statement Doe made to her boyfriend before she stormed out of the house on the Saturday night preceding the assaults—namely, that she

was "going to get laid." Singh argued that the statement was not evidence of Doe's sexual conduct, such that the rape shield law (Evidence Code section 1103) and its exception (Evidence Code section 782) did not apply, and that it was admissible even if those statutes governed. Singh maintained that the statement was relevant to Doe's credibility and state of mind. Sekhon joined the motion. The prosecutor opposed the motion, arguing orally that defendants really were trying to introduce the statement to show consent and that it would be improper to introduce the statement for that purpose. The trial court excluded the statement under Evidence Code section 1103, reasoning that "the prejudicial effect of the jury interpreting that statement as possible consent to the sexual acts outweighs the probative value of the statement for impeachment in that it would allow the jury to speculate that there was consent as opposed to merely an angry statement [made] to a boyfriend with whom she was arguing." Defendants now say that was error on the theory that the statement was not sexual conduct evidence such that Evidence Code section 1103 did not apply.

b. Additional Legal Principles

"Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions. A defendant may not introduce evidence of specific instances of the complaining witness's sexual conduct, for example, in order to prove consent by the complaining witness. (Evid. Code, § 1103, subd. (c)(1).) Such evidence may be admissible, though, when offered to attack the credibility of the complaining witness and when presented in accordance with the following procedures under section 782: (1) the defendant submits a written motion 'stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness' (*id.*, § 782, subd. (a)(1)); (2) the motion is accompanied by an affidavit, filed under seal, that contains the offer of proof

(*id.*, subd. (a)(2)); (3) '[i]f the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant' (*id.*, subd. (a)(3)); and (4) if the court, following the hearing, finds that the evidence is relevant under Evidence Code section 780 and is not inadmissible under section 352, then it may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. (*Id.*, § 782, subd. (a)(4).)" (*People v. Fontana* (2010) 49 Cal.4th 351, 362.)

This court has construed "sexual conduct, as that term is used in [Evidence Code] sections 782 and 1103 [to] encompass[] any behavior that reflects the actor's or speaker's willingness to engage in sexual activity." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334.) Thus, in *People v. Casas* (1986) 181 Cal.App.3d 889, 895, this court concluded that the victim's "statement that she offered to have sexual intercourse with [a man other than the defendant] for money . . . [fell] within the ambit of [Evidence Code] sections 782 and 1103" because it reflected "the speaker's willingness to engage in sexual intercourse."

We review issues of statutory interpretation de novo. (*People v. Tidwell* (2016) 246 Cal.App.4th 212, 216.) "A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 711.)

c. The Trial Court Did Not Err in Applying Evidence Code Sections 1103 and 782

Doe's statement that she was "going to get laid" indicated a willingness to engage in sexual activity. Therefore, the trial court was correct to apply Evidence Code sections 1103 and 782 in determining its admissibility. Defendants do not argue that the trial court abused its discretion in excluding the evidence under those statutes, so we need not reach that issue.

d. Trial Counsel Did Not Render Ineffective Assistance

Alternatively, defendants contend that trial counsel was ineffective in failing to seek admission of the "going to get laid" statement on the ground that it was relevant to whether Doe consented to sexual intercourse with them. That claim fails because defendants cannot establish either that counsel's performance was deficient or that they suffered prejudice for the reasons discussed below.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) With respect to prejudice, a defendant must show "there is a reasonable probability"—meaning "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, at p. 694.)

Defense counsel argued that the statement was relevant to "Ms. Doe's state of mind when she met Mr. Singh, her anger with [her boyfriend], and her motive to carry out her stated threat to [her boyfriend] with Mr. Singh and Mr. Sekhon." The "stated threat" was that she was "going to get laid." Therefore, defense counsel essentially

argued that the statement proved Doe consented to sex with defendants without using the word "consent."

Defense counsel's decision to characterize the evidence as relevant to credibility, not consent, was hardly deficient given the applicable law. As discussed above, Evidence Code section 1103, subdivision (c)(1) prohibits the use of evidence of the complaining witness's sexual conduct to prove consent. Evidence Code section 782 sets forth an exception to that rule for evidence of sexual conduct of the complaining witness offered to attack his or her credibility. In view of the applicable law, defense counsel was not deficient in arguing that the statement was relevant to Doe's credibility as opposed to consent. Indeed, had counsel offered the statement to prove consent and not to attack Doe's credibility, the court certainly would have excluded it under Evidence Code section 1103, subdivision (c)(1).

Regardless of how the evidence was characterized, it is clear from the record that the court understood its potential relevance to the issue of consent. The prosecutor took the position that defendants were seeking to use the statement to prove consent. And the court mentioned consent in its ruling. Therefore, defendants cannot show that they suffered any prejudice from defense counsel's failure to explicitly seek admission of the statement on the ground that it was relevant to the issue of consent.

3. Expert Testimony Regarding Alcohol-Induced Blackouts

a. Background

Defendants sought to introduce expert testimony regarding alcohol-induced blackouts. Defendants' offer of proof indicated that the expert, a psychiatrist, would testify that an alcohol-induced blackout occurs during excessive drinking or a rapid blood alcohol increase and is defined as amnesia or memory loss for all or part of a drinking episode. The expert would have further testified that a person in an alcohol-induced blackout is conscious and interacting with his or her environment but is not creating

memories. The expert would opine that Doe's account of memory gaps on the day of the alleged sexual assaults combined with her high BAC were consistent with an alcohol-induced blackout. The prosecutor opposed the request, arguing that the expert testimony should be excluded under Evidence Code section 352. The trial court excluded the expert's testimony under Evidence Code section 352.

b. Additional Legal Principles

Expert opinion testimony is admissible only if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion." (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) "[A] ruling on admissibility of [expert testimony] under Evidence Code section 352 is [likewise] reviewed under an abuse of discretion standard." (*People v. Moore* (2011) 51 Cal.4th 386, 406.) "[W]hen the proposed expert testimony rests on an assumption without any support in the trial evidence, the court . . . abuse[s] its discretion in admitting it. Such testimony has little or no probative value, bears the potential to mislead the jury into accepting the unsupported assumption and drawing from it unwarranted conclusions, and thus cannot significantly 'help the trier of fact evaluate the issues it must decide.' " (*Ibid.*)

c. Analysis

The expert's opinion that Doe was in an alcohol-induced blackout was inconsistent with the evidence, such that it had little or no probative value. As such, the trial court did not abuse its discretion in excluding the testimony.

The expert would have testified that an alcohol-induced blackout occurs during excessive drinking or a rapid blood alcohol increase. But there is no evidence that Doe

engaged in excessive drinking or drank a significant amount of alcohol in a brief period of time preceding her first memory loss, which occurred shortly after the trip into Safeway. Santa Clara County sheriff's deputy Ryan Omori testified that Doe exhibited no signs of alcohol intoxication at 6:00 a.m. Doe testified that prior to her first memory gap she drank a bottle of wine the night before and less than a glass of wine and a couple of sips of Hennessy that morning. Certainly, evidence that Doe's BAC was 0.21 at about 6:00 p.m. supports an inference that she drank more than she recalled (or admitted) at some point that day. But it does not support an inference that she was blackout drunk at 8:00 a.m. when her first memory lap occurred.

The expert also would have testified that a person experiencing a blackout may appear to engage in consensual sexual activity. But there is no evidence that Doe appeared to consent to the sexual acts. Instead, she testified that she was unable to move her arms normally, that she told Singh to get off of her, and that she slapped him in the head.

Significantly, the expert's opinion failed to account for the GHB found in Doe's system. Indeed, his proposed testimony failed to mention that evidence and it is unclear whether he considered it—and if he did not, how it would have affected his opinion.

Even assuming the trial court erred in excluding the expert's testimony, that error was harmless. As discussed above, the theory that Doe suffered from an alcohol-induced blackout and engaged in consensual sex with defendants is unsupported by the evidence. Accordingly, it is not reasonably probable that the verdicts would have been any different had the expert been permitted to testify.

4. Evidence Doe Had Falsely Accused Her Ex-Husband of Violence

a. Background

Singh moved in limine to introduce evidence that Doe had falsely accused her ex-husband of domestic violence. The prosecutor moved in limine to exclude that

evidence, arguing that it would require re-litigating the divorce and thus would be too time consuming. The trial court excluded the evidence, which defendants argue was an abuse of discretion.

b. Analysis

Defendants claim they could have established that Doe's accusations against her ex-husband were false using the ex-husband's statements, made under penalty of perjury, to that effect. They argue that, if proved false, the prior accusations were highly probative of Doe's credibility, which was a central issue at trial. The Attorney General disputes that defendants proved the falsity of the accusations, noting that the ex-husband's statements were made in the context of a contentious divorce in which both parties filed conflicting declarations. He further argues that admitting the evidence would have led to a mini-trial as to the truth or falsity of the accusations, which would have necessitated undue consumption of time.

The Attorney General has the better argument. As the parties agree, the prior accusations of violence were relevant to impeach Doe's credibility only if they were false. While the ex-husband denied the accusations under penalty of perjury, Doe apparently made the accusations in declarations filed under penalty of perjury in the divorce proceedings. Accordingly, admitting the evidence would have entailed the presentation of conflicting evidence as to the veracity of the accusations, which would have resulted in an undue consumption of time. (See *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1458 [evidence of prior rape complaints properly excluded under Evidence Code section 352 where presentation of evidence regarding the truth or falsity of the complaints would have been unduly time consuming].) Under these circumstances, we cannot say that the trial court abused its discretion in excluding the evidence.

5. *Evidence of Doe's Arrest for Being Under the Influence of Methamphetamine Three Months Before Trial*

Doe was arrested for being under the influence of methamphetamine, in violation of Health and Safety Code section 11550, in July 2016, a few months before trial. Defendants moved to impeach Doe with the incident, arguing it was relevant to her ability to perceive or recollect events, evinced moral turpitude, supported an inference that she had a bias to testify consistently with her prior statements to avoid an adverse charging decision by the prosecutor, and supported an inference that she consumed GHB voluntarily during her encounter with defendants. The prosecutor moved in limine to exclude evidence of the arrest and methamphetamine use. The prosecutor noted that, while Doe was found in a hotel room with a significant amount of methamphetamine, her male companion said the drugs were his and he had been convicted of possession for sale based on the incident. The trial court excluded the evidence, reasoning that there was insufficient evidence of moral turpitude and noting that the instant case did not involve methamphetamine.

Defendants challenge that ruling on appeal, saying it was error because Doe was aiding and abetting the possession of methamphetamine for sale, a crime of moral turpitude, and that the evidence was relevant to bias. Defendants say the exclusion of the evidence was an abuse of discretion under state law and violated their Sixth Amendment right to cross-examine the witnesses against them.

a. Factual Background

On July 8, 2016, police contacted a man who was driving Doe's car. In the car, they found loose baggies, nearly five grams of methamphetamine, and a methamphetamine pipe. The man was staying in a hotel room booked under Doe's name. Police went to the room where they found Doe, who exhibited signs of methamphetamine use and admitted using methamphetamine the day prior. When police asked Doe about the presence of narcotics for sale, she pointed to a black case, which was found to contain

more than 20 grams of methamphetamine, empty syringes, and a rubber strap. Doe was arrested for being under the influence of methamphetamine but was not charged with any crime.

b. Doe's Prior Conduct did not Involve Moral Turpitude

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn.omitted (*Clark*).) " ' "Crimes involve moral turpitude when they reveal dishonesty, a ' "general readiness to do evil," ' " [citation], or "moral laxity of some kind." [Citation.]' [Citation.]" (*People v. Bedolla* (2018) 28 Cal.App.5th 535, 551.) "Whether an offense constitutes a crime of moral turpitude is a question of law." (*People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556.)

Our Supreme Court has held that "simple possession of [a controlled substance] does not necessarily involve moral turpitude [citations], [but that] possession for sale does . . . ." (*People v. Castro* (1985) 38 Cal.3d 301, 317.) The latter involves moral turpitude because the crime evinces an "intent to corrupt others." (*Ibid.*) Thus, the distinction is that one who simply possesses a controlled substance "most likely exposes only himself to harm with his drug use, [whereas] possession for sale exposes others to this harm." (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381.)

Defendants argue that the incident involved moral turpitude on Doe's part because she aided and abetted the possession of drugs for sale, which is a crime involving moral turpitude. "In order to be guilty on a theory of aiding and abetting, a defendant must have (1) known the unlawful purpose of the perpetrator[;] (2) acted with the intent or purpose of committing, encouraging or facilitating the commission of the offense[;] and (3) by act or advice, aided, promoted, encouraged or instigated the commission of the crime. [Citations.] Factors relevant to a determination of whether defendant was guilty

of aiding and abetting include: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.]" (*People v. Singleton* (1987) 196 Cal.App.3d 488, 492.) " 'Mere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.' [Citations.]" (*People v. Pettie* (2017) 16 Cal.App.5th 23, 57.)

The record does not establish that Doe had the requisite specific intent to aid or abet the crime of possession of drugs for sale. Accordingly, the trial court did not err in concluding that her conduct did not involve moral turpitude.

c. Even if Doe's Prior Conduct Supported an Inference of Motive to Lie, its Exclusion was not Prejudicial State Law Error

"The existence or nonexistence of a bias, interest, or other motive" generally is admissible, as it is relevant to witness credibility. (Evid. Code, § 780, subd. (f).) Defendants maintain the drug arrest gave Doe a motive to tailor her testimony to aid the prosecutor and thereby avoid charges related to the incident. As noted above, we review the exclusion of impeachment evidence for abuse of discretion. (*Clark, supra*, 52 Cal.4th at p. 932.) And any error is subject to the standard of prejudice applicable to state law error set forth in *Watson*. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

Even assuming the trial court erred in excluding evidence of the drug arrest because it supported an inference of bias in favor of the prosecution, defendants fail to show they suffered prejudice. Doe was cooperating with the prosecution prior to her arrest. She reported the crimes immediately and testified at the preliminary hearing, which took place before her arrest. Defendants identify no significant inconsistencies between Doe's preliminary hearing testimony and her trial testimony. Accordingly, it is not reasonably probable that jurors would have concluded that Doe's testimony was biased and not credible had they learned of the arrest. It follows that it is not reasonably

probable that defendants would have received a more favorable result had that evidence been admitted.

d. Constitutional Error

Defendants contend the exclusion of the drug arrest violated their federal constitutional right to cross-examine Doe. " ' " '[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' [Citation.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. . . . Thus, unless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witness['s]] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]" ' [Citation.]" (*People v. Dalton* (2019) 7 Cal.5th 166, 217.)

Evidence of Doe's drug arrest would not have produced a significantly different impression of Doe's credibility. As noted above, there was no indication that she altered her account of events to be more favorable to the prosecution after the arrest. And her mere use of methamphetamine was not relevant to her credibility generally. Accordingly, defendants have not established a Sixth Amendment violation.

C. Sekhon's Claims of Instructional Error

1. Standard of Review

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record." (*People v. Dieguez* (2001) 89

Cal.App.4th 266, 276.) "We determine whether a jury instruction correctly states the law under the independent or de novo standard of review." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

"A party is entitled to a requested instruction if it is supported by substantial evidence. [Citation.] Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.] At the same time, instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]' " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049-1050.)

"Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

2. Denial of Request for Voluntary Intoxication Instruction

Sekhon's trial counsel requested that the jury be instructed with CALCRIM No. 3426 that it could consider Sekhon's voluntary intoxication in deciding whether he had the requisite knowledge to commit rape of an intoxicated person (§ 261, subd. (a)(3)) and rape of an unconscious victim (§ 261, subd. (a)(4)) as charged in counts 6 and 7. The trial court denied that request, which Sekhon claims was prejudicial error.

a. Legal Principles

Sekhon was charged in count 6 with violating section 261, subdivision (a)(3), which defines rape to include "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here [that] person is 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." As the plain words of the statute indicate, an element of that offense is that the defendant knew or reasonably

should have known that the victim was prevented from resisting by any intoxicating substance.

Sekhon was charged in count 7 with violating section 261, subdivision (a)(4), which defines rape to include "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here [that] person is at the time unconscious of the nature of the act, and this is known to the accused." Section 261, subdivision (a)(4), defines "unconscious of the nature of the act" to mean "incapable of resisting because the victim . . . [w]as unconscious or asleep," or met another of the listed conditions. Thus, an element of the offense of rape of an unconscious person is that the defendant knew that the victim was unconscious of the nature of the act.

As the parties agree, rape—including rape of an intoxicated person and rape of an unconscious person—is a general intent crime. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 70-71.) In other words, "the requisite criminal intent is the intent to do the prohibited act." (*People v. Dancy* (2002) 102 Cal.App.4th 21, 34.)

By statute, "[e]vidence 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." (§ 29.4, subd. (b).) This court recently construed that provision to mean that evidence of voluntary intoxication is admissible only when the defendant is charged with a specific intent crime. (*People v. Berg* (2018) 23 Cal.App.5th 959, 966 (*Berg*).)

b. Analysis

Sekhon acknowledges that counts 6 and 7 charged him with general intent crimes. Nevertheless, he contends that the jury should have been permitted to consider his voluntary intoxication in determining whether he knew or reasonably should have known that Doe was prevented from resisting by an intoxicating substance (for purposes of count 6) and whether he knew that Doe was unconscious of the nature of the act (for

purposes of count 7). This court rejected a similar argument as "contradicted by the plain language of section 29.4" in *Berg*. (*Berg, supra*, 23 Cal.App.5th at p. 969.) The same reasoning holds here. Accordingly, the trial court's refusal to instruct the jury that it could consider Sekhon's voluntary intoxication in connection with counts 6 and 7, which charged general intent offenses, was not error.

3. Instructions Regarding the One Strike Law Alternate Penalty Provisions

In connection with count 5 (rape in concert in violation of section 264.1), the jury found true allegations that Sekhon kidnapped the victim (§ 667.61, subd. (e)(1)) and that any person kidnapped the victim in the commission of the offense (§ 667.61, subd. (e)(7)). Sekhon contends the trial court failed to properly instruct the jury regarding those allegations.

a. Section 667.6—The One Strike Law

Section 667.61, known as the One Strike law, "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes," including rape in concert, where "the defendant has previously been convicted of one of [several] specified offenses[] or . . . the current offense was committed under one or more specified circumstances." (*People v. Mancebo* (2002) 27 Cal.4th 735, 741-742; § 667.61, subd. (c)(3).) One of the statutorily specified circumstances is that "the defendant kidnapped the victim of the present offense in violation of [s]ection 207, 209, or 209.5." (§ 667.61, subd. (e)(1).) Another is that "[t]he defendant committed [rape in concert] and, in the commission of that offense, any person" kidnapped the victim. (§ 667.61, subd. (e)(7).)

b. Instructions Regarding Section 667.61, Subdivision (e)(1)

The trial court instructed the jury with CALCRIM No. 3179 as follows: "If you find one or both of the defendants guilty of any of the crimes charged in Counts 1, 2, 3, 4, or 5 you must then decide whether for each crime the People have proved the additional allegation that the defendant kidnapped Jane Doe. [¶] . . . [¶] To decide whether the

defendant kidnapped Jane Doe, please refer to the separate instructions that I have given you on kidnapping. You must apply those instructions when you decide whether the People have proved this additional allegation. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Sekhon says the foregoing instruction was deficient in two ways. First, it did not instruct jurors that they could find the section 667.61, subdivision (e)(1) allegation true only if the kidnapping occurred before or during the sex crime. Second, it did not instruct jurors that they could find the section 667.61, subdivision (e)(1) allegation true only if the defendant intended to commit the second offense (e.g., the sex crime) at the time he committed the first offense (e.g., the kidnapping). The Attorney General responds that the instruction correctly stated the law and that, contrary to Sekhon's claims, section 667.61, subdivision (e)(1) does not require the kidnapping to precede the sex crime and does not impose an independent scienter requirement.

Courts have rejected arguments similar to Sekhon's, asserted in the context of this and other section 667.61 circumstances, as unsupported by the plain statutory language. For example, in *Luna, supra*, 209 Cal.App.4th at p. 464, the Fourth Appellate District rejected an argument that section 667.61, subdivision (e)(1) applies only where a defendant "kidnap[s] the victim *with the intent to rape* . . . ." (Italics added.) The *Luna* court reasoned that "[t]he plain language of section 667.61(e)(1) is unambiguous and certain." (*Luna, supra*, at p. 466.) It "requires a finding only that the defendant kidnapped the victim of the sexual offense." (*Id.* at p. 464; see *People v. Jones* (1997) 58 Cal.App.4th 693, 709 (*Jones*) ["from the jury's verdict finding defendant guilty of committing the charged sexual offenses and guilty of kidnapping the victims, it necessarily followed that the simple kidnapping circumstance (§ 667.61, subd. (e)(1)) applied to each such sexual offense"].)

Similarly, in *Jones*, the court concluded that section 667.61, subdivision (d)(2)—the aggravated kidnapping circumstance—does not require a finding that the defendant committed the kidnapping with the specific intent to commit the sexual offense. (*Jones*, *supra*, 58 Cal.App.4th at pp. 716-717.) The *Jones* court noted that "[n]othing in [section 667.61, subdivision (d)(2)] explicitly requires that the defendant kidnap the victim for the purpose of committing the sexual offense." (*Id.* at p. 717.)

In *People v. Kelly* (2016) 245 Cal.App.4th 1119, 1124, the Fifth Appellate District held that section 667.61, subdivision (d)(2) does not require the kidnapping to precede the sex offense. Again, the court relied on the plain language of that statute for its conclusion, stating: "Nothing in section 667.61, subdivision (d)(2) provides [that] the circumstance applies only where a defendant commits a sex offense, in or during the commission of a kidnapping." (*Kelly*, *supra*, at p. 1128.)

We find the reasoning of the foregoing cases convincing and dispositive of Sekhon's appellate contentions. "The plain language of section 667.61[, subd.](e)(1) requires a finding only that the defendant kidnapped the victim of the sexual offense." (*Luna*, *supra*, 209 Cal.App.4th at p. 464.) The statute does not require that the kidnapping precede or take place simultaneously with the sex offense. Nor does it impose any specific intent requirement. Accordingly, we conclude the trial court properly instructed the jury regarding section 667.61, subdivision (e)(1).

c. Instructions Regarding Section 667.61, Subdivision (e)(7)

As to section 667.61, subdivision (e)(7), the trial court instructed the jury as follows: "If you find both of the defendants guilty of the crimes committed IN CONCERT as charged in counts 4 or 5 you must then decide whether for each crime the People have proved the additional allegation that one of the defendants committed a simple kidnapping of Jane Doe." Defendant argues that this instruction was defective because it failed to inform jurors that he must have known of any kidnapping by Singh for section 667.61, subdivision (e)(7) to apply. Sekhon effectively concedes that the

statute does not include an express knowledge requirement. But he maintains that one must be implied for section 667.61, subdivision (e)(7) to pass constitutional muster. For that argument, he relies on the general rule that "every crime has two components: (1) an act or omission, sometimes called the actus reus; and (2) a necessary mental state, sometimes called the mens rea." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

We are not persuaded by Sekhon's argument. As the Attorney General points out, section 667.61, subdivision (e)(7) does not define a substantive offense, "but instead increases the punishment for the underlying substantive crime, here [rape in concert]." (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1298.) As our Supreme Court has explained, "enhanced penalties may be imposed absent the accused's knowledge of all the facts bringing his conduct within the prohibition of the statute." (*People v. Coria* (1999) 21 Cal.4th 868, 879.) "This is permissible because [alternative penalty provisions] do not criminalize otherwise innocent activity, since the statutes incorporate the underlying crimes, which already contain a mens rea requirement. [Citation.]" (*Id.* at p. 880.) In the context of this case, "because it is unlawful to [commit rape in concert] regardless of [whether the victim has been kidnapped], the accused, by participating in such an illegal [act], assumes the risk of the enhanced penalties even absent knowledge of the facts bringing his conduct within the [alternative penalty provisions]." (*Ibid.*)

D. Sekhon is Entitled to Presentence Conduct Credit

Sekhon contends, and the Attorney General concedes, that the trial court erred in failing to award him presentence conduct credit on the theory that his indeterminate sentence made him ineligible. We agree that Sekhon is entitled to presentence conduct credit.

Generally, a person confined prior to sentencing may earn two days of conduct credit for every two days served under section 4019. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1212.) But section 2933.1, subdivision (c) sets forth an exception to

that rule for those convicted of a violent felony within the meaning of section 667.5, subdivision (c). "[T]he maximum credit that [a person convicted of a violent felony] may . . . earn[] against a period of confinement in . . . a county jail . . . following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement . . . ." (§ 2933.1, subd. (c).) "[N]either section 2933.1 nor section 4019 contains any express provision making defendants ineligible for presentence conduct credit if they receive an indeterminate life sentence. If anything, section 2933.1 implicitly provides to the contrary, because it puts a limitation on the presentence conduct credit available to persons convicted of any of the offenses characterized as violent felonies by section 667.5, subdivision (c), several of which carry mandatory indeterminate life sentences. If defendants who receive indeterminate life sentences were thereby ineligible for any presentence conduct credit, there would be no need for a statutory provision limiting the amount of such credit available to those defendants." (*People v. Brewer* (2011) 192 Cal.App.4th 457, 462, fn. omitted.)

Sekhon was convicted of rape in concert, which is a violent felony. (§§ 667.5, subd. (c)(18).) Therefore, he is entitled to presentence conduct credits under section 2933.1. The parties agree that, as the probation report indicated, Sekhon earned 95 days of presentence conduct credit under section 2933.1. As the parties request, we shall modify the judgment as to Sekhon to award him 95 days of presentence conduct credit.

E. Cumulative Error

Defendants contend that the cumulative effect of the errors they raise was to deprive them of their due process rights. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*People v. Williams* (2009) 170 Cal.App.4th

587, 646.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) We have assumed a single error—that the trial court erred in excluding evidence of Doe's drug arrest—so there are no errors to cumulate. Thus, the claim fails.

III. DISPOSITION

The judgment as to Singh is affirmed. The judgment as to Sekhon is modified to award Sekhon 95 days of conduct credit pursuant to section 2933.1; the judgment as to Sekhon is affirmed as so modified. The trial court is directed to prepare an amended abstract of judgment as to Sekhon and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

ELIA, Acting P. J.

WE CONCUR:

MIHARA, J.

GROVER, J.

People v. Singh et al.
H044283

APPENDIX B

Court of Appeal, Sixth Appellate District - No. H044283

S260129

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

NAVJOT SINGH et al., Defendants and Appellants.

The petitions for review are denied.

CANTIL-SAKAUYE

Chief Justice