IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DANNY ALFRED FONTANA,

Defendant and Appellant.

No. S170528

First Appellate District, Division Five, No. A117588
San Francisco County Superior Court No. 192597
The Honorable Jerome T. Benson, Judge

PETITION FOR REVIEW

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RENE A. CHACON
Supervising Deputy Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General
State Bar No. 125138

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5974
Fax: (415) 703-1234
Email: Jeremy.Friedlander@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DANNY ALFRED FONTANA,** Defendant and Appellant.	No. _____

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent respectfully petitions for review of the decision of the Court of Appeal for the First Appellate District, Division Five. The opinion is attached as Exhibit A and is unpublished. It was filed on January 13, 2009. The court denied respondent's petition for rehearing on February 2, 2009, without modifying the judgment. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUE

Whether, in light of California's rape shield law (Evid. Code, § 1103), a defendant can compel the admission into evidence of a complaining witness's prior consensual sexual activity with a third party if (1) no substantial evidence shows that the prior sexual activity caused the witness's injuries and (2) the defendant denies the charged sex acts and depicts the complaining witness as a sexual aggressor?

STATEMENT OF THE CASE

A jury convicted appellant of forcible digital penetration, forcible oral copulation, and assault with intent to commit rape, digital penetration and/or oral copulation. (CT 610, 611, 617). The jury also found true an allegation that appellant used a deadly weapon, a dumbbell, in the crimes. (RT 613.) A recidivist sex offender as well as a "third-striker," appellant was sentenced to 89 years to life. (Typed opn. at p. 9.) The Court of Appeal reversed the judgment (*id.* at p. 18), finding that the trial court erroneously "excluded evidence that the victim had had consensual sexual relations with her boyfriend on the morning of the alleged sexual assault." (*Id.* at p. 1).

Uncontested evidence established that at 4:00 p.m. or later, appellant strangled and nearly killed the victim, Irene S, a 19-year-old female who stood five feet, one inch tall, weighed 105 pounds, and was a recent immigrant from the Philippines. Appellant was 47 years old, stood six feet tall, weighed 190 pounds, and was a convicted sex offender on parole. Irene worked at a store beneath the hotel where appellant lived. Knowing that Irene was looking for a laptop computer, appellant told her he was selling one and offered to show it to her in his room. Irene agreed to go with him to see the laptop there after he refused her request to bring it to the store.

A. The Competing Accounts of the Crime by Irene and Appellant

The Court of Appeal's summary of Irene's account of the attack follows:

> When they arrived at his door, appellant told Irene, "Oh, that's my room. I'm just gonna grab it." Instead, he grabbed Irene by the neck and pushed her into the room. Irene tried to scream but she felt like she could not breathe and could not hear her own voice. After appellant forced Irene into his room, he pushed her onto the bed and lay on top of her. He picked up a small metal dumbbell and held it over her, threatening to kill her if she kept shouting. Irene became quiet but appellant continued to grab her neck as he started to remove her clothes.
>
> Irene lost consciousness because she could not breathe. When she

> woke up she was at least partially naked and realized that she had urinated on the bed. Appellant was on top of her, naked. He put his fingers inside her vagina. She begged him to stop but he continued to strangle her and she lost consciousness again. When she woke up he was kissing her breasts and body and told her to "blow" him. He forced her to take his penis into her mouth and she sensed something sticky. Appellant told Irene that she had to pose for nude photographs because if she went to the police they would show that she did these things voluntarily. He instructed her to strike provocative poses and took about four or five shots. He put his fingers in her vagina a second time and she begged him to let her go. Appellant told Irene he wanted her to be his girlfriend and would walk her to school every day. He threatened to post the nude photographs on the Internet if she went to the police. Appellant eventually allowed Irene to get dressed and leave the room.

(Typed opn. at p. 3.)

Appellant testified that Irene tried to orally copulate him without his consent. He panicked and strangled her because he had a phobia of having his penis bitten. The appellate court summarized appellant's account as follows:

> Irene met appellant in the reception area of [the hotel] and they went to his room. She looked at the laptop and determined that it worked. Appellant told her $400 was a good deal, but Irene said she didn't have any money. She said she was hoping to get it as a commission when they opened the store together.[1/] Appellant said he was disappointed in her and complained that she had not yet paid him the $20 she owed him for the headset.[2/]
>
> Appellant panicked because [as a high risk sex offender on parole] he was not supposed to be alone with a woman. When she leaned back naked on the bed[,] he took off his shirt and sat beside her,[3/] but then noticed some semen "between her legs in her privates." Disgusted, he

---

1. Appellant testified that he had spoken to Irene about him taking over the store where she worked. (Typed opn. at pp. 6-7.)

2. Appellant testified that Irene had incurred such a debt to him. (Typed opn. at p. 7.)

3. Appellant testified more particularly that Irene "slid back on the bed towards the head of the bed and spread her legs and bent her knees, and I took off my shirt and sat on the side of the bed next to her." (RT 1280.)

handed her a wad of toilet paper and made her wipe herself off. He then took the toilet paper to the bathroom down the hall where he disposed of it. Her returned to his room, hoping Irene had left.

Irene was still in the room. Appellant took off his shirt and washed his hands because he was "grossed out." He retrieved a camera from his dresser and took pictures of Irene naked because he didn't want her to falsely accuse him of anything and he thought that having pictures would show he didn't do anything to her. She posed for the pictures without being asked to do so. Appellant walked to the corner of the bed with his camera and Irene started coming toward him on her hands and knees. She began to undo his belt and asked if she could have the computer now. Appellant thought she was offering to perform oral copulation and backed away.

Irene moved toward appellant again in a second attempt to orally copulate him. This time she opened his pants and pulled out his penis. He then panicked because he had a phobia of a woman biting his penis and had been terrified his whole life that it would happen. Thinking Irene was going to bite him, he took a picture and then realized that hadn't stopped her. He dropped the camera, grabbed Irene by the throat, and strangled her with both hands. He was only thinking about getting her away from his penis. He held her throat for five to six seconds and then grabbed her by the neck and threw her down hard enough to make her urinate. Irene start[ed] dressing and told appellant, "You're on parole. I'm gonna get you." He walked with her down to the street and asked her not to tell lies about him.

(Typed opn. at pp. 7-8.)

B. Medical Evidence

Irene promptly reported the incident and was taken by ambulance to the hospital. (Typed opn. at p. 4.) The opinion summarizes the prosecution's medical evidence:

When Irene arrived at the rape trauma center, she was examined and treated by nurse practitioners Johnson-Gelb and Armstrong. Irene described the attack, stating that appellant had grabbed her neck in the hallway, that he threatened to beat her with a dumbbell, that he squeezed and strangled her until she fell "asleep," that she had urinated, that he had penetrated her vagina twice with his finger, though she was unsure whether he had penetrated her vagina with his penis, that he had forced

her to put his penis in her mouth and had ejaculated, and that he had forced her to pose for pictures that he threatened to post on the Internet. A report prepared by Armstrong noted that Irene reported "forced vaginal penetration with ejaculation." [Footnote omitted.]

Irene's face, neck and scalp were covered with petechiae, or small dots that occur when capillaries are broken from the inside because of intense pressure such as that caused by strangulation. Johnson-Gelb had never seen petechiae so severe in a victim who had survived an attack. Irene's other injuries included several abrasions, bruises on her left collarbone, bruises behind the ear, a broken thumbnail with dried blood inside, tenderness to the fren[u]lum (the piece of skin that connects the tongue to the bottom of the mouth), two small lacerations inside the lower lip, blood pooling in both corners of the right eye, erythema (redness) of the right labia minora, generalized erythema and scratch marks at the posterior fourchette near the opening of the vagina, redness of the cervix[,] and an arched-shaped possible laceration of the upper part of the cervix about three millimeters long. [Footnote omitted.] A laryngoscopy revealed a congestion of blood in the throat and petechiae were discovered inside both ears all the way to the eardrums.

According to Johnson-Gelb, the possible vaginal and cervical injuries were consistent with digital penetration, which may cause more damage than penile penetration due to a finger's hardness and the sharpness of fingernails. The erythema was also consistent with non-consensual sex. The injuries to the fren[u]lum and lower lip were consistent with forcible oral copulation. Strangulation can cause involuntary urination. According to Dr. Hart, the chief medical examiner for San Francisco, Irene's injuries were consistent with strangulation, attempted resistance, sexual assault with a finger and forced oral copulation.

(Typed opn. at pp. 4-5.)

The appellate court summarized the defense evidence of Irene's physical injuries as follows:

Dr. Snyder, the medical director at the emergency room at St. Luke's hospital, examined the photograph from the speculum examination of Irene and did not see an arc lesion or possible laceration of the cervix. He believed the redness of the cervix could have been the result of an infection or the way the cervix looked in its normal condition. Similarly, the areas of redness shown in vaginal photographs were not "that impressive as an irregularity or as trauma" and were equally consistent

with someone who had not been sexually assaulted. Dr. Snyder agreed that Irene had been strangled.

(*Id.* at pp. 8-9.)

Dr. Snyder also testified that the injuries to the mouth were consistent with forced oral copulation (RT 613) but could have been produced by the strangulation (RT 606).

C. The Trial Court's Exclusion of Evidence that Irene Had Prior Consensual Vaginal Intercourse with Her Boyfriend

The prosecutor in limine moved to exclude "Irene's consensual sexual activities with her boyfriend earlier in the day of the incident, and the presence of semen in Irene's vagina." (CT 436.) Defense counsel recounted Irene's statement from the hospital sexual assault report "that on 3/5/03 [the date of the offense] she had had vaginal intercourse and that a condom was not used the first time and that a condom was used the second time." (RT 106.)[4/] Citing the rape shield law, the trial court excluded the evidence (RT 106), but told defense counsel that he could seek reconsideration in light of the evidence adduced at trial. (RT 107.)

As summarized in Part B., *ante*, both the prosecution and defense adduced medical evidence. Defense counsel then moved in writing to have evidence of Irene's prior sexual activity admitted, including semen found on a swab taken from Irene's vagina and DNA analysis ruling out appellant as a contributor of that semen. The motion referred to Irene's "statement during the rape investigation that she had intercourse 'two other times' that same day. . . ." (CT 494.) Defense counsel argued that the DNA donor might have left his DNA through digital penetration and might have sexually assaulted Irene in the half hour that it took her to get home after the charged incident. (CT 497.) Defense

---

4. The record does not include a copy of the report from the sexual assault examination.

counsel apparently assumed that the "two other times" Irene had sex referred to separate occasions (and different sex partners—one consensual, one non-consensual), rather than to two consensual sexual acts on the same occasion with the same partner. (See RT 835 [arguing that Irene said at the hospital "she had had two sexual encounters the very same day that she has testified that she was abused by [appellant]."].) The prosecutor said Irene had only one other sexual encounter, with her "partner" in the morning. (RT 837.)

The trial court considered and rejected Irene's prior sexual activity as explanatory of the possible laceration of her cervix and the redness in her vaginal canal. (RT 839.) Appearing to accept the prosecutor's position that the excluded evidence showed only consensual sex, the court reasoned that the trial evidence was "not conclusive on the lack of consent" and, thus, "the need to . . . establish that . . . she did have [prior] consensual sexual relations diminishes quite a bit." (RT 840.)

After appellant testified that he saw semen between Irene's legs (RT 1281), the defense sought reconsideration of the court' s ruling excluding the victim's third-party sexual relations. (RT 1374.) Defense counsel asserted again that Irene "had sexual relations two other times that day," and he argued that the evidence of semen from a third party in Irene's vagina "goes to [appellant's] credibility." (RT 1318.) The court disagreed, finding Irene's consensual sexual relations "irrelevant to her credibility and any other issue. . . ." (RT 1319.)

Elaborating on its ruling before the jury retired to deliberate, the court noted that Irene said at the rape treatment center "that she had sex on the same day, protected and unprotected" and that Irene told the prosecutor that "the sex she was referring to occurred in the morning." (RT 1374.) Because the sexual intercourse was "earlier in the day," the court found that it was "not specifically corroborative of the defendant's claim of visible semen in the afternoon at 4:00 o'clock." (RT 1375.) Noting that it was "not judging witness credibility," the

court added:

> [the evidence is] offered to apparently corroborate the defendant's utterly fantastic and inherently unbelievable . . . claim that the complaining witness . . . despite refusing to come up before, on her own initiative came up to the defendant's room after recent sex with [her] boyfriend and without drying herself[,] in a condition where she would be uncomfortable, wet and unappealing, where her object was apparently to trade sex for a laptop because she didn't have any money . . . she was to present herself to the defendant . . . in an obviously unappealing and unattractive condition, which would have the direct effect of defeating the very object of her visit.

(RT 1375.) The court concluded that the defense had made an insufficient showing to "require the court to exercise its discretion to allow in the testimony" (RT 1375-1376) and that excluding the evidence did not deprive the defendant of a defense (RT 1376).

After appellant's direct testimony, a juror directed a note to the court, asking how appellant knew the fluid was semen rather than "cervical fluid," which, the juror's note said, would have been "totally normal. . . ." (RT 1319.) The court's response to the note does not appear, but defense counsel addressed the idea expressed in the note in closing argument to the jury. Counsel suggested that appellant "didn't have a microscope," that what he saw "might not have been [semen]," and that "[i]t might have been a normal female secretion that gave that appearance." (RT 1464.) The court sustained the prosecutor's objection but did not tell the jury to disregard the argument. Without objection, defense counsel continued: "He didn't have a microscope. He did testify that that's what it was [i.e., semen], and that's what he thought it was." (RT 1465.)

D. The Denial of the Motion for a New Trial

Appellant moved for a new trial. The record does not include any written pleadings. The court denied the motion with respect to the forcible oral copulation count, finding that exclusion of Irene's prior sexual activity was

correct and, in any case, harmless. (PTM RT[5] 42.) With respect to the digital penetration count, the court found no error but ordered an evidentiary hearing to determine whether any error was prejudicial. (PTM RT 43.) The court indicated that the hearing would address "the morning consensual sex" and, more particularly, "a factual dispute" as to whether the consensual sex was one event, as the prosecution said, or two, as the defense said. (PTM RT 43.)

Irene testified at the hearing. (CT 727.) The court reaffirmed its ruling that there was no error. It found, in any event, "no reasonable probability [of] a result more favorable to the defendant in the absence of such error. . . ." (PTM RT 65.) The court explained that "the evidence of force and lack of consent is substantial, if not overwhelming[,]" and that "the petechiae from the point of the manual strangulation . . . is dramatic, convincing and compelling." The court found that "Irene's testimony regarding the facts of the consensual sex in the morning is unhelpful to either side." (PTM RT 65.) The transcript of the evidentiary hearing was sealed. (PTM RT 65.) The appellate court reviewed the sealed record and found nothing altering its view of the case. (Typed opn. at p. 11, fn. 5.)

REASONS FOR GRANTING THE PETITION

REVIEW IS REQUIRED TO ENSURE UNIFORMITY OF DECISION IN THE ADMINISTRATION OF THE RAPE SHIELD LAW.

Evidence Code section 1103, subdivision (c)(1), is part of California's Robbins Rape Evidence Law. (Stats. 1974, ch. 569, § 3, pp. 1388-1389.) In pertinent part, the statute provides that "in any prosecution [for specified sex offenses] . . . evidence of specific instances of the complaining witness' sexual

---

5. "PTM RT" refers to a volume of reporter's transcript entitled "POST-TRIAL MOTIONS." It covers proceedings on several dates.

conduct . . . is not admissible by the defendant in order to prove consent by the complaining witness." The purpose of the law is to shield the complaining witness from the fallacious, embarrassing, and pernicious inference that a sexually active individual is, because of "unchaste character," more likely to engage in consensual sexual activity and then to make a false accusation of sexual assault. (See *"Unchaste Character," Ideology, and the California Rape Evidence Laws* (1980) 54 So. Cal.L.Rev. 35, 54 (hereafter "Letwin") ["at a minimum, the 1974 amendment to section 1103 barred the use of character ('prior unchastity') evidence to prove the complainant's conforming conduct."]; *id.* at p. 64 [" . . . the amending provision was intended to bar only evidence that would otherwise have been permitted—sexual history to prove the victim's *character*"]; original emphasis. See also *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 ["[T]the Legislature recognized that evidence of the alleged victim's consensual sexual activities with others has little relevance to whether consent was given in a particular instance"].)

Review is necessary because the opinion, though unpublished, recognizes a wholly impermissible and unprecedented means of nullifying this state's rape shield law. The Court of Appeal produced that unfortunate result by misapplying the law in three main respects.

First, as explained in Part A., *post*, the Court of Appeal misapplied a well-recognized exception to Evidence Code section 1103's rule of exclusion—namely, that evidence of prior consensual sex is admissible to explain the complaining witness's injuries. Here, the Court of Appeal assumed that the evidence of prior sexual activity explained Irene's injuries when in fact it did not. This mistake caused the court to find constitutional error in the exclusion of irrelevant evidence.

Second, as explained in Part B., the Court of Appeal misunderstood "consent," as that term is used in the rape shield law. After noting that the

statute excludes only evidence offered by the defendant "to prove consent by the complaining witness," the court said "appellant completely denied having sex with Irene, so consent was not an issue." (Typed opn. at p. 13.) But consent was very much an issue. The defense relied on the (fiercely disputed) notion that Irene did *more* than consent: appellant said she tried to sexually assault him, causing him to react violently in self-defense. If a defendant can render consent "not an issue" by testifying that the charged sex acts simply did not occur, the rape shield law's rule of exclusion would have a huge and utterly unwarranted exception.

Third, as explained in Part C., the Court of Appeal transformed insignificant evidence into crucial evidence through a faulty harmless error analysis. The court formulated the prejudice standard incorrectly and considered only the defense evidence, rather than the entire record. Under a proper prejudice analysis, any error was harmless because the entire record conclusively shows that the result would have been the same had the evidence been admitted.

A. The Court of Appeal Incorrectly Assumed that the Excluded Evidence Explained the Victim's Injuries.

The Court of Appeal found:

> The sexual assault examination revealed injuries to Irene's mouth, genital region and cervix that, according to the experts, were consistent with a forced sexual assault. But the experts also allowed that *the injuries could have been the result of consensual conduct.* Evidence that Irene had in fact engaged in such consensual conduct supported the defense version of events and was relevant to determining whether appellant committed the acts she described.

(Typed opn. at pp. 12-13, emphasis added. See also *id.* at p. 17, fn. 7 [". . . the medical experts acknowledged that in general, Irene's non-strangulation injuries could have been the result of consensual or voluntary activities. . . ."].)

The court nowhere explained its interpretation of the experts' testimony. The opinion fails to support that interpretation with a reference to any part of

the record or to the court's own summary of the evidence. The court's interpretation is flatly incorrect.

The medical evidence (summarized above) shows that the prosecution's two medical witnesses said the injuries to Irene's mouth were consistent with forced oral copulation. The defense's witness said the injuries were consistent with forced oral copulation but could have been produced by the strangulation. The witnesses did not say or even imply that the injuries "could have been the result of consensual conduct." (Typed opn. at p. 12.) Moreover, no one suggested that Irene's prior consensual sex included *any* oral copulation (consensual or otherwise). Thus, even if (contrary to the record) consensual oral copulation could have caused the injuries to the victim's mouth, Irene's prior consensual sexual activity did not tend to explain those injuries.

The record similarly belies the Court of Appeal's interpretation of the evidence of injuries to Irene's vagina and cervix. The witnesses did not say that the possible injury to the cervix or the redness in the exterior vaginal area could have been caused by consensual sex. The prosecution witnesses said the conditions were consistent with forcible digital penetration and assault. The defense doctor said the conditions could have been normal. The only mention of consensual sex came when the defense's expert said that a report of "tenderness" (a report presumably from Irene) "could have been consensual sex or sexual assault." (RT 618-619.) At most, then, prior consensual sex might have explained only one of three *possible* injuries to the vagina and cervix and none of the *actual* injuries to the mouth. The prior sexual activity had no tendency in reason to explain Irene's actual and possible sexual injuries as a whole. Moreover, the prosecution witnesses did not mention the "tenderness" evidence, much less contend that it suggested sexual assault. A defendant in a sexual assault case may not introduce evidence of a condition in the complaining witness possibly caused by consensual sexual activity with a third

party and then bootstrap that evidence into a justification for adducing evidence of the complaining witness's sexual history. (*United States v. Richards* (8th Cir. 1997) 118 F.3d 622, 624-625.)

Taken as a whole, the evidence of prior consensual sex was irrelevant to explain the injuries to the victim. Accordingly, the appellate court erred by finding that the evidence was admissible under that theory. (See *United States v. Azure* (8th Cir. 1988) 845 F.2d 1503, 1505-1506 [where physicians testified unequivocally that victim's injuries would have been inflicted by force and would have been painful, evidence of victim's prior consensual sexual contact inadmissible].)

In a footnote, the Court of Appeal compounded its error by assuming the existence of non-existent evidence. The court wrote:

> Because the [trial] court failed to hold an in camera hearing under Evidence Code section 782, the defense was unable to present a complete record of the nature of the prior sexual conduct. Because the fault was not appellant's, and because the medical experts acknowledged that in general, Irene's non-strangulation injuries could have been the result of consensual or voluntary activities, we assume the specific sexual conduct between Irene and her boyfriend included acts that could have accounted for each of her injuries.

(Typed opn. at p. 17, fn. 7.) The second sentence is error. First, any failure to develop the record was appellant's fault. Evidence Code section 782 requires a trial court to hold an evidentiary hearing only after (A) the defense makes a written motion accompanied by an affidavit stating an offer of proof (Evid. Code, § 782, subds. (a)(1), (2)), and (B) the trial court "finds the offer of proof sufficient." (Evid. Code, § 782, subd. (a)(3).) The Court of Appeal ignored the defense's failure to make a written offer of proof stating the theories of relevance the court found meritorious. Second, the court repeated its incorrect conclusion that "the medical experts acknowledged that in general, Irene's non-strangulation injuries could have been the result of consensual or voluntary activities . . . ." Third, even if the first two parts of the court's statement were

correct, the court would not be entitled to "*assume* the specific sexual conduct between Irene and her boyfriend included acts that could have accounted for each of her injuries." (Typed opn. at p. 17, fn. 7, emphasis added.) Had the experts indeed said that consensual sexual activity could have caused the injuries, it still would not follow that Irene had engaged in the particular type of consensual activity that could have caused the injuries. For example, if the experts had said that consensual oral copulation could have caused the injuries to Irene's mouth (a premise wholly at odds with the record), it does not follow that Irene engaged in oral copulation with her boyfriend. Without authority, the appellate court took the extraordinary position that the trial court's (supposedly) erroneous failure to develop the record permits a reviewing court to assume facts that are not only unsupported by the record but may be utterly false. The record does not support the court's unexplained and unsupported conclusions that the proffered evidence was admissible to explain Irene's injuries or that undeveloped evidence can be considered proffered evidence.

Even assuming that the excluded evidence had some minimal relevance, it remained inadmissible because "its probative value [was] substantially outweighed by" the danger of undue prejudice. (Evid. Code, § 352; see *People v. Casas* (1986) 181 Cal.App.3d 889, 897 [no abuse of discretion in excluding as more prejudicial than probative proffered evidence of complaining witness's alleged prior prostitution, where defendant's account "verges on the improbable" and complaining witness was physically beaten]; see also *Michigan v. Lucas* (1991) 500 U.S. 145, 149 [in rape-shield context, as in others, trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness, based on concerns such as harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant].)

The Court of Appeal erroneously minimized the prejudicial effect of

admitting the evidence: "The sexual conduct at issue was not unduly prejudicial, involving consensual sex between an adult and her boyfriend." (Typed opn. at p. 15, fn. 6.) Unsupported by authority, this statement flies in the face of long-established state policy that admitting evidence of the sexual history of a complaining witness in a sexual assault case is inherently prejudicial because it invites the jury to make unwarranted assumptions and fallacious inferences about the character of the complaining witness. (See Letwin, *supra*, 54 So. Cal. L. Rev. at pp. 57-58 [expressing skepticism that jurors can properly evaluate the probative value of a theory that "[p]rior sexual indulgence . . . suggests a receptivity [to] . . . the activity" and, suggesting the jurors instead "will adopt unarticulated premises such as: 'She got what she deserved,'. . . ."].)

The Court of Appeal also suggested that the victim's prior sexual history with her boyfriend would not have been "unduly confusing when the jury could have been instructed on the purpose for which it was offered." (Typed opn. at p. 15, fn. 6.) But such an instruction would have only compounded the error in admitting the evidence. The Court of Appeal deemed the evidence admissible not only to explain the victim's injuries but also to corroborate appellant's testimony. As shown in the next argument, the corroboration theory would have required the jury to construct exactly the kind of fallacious, highly prejudicial character inference the rape shield law prohibits. Instead of preventing the jury from using the evidence impermissibly, the hypothesized instruction would have invited such misuse.

B. By Wrongly Concluding that "Consent Was Not an Issue," the Court of Appeal Erroneously Found the Rape Shield Law Inapplicable And the Victim's Prior Sexual Conduct Admissible to Corroborate Appellant's Testimony.

As the Court of Appeal noted (typed opn. at p. 13), a defendant charged with a sex offense may not try to prove the complaining witness's consent by

introducing specific instances of the complaining witness's sexual conduct with a person other than the defendant. (Evid. Code, § 1103, subd. (c)(1).) The court then found that "appellant completely denied having sex with Irene, so consent was not an issue." (Typed opn. at p. 13.)

The court's statement rests on the false assumption that a defendant must admit a sexual act with a complaining witness before her consent becomes "an issue." Not so. When, as here, a defendant bases his defense on the claim that the complaining witness *initiated* sexual activity with him, he is asserting that the complaining victim's behavior was inherently and, indeed, highly consensual. Likewise, the defense in such cases necessarily seeks "to prove consent by the complaining witness," and the statute applies. To conclude otherwise is to interpret "consent" irrationally—encompassing a complaining witness's willing participation in sexual activity but not the witness's aggressive pursuit of that sexual activity.

Nor can the "character evidence" rule of exclusion be avoided by finding, as the Court of Appeal did, that the victim's prior consensual sexual activity was admissible because it corroborated appellant's testimony and therefore bore on the credibility of Irene. (See typed opn. at p. 14 [the evidence in question "corroborated appellant's testimony that he had not committed the sexual acts described by Irene and that he saw semen between her legs. In a 'he-said, she-said' case such as this, evidence tending to support one party's version of events tends to disprove that put forward by the other party."]; Evid. Code, § 1103, subd. (c)(5) [evidence admissible if offered to attack the credibility of the complaining witness, as provided in section 782].) "Character evidence" made inadmissible by section 1103 does not become admissible simply because it can also be said to relate to a witness's credibility. (*People v. Steele* (1989) 210 Cal.App.3d 67, 75; see *People v. Rioz* (1984) 161 Cal.App.3d 905, 918 [Evidence Code section 782 requires defendant to attack credibility of

complaining witness in some way other than by deprecating her character]; see also *People v. Chandler*, *supra*, 56 Cal.App.4th at p. 708 ["California courts have not allowed the credibility exception . . . to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history."].)

The Court of Appeal failed to appreciate that Irene's prior consensual sex was offered to show behavior by Irene in conformity with a character trait of sexual "unchastity." In testifying that he saw semen between Irene's legs, appellant necessarily also testified as to how the semen became visible to him. He said Irene took off her clothes, spread her legs, and displayed her naked, semen-covered genitals to him. In sum, appellant asserted that Irene acted in an aggressive, even bizarre, sexual manner. The evidence of Irene's prior sexual activity bolstered appellant's testimony by suggesting that Irene had an unchaste sexual character and was acting in conformity with it by displaying herself as appellant said she did. Therefore, the evidence was exactly the kind of sexual character evidence the rape shield law makes inadmissible. (See Letwin, *supra*, 54 So.Cal.L.Rev at p. 64 [rape shield law excludes evidence of "sexual history [offered] to prove the victim's character[.]"].) Likewise, the evidence was inadmissible regardless of whether it also corroborated appellant's account or attacked Irene's credibility.

The defense corroboration theory entailed at least two other impermissible character-based inferences: (1) the fact that Irene had sex earlier in the day tended to show that she wanted to have sex again and (2) the fact that she willingly exhibited herself in a way that displayed evidence of her prior sexual intercourse tended to show that she was sexually aggressive enough to try to orally copulate appellant without his consent. Appellant's claim that Irene tried to forcibly orally copulate him was the core of the defense. Thus, the defense offered the prior-sex evidence to corroborate not just appellant's "semen sighting" but appellant's story that Irene sexually attacked him.

At a minimum, the many impermissible inferences entailed in the evidence produced a danger of prejudice that overwhelmed any legitimate use of the evidence.

The corroboration theory fails for still another reason. As with Irene's reported "tenderness," appellant's "semen sighting" constituted evidence of a condition in the complaining witness that the defense introduced. The defendant in *United States v. Richards*, *supra*, 118 F.3d 622, tried much the same tactic. The complaining witness in that case said the defendant raped her; the defendant said they had no sexual intercourse. (*Id.* at p. 623.) The prosecution's doctor testified that a white fluid was inside the complaining witness, but the prosecutor refrained from asking if it was semen. The defense established on cross-examination that it was, and the parties stipulated that there was not enough semen to determine its source. The defense then offered proof that the complaining witness had sex with other people before the altercation with the defendant. The trial court excluded that evidence but instructed the jury that the government did not contend that the defendant was the source of the semen and that the jury could not consider that evidence. (*Ibid.*) The appellate court found no error. It explained that the federal rape shield law "does not allow for the admission of such evidence when it was the defendant's decision, and not the prosecution's, to introduce the existence of the semen into evidence in the first instance. . . ." (*Id.* at pp. 623-624.) The court explained, "To permit a defendant to introduce the existence of the semen and then, as a consequence, allow him to introduce evidence of past sexual activities, would allow the rule to be short-circuited." (*Id.* at p. 624.)

In this case, the argument for exclusion is even stronger than in *Richards*. There, the parties agreed that third-party semen was present, but the court still excluded all evidence of the complaining witness' prior consensual sexual activity. Here, only the defendant asserted the visibility of third-party semen.

Acceptance of appellant's corroboration theory would give defendants in sex crimes cases a sure-fire way of introducing a complaining witness's recent history of consensual sex: a defendant would merely have to say he saw semen on the victim, just as appellant said he did. Thus, the Court of Appeal's endorsement of appellant's corroboration theory circumvents the rape shield law by providing a road map to the reintroduction in California of core sexual propensity evidence against victims. If accepted, the Court of Appeal's holding will again allow defendants in sexual assault cases to put complaining witnesses on trial through an attack on their sexual character.

C. The Opinion Below Eviscerates Federal and State Harmless Error Standards.

Finding that the trial court abused its discretion by excluding the evidence "based on a determination that appellant's version of events was incredible and unworthy of belief" (typed opn. at p. 15), the Court of Appeal held that the error violated the federal Constitution. (See *id.* at p. 16 [applying the prejudice standard of *Chapman v. California* (1967) 386 U.S. 18, 24].) The court reasoned:

> Had the jurors heard th[e] [excluded] evidence, they might have had a significantly different impression of the case. Absent the evidence that Irene had consensual sex earlier in the day, a sexual assault by appellant was the only explanation of the non-strangulation injuries. [Footnote omitted.] Moreover appellant's claim that he saw semen between Irene's legs would have likely been viewed as untruthful absent the evidence that she had engaged in sexual relations earlier in the day. [Footnote:] One juror submitted a note to the court following appellant's direct testimony that questioned his testimony on this point: "cervical fluid is the female equivalent of semen. It is clear/cloudy. How does [appellant] know the difference? Cervical fluid is the sign when a woman is most fertile. Given her age it is totally normal."

(Typed opn. at p. 17 and fn. 8.)

The court incorrectly asserted that sexual assault was the only explanation other than prior consensual sex for the non-strangulation injuries. The court

overlooked the defense expert's testimony that (1) the possible injuries to the cervix and vagina were not in fact injuries, and (2) the injuries to the mouth could have been caused by strangulation.

The court also erred in its assertion that the exclusion of the victim's prior consensual sex made the jury "likely" to "view[] as untruthful" appellant's claim that he saw semen on Irene. The juror's question does not support the court's conclusion. That question proposed an alternative explanation for what appellant said he saw—an alternative that was essentially consistent with appellant's story that Irene's sexually provocative display revealed something that repelled him. If the question showed anything, then, it showed the willingness of the questioner to accept, not reject, the basic premise of the defense. Indeed, defense counsel demonstrated the usefulness of the question to the defense when he incorporated the thrust of it into his closing argument. (*Ante*, p. 8; RT 1464-1465.)

This is not to suggest that the claimed "semen sighting" actually made sense. The Court of Appeal uncritically accepted the apparent theory that seminal fluid would remain in a recognizable state, notwithstanding that, by all accounts, Irene was wearing underpants and outer clothing in the four hours or more after she had consensual sex. Her clothing would have absorbed any semen between her legs. The court likewise accepted without question the notion that Irene would not clean herself throughout that period and would then attempt to sexually entice appellant by displaying herself in a way reliably calculated to repulse him.

The remainder of the court's prejudice analysis is even more seriously flawed. The court wrote: "The [*Chapman*] test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case. ([*People v.*] *Lewis*

[2006] 139 Cal.App.4th [874] at p. 887.)" (Typed opn. at p. 17.) The *Chapman* standard is exactly what the court said it is not: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.) To answer that question (and, for that matter, the question of prejudice under any standard), a court must consider the evidence as a whole. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ["Since *Chapman,* we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."]; *id.* at p. 684 [to determine whether the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias was harmless, a reviewing court must consider "a host of factors," including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."].)

The court ignored the evidence as a whole. It wrote, "*Whatever the likelihood* of jurors believing appellant's explanation for strangling Irene, he was convicted of specific forcible sex crimes in the face of equivocal physical evidence." (Typed opn. at p. 17. Emphasis added.) By repeating its false and unexplained assertion that the physical evidence was "equivocal," the court turned prejudice analysis inside out, from the consideration of the entire record into the blind acceptance of the defense theory of the case, "[w]hatever the likelihood" that the jurors would have credited that theory had the excluded evidence been admitted.

The court also wrote: "The evidence excluded by the trial court would have provided an alternative explanation for the injuries to Irene's vagina, cervix and

mouth, and could have raised a reasonable doubt as to the specific elements of the digital penetration and oral copulation counts." (Typed opn. at p. 17.) Even if the first part of the sentence were true (and the record shows the contrary, as explained in Part A, *ante*), it still would not show prejudice. Again, the question is not whether the defense offered an "alternative explanation," but whether, in view of the entire record, the jury would have credited that "alternative explanation" had the excluded evidence been admitted.

The court ignored the many obvious reasons why the jury would not have credited the defense "explanation" of the injuries. First, appellant's own account gave appellant no reason to strangle Irene. Appellant only had to back away from her to protect himself from the threat she supposedly posed. His purported explanation of his claimed behavior was no explanation at all. Second, his defense rested on the assertion that he had a phobia of a strange woman biting his penis, yet Nina Timm, appellant's prior sexual assault victim, testified without dispute that appellant tried to rape her at knife point and then suggested that she orally copulate him. (RT 884.) If ever appellant's supposed lifelong phobia of penis-biting would have arisen, it would have been with a female stranger he sexually assaulted. It did not. The phobia defense was not just uncorroborated but conclusively refuted. Third, as mentioned previously, it made no sense for Irene to entice appellant by presenting herself in a way that predictably would repulse him. Fourth, appellant had no reasonable explanation for his picture-taking. He said he took photos to protect himself, yet he never explained how the photos did so, much less why he hid them.[6/] Fifth, the evidence of appellant's saliva on Irene's neck (RT 787-788, 793, 817-820) refuted the defense that appellant only strangled Irene. His saliva on her

---

6. The respondent's brief at pages 22-23 summarizes the evidence of how the prosecution found the photos. The Court of Appeal's opinion does not mention this evidence.

neck showed that he kissed her as well, as she specifically said. (RT 255.) Sixth, undisputed evidence showed that Irene was reluctant to go to appellant's room, doing so only after appellant refused to bring the laptop down to the store. If, as the defense contended, Irene was planning to use sex to "pay for" the laptop, she would hardly have tried to avoid going to his room. Seventh, appellant said he refused to bring the laptop down to the store because he was on parole and feared the laptop was stolen. (RT 1268, 1343.) Yet as a convicted sex offender, he risked a far more serious parole violation by bringing a woman to his room, and he knew he was prohibited from doing so. (RT 1286.)

Eighth, in stark contrast to appellant's singularly unheralded story, Irene repeatedly gave essentially the same, reliably corroborated account. She gave it to the desk clerk at the hotel immediately after the attack, to the store owner in the store a short while later, to Irene's mother when Irene got home, to the police and the medical technicians who took her to the hospital, to the nurses who examined her at the hospital, and to the police detective who interviewed her there. She said appellant strangled her. Her condition confirmed it. She said he took photographs of her. The prosecution found the photos depicting the crime (despite appellant's best efforts to hide them). Irene said he took the photos after he strangled her. The prosecution's doctor identified petechiae, the tell-tale sign of strangulation, in one of the photos. Irene said appellant forced her to orally copulate him. The injuries to her mouth confirmed it.

The Court of Appeal viewed this as a "'he said, she said' case. . . ." (Typed opn. at p. 14.) It was anything but. Given the entire record, no rational jury could have failed to conclude that appellant's story was false, regardless of whether Irene's injuries could be explained by prior sexual behavior. Had the court applied the correct prejudice analysis, it could not have reversed the judgment.

CONCLUSION

For these reasons, review should be granted.

Dated: February 13, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RENE A. CHACON
Supervising Deputy Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

JEREMY FRIEDLANDER
Deputy Attorney General

Attorneys for Respondent

CWG:er
SF2007403512
20183672.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 7,605 words.

Dated: February 13, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

JEREMY FRIEDLANDER
Deputy Attorney General

Attorneys for Respondent

EXHIBIT A

Filed 1/13/09 P. v. Fontana CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DANNY ALFRED FONTANA,** **Defendant and Appellant.**	**A117503** **(San Francisco County Super. Ct. No. 192597)**

Following a jury trial, appellant Danny Alfred Fontana was convicted of committing sexual offenses against a young woman inside his hotel room and was sentenced to a lengthy prison term under the One Strike and Three Strikes laws. The trial court excluded evidence that the victim had had consensual sexual relations with her boyfriend on the morning of the alleged sexual assault. Because this evidence was relevant and admissible to corroborate appellant's version of events and show that injuries attributable to the assault could have been caused by the earlier consensual encounter, and because the record does not establish that this evidence was harmless beyond a reasonable doubt, we reverse.

I. FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence*

At the time of the events in this case, Irene S. was a 19-year-old who had recently immigrated from the Philippines. She lived with her parents in an apartment on Sixth Street in downtown San Francisco and was studying to become a medical assistant. Irene befriended Aslem Shaikh, who owned a discount store on Sixth Street called the Bargain Warehouse. The neighborhood was a rough one, and Sheikh was looking for someone to take over the store. Irene would sometimes help Shaikh by opening and closing the store for him, but because she was so small (five feet one inch tall, 105 pounds), she had a difficult time opening and closing the heavy security gate by herself.

Appellant lived in the Winsor Hotel (Winsor) above the Bargain Warehouse, having been paroled from prison as a high risk sex offender in 2002. He was interested in taking over the store from Sheikh so he could sell used clothing. Appellant met Irene when she was working at the store, and at Shaikh's direction, she sometimes called appellant to help her with the security gate. Appellant was nice to Irene and told her she was pretty. He asked her to go to church with him, but she refused.

At about 4:00 in the afternoon on March 5, 2003, Irene went to the Bargain Warehouse and spoke to appellant and Shaikh. Irene wanted to buy a laptop computer for school, and appellant told her he had one in his room. Irene asked him to bring it downstairs so she could look at it, but appellant did not want to do that. He left the store and went back to his room at the Winsor. Irene asked Shaikh to accompany her to appellant's room so she could look at the laptop, but he told her he had to watch the store. Irene went to the hotel by herself after calling appellant and arranging to meet him at the front counter outside the hotel manager's office.

When Irene arrived at the hotel, she walked upstairs and was buzzed into the reception area where appellant was waiting for her. The manager's son Amit Patel was working at the desk. Appellant told Patel that Irene would only be there for about five to

ten minutes. Irene said she was only going to be in the hallway. Consistent with the hotel's visitor policy, Patel had Irene leave her keys at the desk as security.

Appellant and Irene walked back toward appellant's room, which was about 40 to 50 feet away from the reception area. When they arrived at his door, appellant told Irene, "Oh, that's my room. I'm just gonna grab it." Instead, he grabbed Irene by the neck and pushed her into the room. Irene tried to scream but she felt like she could not breathe and could not hear her own voice. After appellant forced Irene into his room, he pushed her onto the bed and lay on top of her. He picked up a small metal dumbbell and held it over her, threatening to kill her if she kept shouting. Irene became quiet but appellant continued to grab her neck as he started to remove her clothes.

Irene lost consciousness because she could not breathe. When she woke up she was at least partially naked and realized that she had urinated on the bed. Appellant was on top of her, naked. He put his fingers inside her vagina. She begged him to stop but he continued to strangle her and she lost consciousness again. When she woke up he was kissing her breasts and body and told her to "blow" him. He forced her to take his penis into her mouth and she sensed something sticky. Appellant told Irene that she had to pose for nude photographs because if she went to the police they would show that she did these things voluntarily. He instructed her to strike provocative poses and took about four or five shots. He put his fingers in her vagina a second time and she begged him to let her go. Appellant told Irene he wanted her to be his girlfriend and would walk her to school every day. He threatened to post the nude photographs on the Internet if she went to the police. Appellant eventually allowed Irene to get dressed and leave the room.

Irene went to the hotel reception desk to retrieve her keys. She asked Patel for a glass of water and told him she had been raped. Patel was shocked and did not believe her, although he noticed that her voice was low and scared and her eyes were red and watery. Appellant approached the desk and asked Irene what she was doing. When she told him she was asking for a glass of water, appellant said he would buy her a bottle downstairs. He grabbed her arm and they walked downstairs together.

When they reached the street, Irene went into the Bargain Warehouse and told Shaikh that appellant had raped her. She was crying and appeared to be "totally messed up" and frightened. Her eyes were red and her face was bruised and red. Appellant looked in through the window and then left. Shaikh called Patel on the telephone and Patel joined them in the store. Shaikh and Patel told Irene to call the police, but she said she wanted to speak to her father first and Shaikh walked her part of the way home. According to Shaikh, Irene told him appellant had "raped" her or "fuck[ed]" her without a condom.

Irene arrived at home at about 5:45 in the evening, crying and upset, and told her mother appellant had raped her. Irene's mother called 911 and officers from the San Francisco Police Department responded right away. Irene was traumatized and crying, with red and prickly cheeks and bloodshot eyes. She complained of pain in her neck and was having a difficult time breathing. Irene told the officers appellant had raped her. Officer Yee rode with Irene in an ambulance to the hospital, and she related what had happened during the ride. She described the choking and the forced digital penetration, but was unable to say whether appellant had penetrated her with his penis. Irene's blood pressure was measured at 140, which was high.

When Irene arrived at the rape trauma center, she was examined and treated by nurse practitioners Johnson-Gelb and Armstrong. Irene described the attack, stating that appellant had grabbed her neck in the hallway, that he threatened to beat her with a dumbbell, that he squeezed and strangled her until she fell "asleep," that she had urinated, that he had penetrated her vagina twice with his finger, though she was unsure whether he had penetrated her vagina with his penis, that he had forced her to put his penis in her mouth and had ejaculated, and that he had forced her to pose for pictures that he threatened to post on the Internet. A report prepared by Armstrong noted that Irene reported "forced vaginal penetration with ejaculation."[1]

---

[1] Johnson-Gelb offered Irene emergency contraception because she was unsure whether appellant had ejaculated insider her.

Irene's face, neck and scalp were covered with petechiae, or small dots that occur when capillaries are broken from the inside because of intense pressure such as that caused by strangulation. Johnson-Gelb had never seen petechiae so severe in a victim who had survived an attack. Irene's other injuries included several abrasions, bruises on her left collarbone, bruises behind the ear, a broken thumbnail with dried blood inside, tenderness to the frenelum (the piece of skin that connects the tongue to the bottom of the mouth) two small lacerations inside the lower lip, blood pooling in both corners of the right eye, erythema (redness) of the right labia minora, generalized erythema and scratch marks at the posterior fourchette near the opening of the vagina, redness of the cervix and an arched-shaped possible laceration of the upper part of the cervix about three millimeters long.[2] A laryngoscopy revealed a congestion of blood in the throat and petechiae were discovered inside both ears all the way to the eardrums.

According to Johnson-Gelb, the possible vaginal and cervical injuries were consistent with digital penetration, which may cause more damage than penile penetration due to a finger's hardness and the sharpness of fingernails. The erythema was also consistent with non-consensual sex. The injuries to the frenelum and lower lip were consistent with forcible oral copulation. Strangulation can cause involuntary urination. According to Dr. Hart, the chief medical examiner for San Francisco, Irene's injuries were consistent with strangulation, attempted resistance, sexual assault with a finger and forced oral copulation.

Swabs taken from Irene's neck showed the presence of amylase, which indicates the presence of saliva. A forensic analysis of one of the swabs showed DNA consistent with two contributors—appellant and Irene. Vaginal and oral swabs were also taken but there were no matches with appellant's DNA profile.

---

[2] Because Irene had difficulty tolerating the speculum during the pelvic examination, Johnson-Gelb was unable to study the area for long and could not be certain the mark on the cervix was a laceration.

On March 6, 2003, the day after the sexual assault, appellant called Shaikh early in the morning. Shaikh asked him why he had raped Irene and appellant hung up without saying anything. Police searched appellant's room at the Winsor that same morning and discovered it to be in disarray. Among other things, they recovered a pair of eight-pound dumbbells and an empty camera case. There was no laptop computer. Appellant was arrested at the Greyhound Station in Santa Cruz on March 7, 2003, on a bus that was heading to Reno, Nevada with an intermediate stop in San Francisco. The ticket was in the name of "Dan Heart."

In May 2004, police obtained a warrant to search the trailer home of appellant's girlfriend and discovered five nude photographs of Irene.

Appellant had been convicted of assault with intent to commit rape against Nina T. in 1992. She was a customer in a mechanic's shop where he was working, and after giving her rides to and from work while her car was being repaired, he invited her into a loft above the shop. Once there, he held a knife to her throat and tried to penetrate her vagina with his penis several times. He also demanded that she give him oral sex, though he did not follow through. Eventually he started crying and let her go.

B. *Defense Case*

Appellant testified on his own behalf. He admitted that he had a propensity to commit sexual offenses. Everything Nina T. testified to in describing his 1992 offense was true. In addition to that 1992 conviction for assault with intent to commit rape, he was convicted of rape in 1975. At the time of the events in this case, he was on parole as a high risk sex offender and was subject to many conditions and restrictions. One such condition precluded him from being alone with a woman.

Shaikh introduced appellant to Irene and he sometimes helped her open and close the metal security gate at the Bargain Warehouse. Appellant thought Irene was pretty but he was not attracted to Asian women. He began speaking to her about working for him if he took the store over from Shaikh because she seemed to be very good at selling things. He told her about his criminal history because he thought she needed to know about it

before she decided to work for him. Irene owed him $20 for a hands-free phone headset and told him she was looking for a laptop computer and could pay $300 to $400.

On the morning of March 5, 2003, appellant visited a man named Rosie who had a laptop computer for sale. Rosie wanted $400 in cash for the computer and a World War II flag appellant wanted to buy. Appellant left his wallet as security and agreed to return the laptop by 6:00 p.m. if he did not have the cash. After taking the laptop to his room at the Winsor, he went to the Bargain Warehouse and spoke to Shaikh and Irene. Irene asked appellant to bring the laptop down to the store so she could look at it, but appellant did not want to do so because he thought it might be stolen and he did not want anyone to see him with property that would be a violation of his parole conditions. He told Irene she could come to his room to see it, and though she initially declined, she called him twice after he returned to his room and said she would come upstairs.

Irene met appellant in the reception area of the Winsor and they went to his room. She looked at the laptop and determined that it worked. Appellant told her $400 was a good deal, but Irene said she didn't have any money. She said she was hoping to get it as a commission when they opened the store together. Appellant said he was disappointed in her and complained that she had not yet paid him the $20 she owed him for the headset. In response, Irene said nothing but started to take off her clothes.

Appellant panicked because he was not supposed to be alone with a woman. When she leaned back naked on the bed he took off his shirt and sat beside her, but then noticed some semen "between her legs in her privates." Disgusted, he handed her a wad of toilet paper and made her wipe herself off. He then took the toilet paper to the bathroom down the hall where he disposed of it. He returned to his room, hoping Irene had left.

Irene was still in the room. Appellant took off his shirt and washed his hands because he was "grossed out." He retrieved a camera from his dresser and took pictures of Irene naked because he didn't want her to falsely accuse him of anything and he thought that having pictures would show he didn't do anything to her. She posed for the pictures without being asked to do so. Appellant walked to the corner of the bed with his

camera and Irene starting coming toward him on her hands and knees. She began to undo his belt and asked if she could have the computer now. Appellant thought she was offering to perform oral copulation and backed away.

Irene moved toward appellant again in a second attempt to orally copulate him. This time she opened his pants and pulled out his penis. He then panicked because he had a phobia of a woman biting his penis and had been terrified his whole life that it would happen. Thinking Irene was going to bite him, he took a picture and then realized that hadn't stopped her. He dropped the camera, grabbed Irene by the throat, and strangled her with both hands. He was only thinking about getting her away from his penis. He held her throat for five to six seconds and then grabbed her by the neck and threw her down hard enough to make her urinate. Irene starting dressing and told appellant, "You're on parole. I'm gonna get you." He walked with her down to the street and asked her not to tell lies about him.

Appellant returned to his room, retrieved some belongings and went downtown. He walked to Baker Beach and slept on the dunes. The next morning he telephoned Shaikh, who asked why he had raped Irene. Appellant thinks that before hanging up the phone he told Shaikh he had not raped her. He took the train to San Jose, walked along Highway 17 and ended up in Santa Cruz, where he received a call on his cell phone from the San Francisco Police Department telling him to surrender to his parole agent. He did some work for a priest in Santa Cruz so the priest would buy him a bus ticket to San Francisco, but then he panicked and exchanged the ticket for one that went on to Reno. He wanted to surrender in San Francisco and did not want to be arrested first, so he used a false name on the ticket. He was arrested while waiting for the bus to leave.

Reginald Ford, another resident of the Winsor, recalled passing appellant and Irene in the hallway of the hotel on his way to the bathroom. He saw them talking in a low conversational tone and never heard any screaming. When he returned from the bathroom about a minute later they were no longer in the hallway.

Dr. Snyder, the medical director at the emergency room at St. Luke's hospital, examined the photograph from the speculum examination of Irene and did not see an arc

lesion or possible laceration of the cervix. He believed the redness of the cervix could have been the result of an infection or the way the cervix looked in its normal condition. Similarly, the areas of redness shown in vaginal photographs were not "that impressive as an irregularity or as trauma" and were equally consistent with someone who had not been sexually assaulted. Dr. Snyder agreed that Irene had been strangled.

C. *Convictions and Sentence*

Appellant was tried before a jury and convicted of forcible digital penetration (Pen. Code, § 289, subd. (a)),[3] forcible oral copulation (§ 288a, subd. (c)(2)) and assault with intent to commit rape, digital penetration and oral copulation (§ 220).[4] The jury determined that a deadly weapon was used in the commission of each count within the meaning of section 12022.3, subdivision (a), and that appellant had used a deadly weapon and been previously convicted of a sexual offense within the meaning of the one strike law (§ 667.61, subds. (d)(1) & (e)(4)). In a bifurcated proceeding, the court determined that appellant had suffered two prior felony convictions within the meaning of the five-year serious felony enhancement under section 667, subdivision (a) and the Three Strikes law (§ 1170.12).

The court imposed a prison sentence of 75 years to life plus 14 years on the oral copulation count: 25 years to life pursuant to the One Strike law, tripled under the Three Strikes law, a ten-year determinate term for the two five-year serious felony enhancements and a four-year determinate term for the deadly weapon enhancement. Sentences on the other counts were ordered to run concurrently.

II. DISCUSSION

Appellant contends the trial court committed prejudicial error when it prevented the defense from eliciting evidence that on the morning of the alleged sexual assault,

---

[3] Further statutory references are to the Penal Code unless otherwise stated.

[4] The jury could not reach a verdict as to a second count of forcible digital penetration and a mistrial was declared on that count.

Irene had consensual sexual relations with another man. We agree. Although the evidence did not, in and of itself, affect Irene's general veracity, it did provide an alternative explanation for injuries identified during the sexual assault examination and relied upon by the prosecution as proof that a sexual assault occurred. It also tended to corroborate defense testimony that might otherwise have been unbelievable to the jury. Because the evidence was crucial to appellant's defense, we cannot conclude its exclusion was harmless beyond a reasonable doubt.

A. *Trial Court's Rulings*

As the jury learned at trial, no DNA matching appellant's was found on the vaginal swabs taken from Irene during the sexual assault examination. The defense filed a written motion seeking to introduce evidence that DNA from another man had been found on the vaginal swabs, and that Irene had told the examining nurse practitioner she had consensual sex that morning with someone other than appellant. Counsel argued in the motion that the evidence was relevant to Irene's credibility because it tended to show why she initially claimed to have been raped but later stated she was unsure whether appellant had penetrated her with his penis. Counsel also argued that the evidence established an alternative explanation for Irene's vaginal and cervical injuries.

The prosecutor opposed the motion, representing that the person with whom Irene had had consensual sex was her boyfriend. He objected to introducing any evidence concerning Irene's earlier consensual sexual encounter on the grounds that it was irrelevant and violated the public policy behind the rape shield law. (See, e.g., Evid. Code, §§ 782, 1103, subd. (c).) The court agreed with the prosecutor and excluded the evidence.

During the trial, defense counsel renewed the motion to introduce evidence of Irene's sexual conduct on the date of the alleged attack. In addition to the grounds stated in the written motion, counsel argued that the evidence was relevant to Irene's credibility because it tended to corroborate appellant's testimony that when she voluntarily removed her clothing in his room, he saw semen between her legs. The court denied the renewed

motion, concluding that Irene's prior sexual conduct was "not specifically corroborative of [appellant's] claim" when the consensual encounter occurred in the morning and appellant supposedly saw the semen late in the afternoon. When explaining its ruling, the court noted it was inherently unbelievable Irene would "on her own initiative, despite refusing to come up before . . . came up to [appellant's] room after recent sex with [her] boyfriend and without drying herself in a condition where she would be uncomfortable, wet and unappealing, where her object was apparently to trade sex for a laptop because she didn't have any money, and in achieving that object, she was to present herself to [appellant]. In that condition, she would be presenting herself to [appellant] in an obviously unappealing and unattractive condition, which would have the direct effect of defeating the very object of her visit. . . . So this is sort of equivalent to a man essentially walking around with damp jockey shorts with the object of being desirable to a woman with whom he didn't have a close relationship. . . . Most people, when they engage in voluntary sexual relations, do at some convenient time clean themselves up if it is necessary, whether it's males or females."

After the jury returned its verdict, appellant filed a motion for a new trial arguing, among other things, that the exclusion of the evidence concerning Irene's consensual sexual encounter had been erroneous and had violated his constitutional right to confront witnesses and present a defense. The trial court ordered an in camera hearing to determine whether Irene had consensual sex once or twice on the day of the attack.[5] The motion for new trial was denied.

---

[5] A sealed transcript of this in camera hearing is part of the record on appeal but no party has filed a motion requesting that it be unsealed. (See Cal. Rules of Court, rule 8.160(f).) We have reviewed the sealed record and conclude that it contains nothing that would change our analysis of the issues presented on appeal.

B. *Evidence of the Irene's Prior Sexual Conduct Was Relevant to Provide an Alternative Explanation for Her Injuries*

Appellant argues that Irene's prior consensual sexual conduct was relevant because it established another possible source of injuries to her vagina, cervix and mouth. We agree. As a number of cases from other jurisdictions recognize, federal due process requires the admission of such evidence when it would provide an alternative explanation for injuries allegedly inflicted during a sexual assault: *Neeley v. Commonwealth* (1993) 17 Va.App. 349, 358-359, 437 S.E.2d 721, 726-727 [victim's prior sexual conduct with boyfriend relevant to explain presence of hair fragment taken from cervical swab]; *United States v. Begay* (10th Cir. 1991) 937 F.2d 515, 519, 523 [evidence that child victim has been sexually abused by another person relevant to explain enlarged hymen and cervical abrasion]; *United States v. Bear Stops* (8th Cir. 1993) 997 F.2d 451, 457-458 [separate incident of sexual abuse of victim occurring during same general time period as alleged assault by defendant was relevant to explain victim's manifestation of behaviors consistent with sexual abuse and to provide alternative explanation for blood on victim's underwear]; *State v. Douglas* (Mo.App. 1990) 797 S.W.2d 532, 534-536 [fact that teenage victim had sexual intercourse with her boyfriend was relevant to explain absence of hymen in sexual assault case].

When a defendant denies a sexual assault, but the victim exhibits physical symptoms or injuries consistent with such an assault, evidence that the symptoms or injuries could have been inflicted by some event other than the charged crime is obviously relevant to the issue of guilt. (Evid. Code, § 210 ["relevant" evidence is that "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"].) In this case, appellant admitted that he strangled Irene, but denied committing the sexual acts she described. The sexual assault examination revealed injuries to Irene's mouth, genital region and cervix that, according to the experts, were consistent with a forced sexual assault. But the experts also allowed that the injuries could have been the result of consensual conduct. Evidence that Irene

had in fact engaged in such consensual conduct supported the defense version of events and was relevant to determining whether appellant committed the acts she described.

C. *The Proffered Evidence Did Not Violate the Rape Shield Law*

The trial court excluded the evidence of Irene's prior act of consensual sex because it believed the introduction of that evidence would violate California's rape-shield law, embodied in Evidence Code sections 1103 and 782. (See *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 (*Chandler*).) We agree with appellant that the rape shield law did not preclude the evidence in this case.

Under Evidence Code section 1103, subdivision (c)(1), a defendant charged with a sex offense cannot introduce opinion evidence, reputation evidence or specific instances of the complaining witness's sexual conduct with persons other than the defendant "in order to prove consent by the complaining witness." "In adopting this section the Legislature recognized that evidence of the alleged victim's consensual sexual activities with others has little relevance to whether consent was given in a particular instance." (*Chandler*, *supra*, 56 Cal.App.4th at p. 707.) Here, appellant completely denied having sexual relations with Irene, so consent was not an issue. Section 1103, subdivision (c) did not render the evidence of Irene's prior consensual sex inadmissible.

Evidence Code section 1103, subdivision (c)(5) specifically states that the rule barring evidence of the victim's sexual conduct with others to prove consent shall not be construed to make inadmissible "any evidence offered to attack the credibility of the complaining witness as provided in Section 782." Evidence Code section 782 establishes a procedure for in camera review and allows the defendant to offer evidence of the victim's sexual conduct to attack his or her credibility when that evidence is relevant to the victim's credibility under Evidence Code section 780 and its admission does not contravene the policies of Evidence Code section 352. (See *Chandler*, *supra*, 56 Cal.App.4th at pp. 707-708.)

Although the court did not hold an in camera hearing to allow the defense to develop facts about the details of Irene's prior sexual encounter, we assume for purposes

of this discussion that it involved, as the prosecution represented, consensual acts of sex between Irene and her boyfriend. This evidence was not relevant to her credibility in general, as having sex with one's boyfriend does not make one more or less likely to lie on the witness stand. (See *Chandler*, *supra*, 56 Cal.App.4th at pp. 708-709 [noting that victim's sexual history has been admitted sparingly on issue of credibility, most often in cases where sexual history involved prostitution, a crime of moral turpitude].) But the evidence was not offered to show that because Irene had had sex with her boyfriend she was more likely to lie; it was offered to establish an alternative source of the injuries attributed by prosecution experts to a sexual assault. Though such evidence would not have directly contradicted Irene's testimony or proved a character trait of dishonesty, it corroborated appellant's testimony that he had not committed the sexual acts described by Irene and that he saw semen between her legs. In a "he said, she said" case such as this, evidence tending to support one party's version of events tends to disprove that put forward by the other party. The evidence was properly offered under Evidence Code section 780, subdivision (i), which allows the jury to consider the "existence or nonexistence of any fact testified to" by the witness when assessing that witness's credibility.

The evidence of Irene's prior sexual conduct on the day of the attack was relevant to both her credibility and appellant's, and it fell outside the purpose of and policy behind the rape shield law. It should not have been excluded on that basis.

D. *Evidence Code Section 352*

Evidence Code section 352 allows the exclusion of otherwise relevant evidence when "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." While it is unclear whether the trial court actually engaged in an Evidence Code section 352 analysis, it noted that in light of Irene's strangulation injuries and the equivocal nature of the vaginal and cervical injuries, the evidence of her prior sexual conduct with her boyfriend was not very

probative. As to the defense claim that the evidence tended to corroborate appellant's testimony about seeing semen in Irene's vagina, the court essentially concluded that no reasonable woman would act in the manner described by appellant, and therefore the defense version of events was not credible. In excluding the proffered evidence about Irene's prior sexual conduct, the trial court did not appear to rely on its prejudicial nature or the possibility that it would confuse the issues or consume an undue amount of time.[6]

Although rulings regarding the relevancy of evidence and the applicability of Evidence Code section 352 are entrusted to the discretion of the trial court (*People v. Cain* (1995) 10 Cal.4th 1, 32-33), these determinations cannot be based on the court's assessment of a witness's credibility. (*Chandler*, *supra*, 56 Cal.App.4th at p. 711.) The fact that evidence is subject to contradiction or impeachment does not render it irrelevant or unduly prejudicial. (*People v. Alcala* (1992) 4 Cal.4th 742, 790-791.) Though the trial court here stated that it was "not judging witness credibility", its rulings were ultimately based on a determination that appellant's version of events was incredible and unworthy of belief. This was a matter for the jury to decide, and the trial court abused its discretion in allowing its own assessment of witness credibility to affect its rulings. (See *Chandler*, *supra*, at p. 711.)

E. *The Error Was Prejudicial*

Having concluded that the trial court abused its discretion when it excluded evidence of Irene's prior consensual sexual conduct as an alternative explanation for her injuries, we must decide whether the error was prejudicial. Appellant argues that the trial court's ruling violated the federal due process clause and deprived him of his federal

---

[6] A consideration of these factors under Evidence Code section 352 would weigh in favor of admitting the evidence in this case. The sexual conduct at issue was not unduly prejudicial, involving consensual sex between an adult and her boyfriend. It would have most likely been elicited through additional questions during the cross-examination of Irene and the experts who testified about her injuries and it would not, therefore, have consumed an inordinate amount of time. Nor would the evidence have been unduly confusing when the jury could have been instructed on the purpose for which it was offered.

constitutional right to present a defense. He therefore urges us to apply the harmless-beyond-a reasonable-doubt standard for federal constitutional error articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), under which reversal is required unless we can say there is no reasonable possibility the error contributed to the convictions in this case. (*People v. Lewis* (2006) 139 Cal.App.4th 874, 887 (*Lewis*).) The People, on the other hand, suggest we apply to less stringent standard for ordinary trial error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), which requires reversal only when it is reasonably probable the defendant would have obtained a more favorable result if the excluded evidence had been presented to the jury.

A criminal defendant has a federal constitutional right to confront witnesses and present evidence in his favor. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 674; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The exclusion of evidence critical to the defense may violate due process and deprive the defendant of his right to a fair trial. (*Chambers*, *supra*, at pp. 302-303; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) A trial court's limitation on cross-examination will violate the confrontation clause when a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680; *People v. Belmontes* (1988) 45 Cal.3d 744, 781, disapproved on other grounds in *People v. Doolin* (2009) ___ Cal.4th ___ [2009 WL 18142, *16, fn. 22].) On the other hand, when the exclusion of evidence does not impair an accused's due process right to present a defense, but represents only the exclusion of some evidence concerning that defense, it is ordinary trial error subject to review under *Watson*. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.)

We conclude that *Chapman, supra,* 386 U.S. 18, is the appropriate standard in this case. The trial court excluded all evidence concerning Irene's prior sexual conduct with her boyfriend on the date of the alleged attack. Had the jurors heard this evidence, they might have had a significantly different impression of the case. Absent the evidence that Irene had consensual sex earlier in the day, a sexual assault by appellant was the only

explanation for the non-strangulation injuries.[7] Moreover, appellant's claim that he saw semen between Irene's legs would have likely been viewed as untruthful absent the evidence that she had engaged in sexual relations earlier in the day.[8] We do not view this as a case in which the trial court's ruling was a rejection of merely "some evidence concerning the defense," such that the lesser standard of *Watson* should apply. (Compare *Fudge, supra*, 7 Cal.4th at p. 1103.)

The People argue that appellant's story was so inherently improbable as to make any error harmless. They focus on his explanation for strangling Irene, namely, "the utterly fantastic notion" that he feared she would bite his penis and overreacted. We are not persuaded.

Our task on appeal is to determine "whether the error actually contributed to the jury's verdict at hand. The test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case." (*Lewis, supra,* 139 Cal.App.4th at p. 887.) Whatever the likelihood of jurors believing appellant's explanation for strangling Irene, he was convicted of specific forcible sex crimes in the face of equivocal physical evidence. The evidence excluded by the trial court would have provided an alternative explanation for the injuries to Irene's vagina, cervix and mouth, and could have raised a reasonable doubt as to the specific elements of the digital penetration and oral copulation counts. If the

---

[7] Because the court failed to hold an in camera hearing under Evidence Code section 782, the defense was unable to present a complete record of the nature of the prior sexual conduct. Because the fault was not appellant's, and because the medical experts acknowledged that in general, Irene's non-strangulation injuries could have been the result of consensual or voluntary activities, we assume the specific sexual conduct between Irene and her boyfriend included acts that could have accounted for each of her injuries.

[8] One juror submitted a note to the court following appellant's direct testimony that questioned his testimony on this point: "Cervical fluid is the female equivalent of semen. It is clear/cloudy. How does [appellant] know the difference? Cervical fluid is the sign when a woman is most fertile. Given her age it is totally normal."

jury had a reasonable doubt as to these counts, it might also have had a reasonable doubt as to the assault with intent count, because absent proof of the underlying sexual acts, the jury might not have been convinced of appellant's sexual intent. We cannot say, beyond a reasonable doubt, that the error was harmless.

Our conclusion makes it unnecessary to address appellant's other contentions on appeal.

III. DISPOSITION

The judgment is reversed.

NEEDHAM, J.

We concur.

JONES, P. J.

DONDERO, J.*

* Judge of the Superior Court of San Francisco City and County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Fontana*** **No.: S_____**
(Court of Appeal No.: **A117503**)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 13, 2009, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Alan Dressler
Attorney at Law
400 Montgomery Street, Suite 2000
San Francisco, CA 94104
(2 copies)

San Francisco County Superior Court
Hall of Justice
Attn: Clerk of the Superior Court
850 Bryant Street
San Francisco, CA 94103

The Honorable Kamala D. Harris
District Attorney
San Francisco County District Attorney's Office
850 Bryant Street, Room 325
San Francisco, CA 94103

First District Appellate Project
Attn: Executive Director
730 Harrison St., Room 201
San Francisco, CA 94107

Clerk, California Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 13, 2009, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

20181239.wpd