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.

Case No. S170528

First Appellate District, Division Five Case No. A117503
San Francisco County Superior Court Case No. 192597
The Honorable Jerome T. Benson, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

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?

INTRODUCTION

We ask this Court to enforce the rule in sexual assault prosecutions that a defendant may not introduce evidence of the complaining witness's sexual history in order to prove consent. (Evid. Code, § 1103, subd. (c)(1).) Here, the trial court properly excluded the complaining witness's prior consensual sexual activity with a third party earlier on the day of the charged crimes. Contrary to the decision of the Court of Appeal, the witness's consensual sexual conduct did not explain her injuries. Nor was her consensual sexual activity admissible on a theory that consent was not an issue because the defendant testified that the charged sexual acts did not occur. Moreover, analysis of the record under established legal principles shows that any error in the trial court's exclusion of the evidence was harmless. Accordingly, the trial court judgment should be reinstated.

STATEMENT OF THE CASE AND FACTS

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 and "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 the complaining witness's consensual sexual relations with her boyfriend on the morning of the alleged sexual assault. (*Id.* at p. 1).

This Court granted respondent's petition for review.

A. The Evidence at Trial

At 4:00 p.m. or later on the date charged, appellant strangled and nearly killed Irene S. Irene was 19 years old, 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 had one for sale and would show it to her in his room. Irene agreed to accompany him to see the laptop there after he refused her request to bring it to the store.

1. The competing accounts of the crime by Irene and appellant

The Court of Appeal summarized Irene's account of the attack:

> 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 handed her a wad of toilet paper and made her wipe herself off. He then took the toilet paper to

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[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.)

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 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.)

2. 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 Court of Appeal 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).[4]

B. The Trial Court Excludes Evidence that Irene Had Prior Consensual Vaginal Intercourse with Her Boyfriend on the Morning of the Assault.

A vaginal swab taken from Irene contained semen that was not appellant's. (CT 408.) The prosecutor moved in limine 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.)[5] Defense counsel continued:

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[4] In the argument below, we recount in greater detail the testimony of the prosecution witnesses and the defense witness about the injuries to Irene's vagina and cervix.

[5] The record does not include the sexual assault examination report containing Irene's statement of this earlier sexual activity. It became clear eventually, as detailed in the text, that her statement was a reference to two instances of penile-vaginal sexual intercourse with her boyfriend on the same occasion during the morning hours before the charged incident.

> If the second time is Mr. Fontana, which is a reasonable inference, and I'm able to hold her to that, if permitted to complete cross-examination, then that's totally at variance to her other statements that "he f—d me without a condom and I might get AIDS."

(RT 106-107.)

Citing the rape shield law, the trial court excluded the evidence (RT 106) but authorized defense counsel to seek reconsideration in light of the evidence adduced at trial. (RT 107.)

After the prosecution and defense introduced medical evidence at trial, defense counsel, by written motion, offered evidence of Irene's prior sexual activity, including the vaginal semen swab and DNA analysis excluding appellant as a donor. The motion referenced Irene's "statement during the rape investigation that she had intercourse 'two other times' that same day. . . ." (CT 494, 503.) Defense counsel argued that the donor might have left his DNA through digital penetration and might have sexually assaulted Irene in the half hour between the charged incident and her arrival home. (CT 497, 503-504.)[6] In contrast to his earlier position, defense counsel apparently assumed that the "two other times" Irene had sex involved separate occasions and different sex partners—one consensual before the charged assault and one non-consensual afterward—rather than two consensual sexual acts on the same occasion, before the assault, with the same partner. (See RT 835 [defense counsel argues 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 that Irene had only one other sexual encounter, with her "partner" in the morning. (RT 837.) Defense counsel did not indicate that Irene's prior

[6] The defense also argued again that the absence of appellant's semen showed that Irene did not tell the truth when she said "'he f—d me without a condom. . . .'" (CT 498, 504.)

consensual sex could explain Irene's non-strangulation injuries, a theory of relevance the defense adopted only later, in moving for a new trial.

Although the record is less than clear, the trial court apparently accepted the prosecution's position that Irene's statement concerned one episode of consensual sex before the assault. On its own initiative, the trial court considered whether Irene's other sexual activity was admissible to explain the possible laceration of the cervix and the redness in Irene's vaginal canal. (RT 839.) The court said that such an explanation could have had "compelling force" (RT 839) if there had not been "all of that other evidence" of force—the evidence of strangulation. (RT 839.) The court found that the evidence of the condition of Irene's genital area was "not conclusive on the lack of consent" and "not very strong against [the defendant]," and "therefore, the need to . . . establish that . . . she did have [prior] consensual sexual relations, diminishes quite a bit." (RT 840.) In sum, the court reasoned that the defense had no compelling need to provide an innocent explanation for the condition of Irene's genitalia because such an explanation would not negate the more powerful evidence of sexual assault—the strangulation. Defense counsel did not assert that appellant would admit to strangling Irene and, therefore, that the defense could distinguish between (1) Irene's injuries caused by an assault that appellant would admit and (2) Irene's injuries caused by a sexual assault that appellant would deny.

Before the defense DNA expert testified, the prosecutor told the court that the defense expert's examination of Irene's underpants may have found amylase and that the "limited profile" from it was the same as that of the person whose semen was found in Irene's vagina. (RT 1034.) Defense counsel argued that the defense should "be able to go into that" because the saliva in the underpants "specifically deals with a kind of sexual activity that [Irene] did not testify about and did not claim happened, and therefore,

it goes directly to her credibility." (RT 1035.) The trial court disagreed and found the evidence "consistent with what we know her testimony is regarding her boyfriend. . . ." (RT 1035-1036.) It concluded: "I'm making the same ruling on this as I did in regards to the DNA and the semen. [¶] No one mentions the fact that there's evidence that she had consensual relations with another person in this trial." (RT 1036.)

Defense counsel stated that the defense expert also found sperm on Irene's underpants. (RT 1037.) Without saying who the donor might have been, defense counsel argued that the evidence was relevant to show that the defense laboratory did "a better job" than the prosecutor's laboratory, which had not found sperm on the underpants. (RT 1038.) The trial court excluded the evidence. (RT 1038.)

After appellant testified that he saw semen between Irene's legs (RT 1281), a juror (or an alternate juror) directed a note to the court, asking how appellant knew the substance was semen rather than "cervical fluid," which, the note said, would have been "totally normal. . . ." (RT 1319.) The court's response to the note (if any) does not appear in the record.

The defense sought reconsideration of the court's ruling excluding Irene's prior sexual activity. (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.)

Evidently tracking the idea suggested by the juror's note about "cervical fluid," defense counsel told the jury in closing argument 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.)

Before the jury deliberated, the court elaborated on its ruling excluding Irene's prior consensual sex. The court noted that at the rape treatment center Irene said "she had sex on the same day, protected and unprotected," and that Irene told the prosecutor "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 reasoned that the proffered 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).

C. The Trial Court Denies the Defense Motion for a New Trial.

The defense moved for a new trial, arguing that "evidence that Irene had intercourse twice on the day of the alleged assault . . . was relevant to

establish that someone else caused the injuries relied on by the prosecution to establish the offenses of digital penetration and oral copulation. . . ." (CT 640.)[7] Appellant characterized the excluded evidence as showing "the fact that Irene had had sex twice with another individual shortly before going to Fontana's room. . . ." (CT 675.)

At the hearing on the new trial motion, counsel referred to the evidence as "Irene's prior consensual sex with her boyfriend. . . ." (PTM RT 9)[8] and said "it could have been two times in the afternoon." (PTM RT 17.) The prosecutor responded that Irene said "that she had sexual activity with her boyfriend earlier in the morning between 9:00 and 10:00 in the morning, if I'm not mistaken." Defense counsel interjected, "[T]here was no time given. It was earlier that day." The prosecutor replied, "No, it was earlier in the morning. I'm positive about that." (PTM RT 21.) The prosecutor also said, ". . . it was one partner and it was two times with one partner" (PTM RT 26) and ". . . she had lawful prior sexual activity with her boyfriend earlier in the day. . . ." (PTM RT 27.) Defense counsel said, ". . . earlier in the day is what she said. We don't know. We don't have any more detail than that in this record. [¶] The court could have had a hearing, I guess, out of the presence of the jury to determine what that was all about, but that's neither here nor there." (PTM RT 28-29.)

The court denied a new trial on the forcible oral copulation count, finding that exclusion of Irene's prior sexual activity was correct and, in any case, harmless error. (PTM RT 42.) Regarding the digital penetration

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[7] In the petition for review, respondent stated that the record does not include written pleadings with respect to the new trial motion. (Pet. Rev. 8.) This was error. The clerk's transcript includes briefing from both the defense (CT 635) and the prosecution (CT 697).

[8] "PTM RT" refers to a volume of reporter's transcript entitled "POST-TRIAL MOTIONS" on the page after the facing page. That volume covers proceedings on several dates.

count, the court found no error but ordered an *in camera* evidentiary hearing (PTM RT 51) to determine if any error was prejudicial. (PTM RT 43.) The court said:

> . . . it is particularly apt at this point in the proceedings to do so, even though such a hearing perhaps should have been held after the defendant testified, the court having no, as I recall it, advance indication as to how precisely he was going to testify regarding what happened in his apartment.
>
> One of the reasons the court feels that it is particularly apt at this point is that there is a factual dispute at this point based upon the discovery by the People. The People have presented the consensual sex as one event. The defense believes that it could be characterized as two events.

(PTM RT 43-44.) The defense opposed a hearing, asserting that "[t]here really isn't a dispute of fact" (PTM RT 46) and that it would "allow the prosecution to have a second crack at trying to produce evidence, which it could have produced at the trial, that would show that the evidence was inadmissible. . . ." (PTM RT 47; 48 [same].) Defense counsel said, "I don't think the court has the authority in a motion for a new trial to invite evidence. . . ." (PTM RT 48, 49 [same].) The court rejected the argument:

> This is not a situation where there has been a failure of proof by the district attorney or an inadequate showing by the district attorney that the court is now allowing to be made on this motion, but rather, the court is ruling on the issue as to whether the failed attempt by the defendant to get the information in was prejudicial to the defendant.

(PTM RT 52.) The court granted defense discovery of Irene's post-trial statements to the prosecution. (PTM RT 53.) It denied discovery of the name and whereabouts of Irene's boyfriend. (PTM RT 56.)

Irene was the only witness at the *in camera* hearing. (CT 727.) The transcript was sealed. (PTM RT 65.)[9]

Two weeks later (CT 727, 728), the court solicited further argument. (PTM RT 60.) Defense counsel said Irene testified that the consensual sex occurred "sometime before noon," that "her boyfriend had not done anything that would injure her cervix[;]" and that "she knew the cervix was inside the vagina somewhere, but she didn't know where it was." (PTM RT 61.)

The court reaffirmed that no error occurred and ruled that there was "no reasonable probability [of] a result more favorable to the defendant in the absence of such error. . . ." (PTM RT 65.) The court explained:

> . . . the evidence of force and lack of consent is substantial, if not overwhelming. [¶] The evidence on the issue is to this court's view as clear and objective as would be a stab wound or gunshot wound. I'm talking about the objective evidence of lack of consent and use of force. [¶] Evidence that the petechiae from the point of the manual strangulation . . . is dramatic, convincing and compelling. [¶] The court finds that Irene's testimony regarding the facts of the consensual sex in the morning is unhelpful to either side.

(PTM RT 65.)

SUMMARY OF THE ARGUMENT

The trial court correctly excluded evidence of the complaining witness's prior consensual sex with her boyfriend. Admission of the evidence for the reasons stated by the Court of Appeal would be inconsistent with the record and Evidence Code section 1103, which embodies this state's rape shield law.

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[9] The appellate court reviewed the sealed record and found nothing that altered its view of the case. (Typed opn. at p. 11, fn. 5.) We have no objection to this Court reviewing the sealed transcript.

Under a well-recognized exception to section 1103's rule of exclusion, evidence that the complaining witness engaged in other, consensual sex is admissible to explain her injuries. Contrary to the decision of the Court of Appeal, the evidence of prior sexual activity did not explain Irene's injuries. There is no constitutional error in the exclusion of evidence lacking substantial probative value, as in this case.

The Court of Appeal also misconstrued the term "consent" in the rape shield law. Noting that the rape shield law excludes evidence offered by the defendant "to prove consent by the complaining witness," the appellate court held that "appellant completely denied having sex with Irene, so consent was not an issue." (Typed opn. at p. 13.) Consent *was* an issue in this case. The defense relied on the hotly contested notion that Irene did more than consent: she tried to initiate sexual contact with appellant, causing him to react violently in perceived self-defense. The rape shield law includes no exception for the defense that the complaining witness is a sexual aggressor whom the accused rebuffed.

Finally, even if the evidence should have been admitted, the error does not require the reversal of the convictions. The Court of Appeal transformed insignificant evidence into crucial evidence through a faulty harmless error analysis. It incorrectly formulated the prejudice standard, and it considered only the defense evidence, rather than the entire trial record. A proper prejudice analysis shows that the verdicts would have been the same had the evidence been admitted. Thus, any error was harmless.

ARGUMENT

THE TRIAL COURT PROPERLY APPLIED THE RAPE SHIELD LAW BY EXCLUDING THE EVIDENCE OF THE COMPLAINING WITNESS'S PRIOR CONSENSUAL SEX. FURTHERMORE, ANY ERROR WAS HARMLESS.

Evidence Code section 1103, subdivision (c)(1), is part of California's Robbins Rape Evidence Law. (Stats. 1974, ch. 569, §§ 2, 3, pp. 1388-1389.) In pertinent part, the statute provides:

> [I]n any prosecution [for specified sex offenses] . . . evidence of specific instances of the complaining witness' sexual conduct . . . is not admissible by the defendant in order to prove consent by the complaining witness.

The purpose of the law is to shield a 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 Letwin, *"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].) "[T]he 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." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707; see *United States v. Kasto* (8th Cir. 1978) 584 F.2d 268, 271-272 ["evidence of a rape victim's unchastity, whether in the form of testimony concerning her general reputation or . . . specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her

general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion . . . to outweigh its highly prejudicial effect."].)[10]

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[10] The federal cognate to our statute is Rule 412 of the Federal Rules of Evidence. Although Rule 412 is not identical to the Robbins Rape Evidence Law, it is a useful analog because it encompasses the same policies.

In most pertinent part, Rule 412 states:

> (a) Evidence generally inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.—
>
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(continued...)

For three reasons, the trial court's exclusion of the evidence and its denial of the motion for a new trial were correct: (A) the record shows that the "injury explanation" exception to the rape shield law does not apply; (2) the statutory term "consent" does not render the rape shield law inapplicable when the defendant denies that the charged sexual acts occurred, and (3) exclusion of the evidence was non-prejudicial.

A. The Evidence of Prior Consensual Sex Was Inadmissible to Explain Irene's Injuries.

We do not dispute as a general matter the Court of Appeal's premise that "federal due process requires the admission of . . . evidence [of a complaining witness's prior consensual sex] when it would provide an alternative explanation for injuries allegedly inflicted during a sexual assault. [Citations omitted.]" (Typed opn. at p. 12.) (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 326 [Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or are disproportionate to the needs that they are asserted to promote].) That principle, however, does not establish any trial court error here.

The Court of Appeal said:

(...continued)

The Advisory Committee Notes to the 1994 Amendments to Rule 412 state its purpose:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Respondent's argument here is fully consistent with the federal rule and its policies.

> The sexual assault examination revealed injuries to Irene's mouth, genital region and cervix that, according to the experts, were consistent with 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, emphases 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 experts never testified about Irene's consensual sex. By relying on hypothesized "consensual conduct," the Court of Appeal disregarded the actual consensual sexual activity in which Irene engaged. Viewed in the context of the evidence as a whole, the evidence of Irene's consensual sex did not explain the injuries to Irene's mouth or the condition of Irene's vagina and cervix. Nor was the defense entitled to an evidentiary hearing in which to try to develop evidence that might explain the injuries.

1. The injuries to Irene's mouth

The prosecution's two medical witnesses testified that the injuries to Irene's mouth were consistent with forced oral copulation. Nurse Johnson-Gelb testified, "We have seen [the frenulum injury] in other cases with forced oral copulation and also possibly the lacerations inside of her lip from touching her own teeth." (RT 557.) Asked "How would that occur?", she said, ". . . as you are having the penis inserted, if your lips aren't outward, they are inward. It goes against the bottom teeth." (RT 557.) Asked on cross-examination, ". . . you don't mean to say that it shows that in fact there was oral copulation?" (RT 590), she responded:

> . . . And I said that you can find injuries like the one she has from forced [RT 590] oral copulation. [¶] Am I 100 percent

> saying her injury came from forced oral copulation? No, because you can always say it came from something else. [¶] I am saying it was consistent with the history, and it was consistent . . . with other times we have seen the same injuries that are documented also in many books about injuries from oral copulation.

(RT 590-591.) Johnson-Gelb acknowledged that similar injuries to the frenulum can "happen from other things." (RT 591.) Defense counsel asked, "Like a tooth brush?" Johnson-Gelb said, "I suppose." (RT 591.) She was not asked about consensual oral copulation.

Dr. Hart said "the tear on the lip and the redness in the frenulum area could be consistent with forced oral copulation" because they "indicate that an individual may have been struggling against the . . . insertion of an object into the mouth." (RT 743; RT 766 [same].) Asked if "[t]he injuries that you observed to the cervix and the mouth are also consistent with *voluntary sexual activity*," Dr. Hart replied, "It's possible." (RT 767. Emphasis added.)[11] She was not asked to elaborate.

Dr. Hart acknowledged only that the injuries to the cervix and mouth were "also consistent with voluntary sexual activity." The question she was asked did not specify consensual *oral copulation* (as opposed to some other form of "voluntary sexual activity"), and her answer did not state whether or how the injuries to the mouth would be consistent with consensual oral copulation. By contrast, both Hart and Johnson-Gelb clearly explained how the injuries showed nonconsensual oral copulation.

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[11] In the briefing below and in the petition for review, respondent overlooked this statement. Appellant mentioned it in the statement of facts in his opening brief (AOB 19) and, without citation, in the argument section. (AOB 40.) He also mentioned it in the reply brief. (Rply Brf 1, 4.) The Court of Appeal's opinion does not mention it. Respondent regrets the error.

The defense expert, Dr. Snyder, said the injuries to Irene's mouth were consistent with forced oral copulation (RT 613) but could have been produced by the strangulation. (RT 606.) He was not asked about consensual oral copulation. Thus, the defense expert never suggested consensual oral copulation as even a theoretical source of the injuries to the mouth.

Most importantly, no one suggested that Irene's prior consensual sexual activity included *any* oral copulation (consensual or otherwise). Therefore, even if one were to assume, theoretically and contrary to the record, that consensual oral copulation could have caused the injuries to Irene's mouth, the evidence the court actually had of Irene's actual prior consensual sexual activity—vaginal intercourse and, possibly, oral copulation of Irene by her partner—did not tend to explain the injuries to Irene's mouth.

2. The condition of Irene's vagina and cervix

The record with respect to the condition of Irene's vagina and cervix is more complicated. However, it also does not support the injury-explanation theory the Court of Appeal relied upon.

a. Evidence

Johnson-Gelb identified four salient conditions:

> [1] erythema (redness) of the right labia minora [RT 522-523, 552-553], [2] generalized erythema and scratch marks at the posterior fourchette near the opening of the vagina [RT 523, 553], [3] redness of the cervix [RT 524, 550, 555, 557][,] and [4] an arched-shaped possible laceration of the upper part of the cervix about three millimeters long [RT 524, 551, 555, 557]. [Footnote omitted.]

(Typed opn. at p. 5.) The injuries were consistent with digital penetration because fingernails can cause more injury than the penis. (RT 557, 595-596.) The erythema was not the uniform redness that women can get after

sex (RT 557), and because the redness was present when Irene was examined eight hours later, it "would be more from trauma related than just physiologic response." (RT 596.) The nurse added that "in terms of consensual, non consensual . . . I can never say, I have never said that something for sure 100 percent happened from a sexual assault." (RT 597.)

Dr. Hart testified, "With irregular areas of redness, as well as a tear on the cervix, that . . . could be evidence of forced penetration without consent." (RT 742-743.) She said the redness could be evidence of digital penetration and that a finger could cause the tearing of the cervix. (RT 743.) On cross-examination, she was asked if she had "no way of knowing if that's the natural condition of that person's cervix," and she answered, "Yes." (RT 767.) Asked if the injuries to the cervix and the mouth were also consistent with "voluntary sexual activity," she said, "It's possible." (RT 767.)

The redness on the external genitalia was "an indication of injury." (RT 770.) Cross-examination continued as follows:

> Q. Okay. And . . . could that injury that you observed be caused by voluntary sexual activity?
>
> A. That's possible.
>
> Q. It's no more possible than anything else; isn't that right?
>
> A. If you are looking at that one isolated injury, that's possible.
>
> Q. And if we are focusing in on sexual activity, that's possible and a multitude of other things are possible, correct?
>
> A. It's possible.
>
> . . .
>
> Q. Okay. Injuries to the vaginal area could be consistent. That's one of the things you testified about, correct?

A. With sexual activity.

Q. Yes.

A. Yes.

Q. Now you are not saying that it is consistent. You are saying it could be?

A. Yes.

(RT 770-771.)

On redirect, referring to all Irene's injuries (not just the ones to the cervix and vagina), the prosecutor asked, ". . . are these injuries more consistent with strangulation and sexual assault, or consensual sex?" (RT 773.) Dr. Hart answered, "The group of injuries all together are more consistent with a strangulation and sexual assault." (RT 773.) Defense counsel asked on recross: "But it's . . . not your testimony, nor could it be, that that is what happened; is that correct?" (RT 773-774.) She answered, "That's correct." (RT 774.)

Dr. Snyder, the defense expert, said: he did not see a lesion of the cervix (RT 601, 612); the "possible laceration" didn't look like one to him and could have been a cyst (RT 614); the possible laceration and the redness to the cervix could be a "normal variant" or the result of "infection," rather than trauma (RT 601); and the areas at issue in the vaginal area "[don't] appear to me to be that impressive as an irregularity or as trauma" (RT 616) because the claimed redness could be a normal pink. (RT 617). Snyder also testified, "The only—apart from the photographs, the only thing that is suggestive of injury is the report of tenderness. And that injury could have been consensual sex or sexual assault. I can't speak to that." (RT 618-619.)

b. Argument

The fact that "experts also allowed that the injuries could have been the result of consensual conduct" (typed opn. at p. 12) was not substantial evidence that the prior consensual sex explained Irene's injuries. Evidence that hypothetical, undefined consensual sexual conduct could explain certain conditions is not evidence that Irene's actual consensual sexual activity explained those conditions.

The evidence of Irene's prior consensual sex showed consensual *penile* penetration of the vagina, not foreign object penetration. There was some expert testimony that the condition of Irene's vagina and/or cervix was consistent with "voluntary sexual activity" or "consensual sex," but no one said what that "voluntary sexual activity" would be. The fact that undefined consensual sex could explain a given condition is not evidence that an actual episode and particular form of consensual sex could explain it. For this reason alone, the excluded evidence did not explain the injuries. (See *People v. Martinez* (Col. 1981) 634 P.2d 26, 30-31 [evidence that complaining witness had consensual sex with third party about 24 hours before alleged sexual assault would be admissible to explain presence of live sperm in the vaginal tract if defendant laid a proper foundation by showing that the presence of the live sperm could have been the result of a specific previous act of sexual intercourse].)

If, contrary to our just-expressed view, the expert testimony sufficed to show that a particular form of consensual sex could have explained Irene's conditions, the evidence of prior consensual sex was still inadmissible. There was no indication that Irene's prior consensual sex included foreign object penetration, so even if one were to interpret the expert testimony to suggest that consensual foreign object penetration could explain Irene's conditions, the prior consensual sex was still not an explanation. If, alternatively, the expert testimony were interpreted to mean

that consensual penile-vaginal intercourse could explain Irene's condition, the "injury explanation" theory was still deficient because, as shown below, it did not include an explanation of how such sexual activity could have caused the conditions.

Johnson-Gelb explained why the conditions pointed to sexual assault, rather than consensual sex. She gave no reason why they pointed to consensual sex. She allowed for the latter possibility only because she could "never say . . . that something for sure 100 percent happened from a sexual assault." (RT 597.)

Dr. Hart said that she had no way of knowing whether the condition of Irene's cervix was its natural one. That opinion—like Dr. Snyder's similar opinion about the condition of Irene's cervix—was irrelevant because it considered non-consensual sex as an explanation only in comparison to a generalized state of "normal," rather than in comparison to consensual sex in particular. Dr. Hart did say it was "possible" that the injuries to the cervix and the mouth were consistent with voluntary sexual activity (RT 767), but she did not explain why, nor did she indicate whether the possibility was a realistic one. When explaining her opinion, Dr. Hart said that consensual sexual activity could explain one injury (to the exterior of the genitalia) only if one viewed that injury in isolation and that, taken as a whole, Irene's injuries were more consistent with strangulation and sexual assault than with consensual sex. (RT 773.) Dr. Hart made clear that one should not view any condition in isolation but, instead, should consider each in light of all the others (a view resembling that of the trial court—RT 839-840). As a whole, Dr. Hart's testimony established sexual assault as a realistic explanation and consensual sex as, at most, an unexplained possibility for individual conditions taken out of context.

Dr. Snyder mentioned consensual sex only to say that "the report of tenderness . . . could have been consensual sex or sexual assault." (RT 618-

619.) His reference to "tenderness" was vague and represented the witness's interpretation of a statement in an unquoted medical document reporting, presumably, a statement from Irene.[12]

The evidence of "tenderness" was deficient for another reason: the prosecution witnesses did not mention it, much less claim it was evidence of sexual assault. When the prosecution does not seek to use evidence of a physical condition in the complaining witness as evidence of the charged sexual assault, a defendant may not introduce the evidence to show that consensual sexual activity with a third party could have caused it. (*United States v. Richards* (8th Cir. 1997) 118 F.3d 622, 624-625.)[13] Such a stratagem would circumvent the rape shield law by allowing a defendant to use inherently prejudicial evidence to "explain" what the prosecution never suggested needed explanation. (See *id.* at p. 624 [allowing defendant to introduce the detection of semen to trigger evidence of the complaining witness's past sexual activities would allow the rape shield rule to be "short-circuited."].)

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[12] Neither Johnson-Gelb nor Dr. Hart used the word "tenderness." Johnson-Gelb testified that Irene said her genital area was "getting a little sore. . . ." (RT 500.) She also said Irene had difficulty tolerating an examination with a speculum. (RT 524, 51, 583.) However, Johnson-Gelb cited neither of these conditions as evidence of sexual assault. Moreover, she agreed with defense counsel's statement that difficulty in tolerating a speculum exam "happens occasionally in ordinary medical speculum exams that have nothing to do with a report of rape[.]" (RT 583.)

[13] The prosecutor said in closing argument that the evidence of sexual assault included the trouble Irene had in tolerating the speculum exam. (RT 1428.) But he attributed her trouble not to any "tenderness" (a word he did not use) but to "what [appellant] had been doing to her. All of that evidence." (RT 1428.)

c. Conclusion

The excluded evidence showed consensual penile-vaginal intercourse. By definition, that evidence did not explain the injuries to Irene's mouth. No one claimed it explained the possible injuries to her vagina and cervix either. At most, the defense showed that an undefined form of "consensual sex" could explain some of the injuries and conditions but, even then, only if one viewed them individually, rather than collectively. By contrast, nonconsensual oral copulation and digital penetration provided clear, articulated explanations for the injuries to Irene's mouth and the condition of her cervix and vagina, and those explanations were fully consistent with Irene's overall condition. Accordingly, evidence of Irene's prior consensual sex did not constitute substantial evidence of an explanation for the conditions in question. (See *United States v. Payne* (9th Cir. 1991) 944 F.2d 1458, 1469-1470 [evidence of "heavy petting" with third party properly excluded because it didn't explain victim's enlarged vaginal canal]; *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 to show alternative source of injury]; cf. *United States v. Begay* (10th Cir. 1991) 937 F.2d 515, 519, 523 [error to exclude doctor's testimony that it was impossible to tell whether hymenal damage to the victim was caused by defendant or by third party who had sexually assaulted her].) That a hypothetical, undefined consensual sexual act might have been consistent with one or more of Irene's injuries did not establish that the prior consensual sex excluded by the trial court explained the injuries.

3. Appellant was not entitled to an evidentiary hearing or to a presumption that he could have developed favorable evidence.

The Court of Appeal said:

> "[b]ecause 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; emphases added.)

The court's assumption about the probative value of the excluded evidence reverses the familiar rule that error is not presumed and that the record must affirmatively establish the error. The court reversed the presumption by mistakenly equating different things: (a) general medical testimony that Irene's non-strangulation injuries might in the abstract be consistent with undefined consensual sexual activity, and (b) never-given medical testimony that the specific prior sexual acts Irene reported could cause those injuries when considered as a whole and evaluated in light of the strangulation injuries.

In any event, the defense—not the trial court—caused the record to be undeveloped by failing in timely fashion to state the operative theory of relevance and to explain why an evidentiary hearing was necessary to develop it. (See *State v. Sharp* (Wis. 1993) 511 N.W.2d 316, 319-320 [in telling trial court he wanted to question child complaining witness about whether a boy "showed her anything" in a possible sexual encounter, defense counsel made insufficient offer of proof to support a theory that that incident was the source of the girl's sexual knowledge].)

Evidence Code section 782 requires 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 defense failed to make *any* offer of proof stating the "injury explanation" theory. That the trial court discerned a limited form of the theory with regard to the condition of Irene's cervix and vaginal area (RT 839) does not excuse the defense's failure to assert the theory of relevance in the motion. (See *United States v. Azure*, *supra*, 845 F.2d at p. 1506, fn. 7 [defendant's contention on appeal that victim's injury stemmed from an attempt to masturbate with a bottle was not mentioned in defendant's Rule 412 motion and therefore was not properly before the district court]; *People v. Sims* (1976) 64 Cal.App.3d 544, 553-554 [oral offer of proof insufficient].)

Our argument is not a formalistic one. As explained below, the defense's failure to make a proper offer of proof denied the trial court a fair opportunity to rule on the particular "injury explanation" relevance theory at issue here. (See *Baden v. State* (Alaska 1983) 667 P.2d 1275, 1280 [defense should have presented true theory of relevance to trial court so that it could determine whether probative value outweighed probability of prejudice]; Wright, 23 Federal Practice & Procedure § 5390 ["an offer of proof or depiction of what the defendant will attempt to prove must be provided so that all parties know what is at issue." (Footnote with citation omitted.)].)

When the trial court ruled that an "injury explanation" based on prior consensual sex was "not compelling" in light of the strangulation evidence, appellant had not revealed his intended testimony. (See PTM RT 43 [court's statement at time of new trial motion that "the court ha[d] no, as I recall it, advance indication as to how precisely [appellant] was going to

testify regarding what happened in his apartment."].) Appellant testified that the strangulation was a non-sexual assault. Based on that testimony, the defense argued *post-trial for the first time* that Irene's prior consensual sexual history was a viable and necessary explanation for the injuries not explained by a non-sexual assault.

After a trial court makes an evidentiary ruling by relying on a factual predicate (here, that appellant's strangulation of Irene indicated sexual assault), a defendant may not impeach the trial court's reliance on that factual predicate by asserting facts that were not part of the offer of proof—here, that appellant strangled Irene to prevent her from having sex with him. This is a classic instance of "sandbagging" a trial court by withholding from the offer of proof both critical facts and the actual defense theory of relevance for the proffered evidence. (See *Michigan v. Lucas* (1991) 500 U.S. 145, 150 ["a criminal trial is not 'a poker game in which players enjoy an absolute right always to conceal their cards until played.' [Citation.]"]; *id.* at pp. 152-153 [notice and hearing requirement in state rape shield statute "serves legitimate state interests in protecting against surprise, harassment, and undue delay"]; *People v. Partida* (2005) 37 Cal.4th 428, 435 ["A party cannot argue [on appeal that] the [trial] court erred in failing to conduct an analysis it was not asked to conduct."].)

In any event, the Court of Appeal could not "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.) That assumption was misplaced because, as explained earlier, the defense had not adduced sufficient evidence that the prior consensual sex could explain Irene's injuries. The defense could have adduced testimony from any of the experts as to whether particular consensual sexual acts explained Irene's non-strangulation injuries. The defense could have explained at trial why an evidentiary hearing was necessary to develop the evidence under its

theory of relevance. It did neither. Because the defense failed to do what it could and should have done to alert the trial court to the need for an evidentiary hearing, the Court of Appeal could not fault the trial court for having failed to hold one. Nor is there any basis for assuming that the defense could have developed evidence favorable to it at such a hearing.

4. If the complainant's sexual history was relevant, the probative value was substantially outweighed by its prejudicial effect.

If the excluded evidence had some minimal relevance under the offer of proof made at trial, the trial court still did not abuse its discretion in finding "its probative value 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*, *supra*, 500 U.S. at p. 149 [in the 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 found "[t]he sexual conduct at issue was not unduly prejudicial, involving consensual sex between an adult and her boyfriend." (Typed opn. at p. 15, fn. 6.) The Legislature clearly expressed a contrary view in the rape shield law. Evidence of the sexual history of a complaining witness in a sexual assault case invites the jury to make unwarranted assumptions and fallacious inferences about the character of the complaining witness. (See *People v. Blackburn* (1976) 56 Cal.App.3d 685, 690-691 [evidence excluded by rape shield law is at best only slightly

relevant; "historical rule allowing the evidence may be more a creature of a one-time male fantasy of the 'girls men date and the girls men marry' than one of logical inference"]; 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 that jurors instead "will adopt unarticulated premises such as: 'She got what she deserved,'. . . ."].) The strong legislative presumption is that a complaining witness's sexual history has a prejudicial effect in criminal trials. This case is no different. An appellate court may not assume that no juror will tend to discredit a witness complaining of a sexual assault once it is revealed that the witness had premarital sex hours before, whether or not with a boyfriend. Moreover, exposure of prior sexual history creates embarrassment and a significant risk that the complaining witness will respond at trial in ways that jurors will misperceive as adversely reflecting on her credibility.

The appellate court below suggested that Irene'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.) The defense requested no such instruction. Regardless, the instruction would have only compounded the error in admitting the evidence because, as discussed below, the Court of Appeal deemed the evidence admissible not only to explain the victim's injuries but to corroborate appellant's testimony. The court thereby invited precisely the fallacious, highly prejudicial character inference the rape shield law prohibits.

B. Because Consent Was an Issue, the Rape Shield Law Made the Victim's Prior Sexual Conduct Inadmissible to Corroborate Appellant's Testimony.

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 of Appeal held that "appellant completely denied having sex with Irene, so consent was not an issue." (Typed opn. at p. 13.) This holding rests on the false assumption that a defendant must admit a sexual act with a complaining witness before her consent becomes "an issue." Appellant testified that Irene *initiated* sexual activity by exposing herself and aggressively soliciting a sexual act. According to that testimony, Irene's behavior was both sexual and highly consensual regardless of whether a sexual act was physically consummated. Likewise, the defense sought "to prove consent by the complaining witness." To conclude otherwise is to interpret "consent" irrationally, encompassing a complaining witness's unenthusiastic participation in a sexual act—for example, an act of prostitution (see *People v. Rioz* (1984) 161 Cal.App.3d 905, 916)—but not a witness's aggressive solicitation of that sexual act. Moreover, the Court of Appeal's reasoning would make the rape shield law inapplicable in any case in which a sexual act was only attempted.[14]

One reason for the rape shield law was the Legislature's recognition that sexual assault victims are reluctant to report the crimes, fearing that it would expose them to extensive questioning about their prior sexual

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[14] The federal rule avoids these problems with the definition of "consent" by excluding (subject to certain exceptions) "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior." (Fed. Rule Evid., rule 412(a)(1).) The California rule should be interpreted similarly.

history. (See *People v. Casas*, *supra*, 181 Cal.App.3d at p. 895 [citing *California Rape Evidence Reform: An Analysis of Senate Bill 1678* (1975) 26 Hastings L.J. 1551, 1554-1556]. See also *Wood v. State of Alaska* (9th Cir. 1992) 957 F.2d 1544, 1552 [state rape shield statute seeks to "encourage reporting by limiting embarrassing trial inquiry into past sexual conduct."].) The concern that sexual assault victims ought not to be unduly deterred from reporting sex crimes is just as powerful if the defendant claims that the complaining victim tried but failed to have sex with him as it is if he says a sex act actually occurred. In either case, a complaining victim who is sexually assaulted will be reluctant to press charges if she knows her sexual history will likely be revealed to the jury and used against her as evidence that she acted as the defendant claims.

Nor can the rape shield law's rule of exclusion be avoided by finding, as the Court of Appeal did, that Irene's prior consensual sexual activity corroborated appellant's testimony and therefore bore on Irene's credibility. (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, supra,* 161 Cal.App.3d at p. 918 [Evid. Code, § 782 requires defendant to attack credibility of complaining witness 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."].)

Irene's prior consensual sex was "character evidence" because it 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 was testifying that this fact became known to him because Irene allegedly acted in an aggressive, even bizarre sexual manner. Thus, the defense offered the prior-sex evidence to corroborate not just appellant's "semen sighting" but appellant's story that he feared Irene was sexually attacking him. Put another way, the asserted 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. More generally, the defense's theory entailed the character-based inference that Irene had sex earlier in the day, so she wanted to have sex again. Thus, the evidence of Irene's prior sexual activity was intended to bolster appellant's theory of Irene-as-sexual-predator—the core of the defense—by suggesting that Irene acted in conformity with an unchaste sexual character. Likewise, 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"].) By the same token, the evidence was inadmissible whether or not it corroborated appellant's account or attacked Irene's credibility.

The corroboration/credibility 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 there 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.) "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.)

The argument for exclusion here 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 this corroboration theory would create a gateway to the introduction of a complaining witness's recent consensual sex whenever a defendant claimed that the charged sexual acts did not occur. The defendant would merely have to introduce evidence that the complaining witness had indicated in some way that she recently had sex and wanted more. He could say that she displayed torn or wet underwear (or none at all), that she showed him "love bites" on her neck, or that she mentioned to

him what her previous partner had said or done that she enjoyed. As signs of prior consensual sex, such evidence would ostensibly be offered to corroborate the defendant's story that the complaining witness wanted to have sex with him, but the evidence would mainly serve to sully the complaining victim's sexual character. In sum, the corroboration theory constitutes a road map to the reintroduction in California of core sexual propensity evidence against sexual assault victims.

The many impermissible inferences entailed in the excluded evidence produced a danger of prejudice that overwhelmed any legitimate use of that evidence. Accordingly, the trial court did not abuse the broad discretion vested in it by Evidence Code sections 782 and 352 in excluding the evidence. (*People v. Casas*, *supra*, 181 Cal.App.3d at pp. 895-896.)

C. Federal and State Harmless Error Standards Dictate Affirmance of the Judgment If any Error Occurred.

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.

Contrary to the court's belief, the mid-trial question from the jury does not suggest that the exclusion of the evidence made the jury "likely" to "view[] as untruthful" appellant's claim that he saw semen on Irene. The 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, it was the willingness of the questioner to accept, not reject, the basic premise of the defense in the absence of the excluded evidence. Defense counsel demonstrated the usefulness of the question when he incorporated the thrust of it into his closing argument. (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 apparently assumed 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 appellate court also misconstrued the applicable standard for conducting harmless error review: It said: "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 the question, 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."].)

Instead of considering the whole record, the Court of Appeal found that "[*w*]*hatever 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 regardless of whether the jurors would have credited that theory had the excluded evidence been admitted.

The court 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 retreat from her to protect himself from the threat she supposedly posed. His purported explanation of his claimed behavior was no explanation at all. Second, appellant did not explain why, if he was not interested in sex with Irene, he twice took off his shirt (as he testified he did) after she supposedly made clear that she wanted to have sex. Third, 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.

Fourth, as mentioned previously, it made no sense for Irene to entice appellant by presenting herself in a way that predictably would repulse him. Fifth, 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.[15] Sixth, the evidence of appellant's saliva on Irene's neck (RT 787-788, 793-794, 817-820) refuted the defense that appellant only strangled Irene. His saliva on her neck showed that he kissed her as well, as she specifically said. (RT 255.)[16] Seventh, 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. Eighth, 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.)

Ninth, in stark contrast to appellant's singularly unheralded story, Irene repeatedly gave essentially the same, reliably corroborated account.

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[15] 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.

[16] Defense counsel argued that the experts couldn't tell whose saliva it was. (RT 1487.) The argument was misleading, at best, because even the defense expert's calculations made it highly unlikely that the saliva came from anyone other than appellant. It was undisputed that the DNA profile from the amylase matched appellant's. The defense expert testified that the statistical frequency of that profile was 1 in 90,000 among African-Americans, 1 in 21,000 among Caucasians, and 1 in 9,000 among Hispanics. (RT 1070.) The prosecution's expert said the DNA profile was much more rare. (RT 794.)

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.

This was not a "'he said, she said' case. . . ." (Typed opn. at p. 14.) Given the entire trial 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. Under a correct harmless error analysis, the trial court judgment should be affirmed. (See *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 874-875 [in prosecution for two counts of sexual assault on a child, exclusion of evidence that mother found condoms in victim's drawer and had tried to keep victim away from a male visitor did not establish that victim had consensual sexual relations with other person, explaining victim's hymenal damage, and would not have created a reasonable doubt of defendant's guilt where victim testified in detail about defendant's sexual assaults and had given substantially similar accounts to investigators].)

CONCLUSION

The Court of Appeal's decision should be reversed.

Dated: May 14, 2009

Respectfully submitted,

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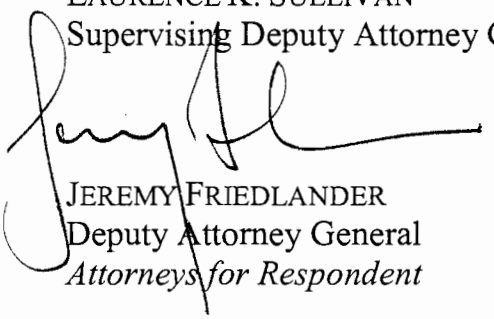

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,887 words.

Dated: May 14, 2009

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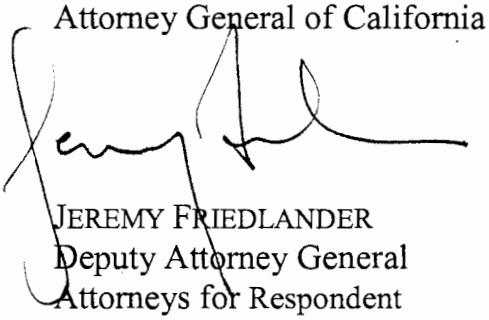
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Fontana**
No.: **S170528**

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 May 14, 2009, I served the attached **OPENING BRIEF ON THE MERITS** 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:

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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 May 14, 2009, at San Francisco, California.

E. Rios
Declarant

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Signature

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