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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. In this appeal from the judgment, he has raised a number of related challenges to the trial court's exclusion of evidence that the victim had consensual sex with her boyfriend earlier in the day, which he claims was relevant to the victim's credibility, to corroborate his version of events, and to show that the injuries she suffered could have been caused by another event. He also argues that the court excluded relevant impeachment evidence, that the prosecutor engaged in misconduct during closing argument, that the cumulative effect of the errors requires reversal, and that the court imposed an unauthorized fine.

This court issued an unpublished opinion reversing the judgment. (*People v. Fontana* (January 13, 2009, A117503) [nonpub. opn.].) We concluded that the excluded evidence regarding the victim's sexual conduct with her boyfriend was relevant and admissible to corroborate appellant's version of events and to show that some of the

injuries attributable to the assault could have been caused by the earlier consensual encounter. (*Ibid.*) Our decision made it unnecessary to address the remaining issues raised by appellant.

The Supreme Court granted the People's petition for review and reversed our decision. (*People v. Fontana* (2010) 49 Cal.4th 351 (*Fontana*)). It concluded that although the trial court had erred in refusing to hold a hearing on the victim's prior sexual conduct with her boyfriend as an alternative explanation for her injuries, the error was harmless. (*Id.* at pp. 366-368.) The court also held that appellant had not been entitled to a hearing on the victim's prior sexual conduct for the purpose of corroborating certain aspects of the defendant's testimony. (*Id.* at pp. 368-370.) The case has now been remanded to this court for consideration of appellant's remaining contentions. (*Id.* at pp. 355, 371.) We agree with appellant that the court imposed an unauthorized fine, but otherwise affirm the judgment.

## I. FACTS AND PROCEDURAL HISTORY

The underlying facts of this case were set forth in detail in *Fontana, supra*, 49 Cal.4th at pages 355-361, which we incorporate by reference. Due to the more limited nature of the remaining issues on appeal, we summarize those facts here in an abbreviated form.

Irene S., who was 19 years old at the time of the events in this case, had recently emigrated to this country and was studying to be a medical assistant. She worked part time at a discount store on Sixth Street in downtown San Francisco that was owned by her friend, Aslem Shaikh. Appellant, who had been recently paroled as a high-risk sex offender, lived upstairs from the store in the Winsor Hotel, a single room occupancy hotel. Because Irene was so small, appellant sometimes helped her close and open a heavy metal gate in front of the store.

At about 4:00 p.m. on March 5, 2003, Irene went to the store and spoke to Shaikh about buying a laptop computer for school. Appellant, who was talking with Shaikh, told her he had one upstairs in his room that he could sell to her, but he did not want to bring it downstairs. Irene went upstairs to the Winsor to see the computer, where appellant

pulled her into his room and pushed her on the bed. Irene tried to scream, but appellant picked up a dumbbell and warned her to be quiet. He choked her, causing her to lose consciousness and urinate, and proceeded to assault her sexually. He placed his finger inside her vagina and forced her to orally copulate him. He also forced her to pose for nude photographs, threatening that he would post them on the Internet if she told anyone what had happened.

After leaving appellant's room, Irene told the hotel manager's son that she had been raped. She walked downstairs, accompanied by appellant, and went into Shaikh's store, locking the door behind her. She told Shaikh she had been raped and Shaikh urged her to call the police. He walked Irene part of the way home, where she told her father what had happened. Her father called the police and Irene was taken to the hospital for a sexual assault examination.

The examination revealed physical symptoms consistent with strangulation and mouth injuries consistent with forcible oral copulation. A possible laceration of the cervix was consistent with forcible digital penetration, as was erythema (redness) on Irene's cervix and labia minora. The erythema could also be consistent with consensual sex, and one expert who examined a photograph taken during speculum examination concluded that the mark identified as a possible laceration might have been the result of an infection or the way the cervix looked in its normal condition.

Appellant left San Francisco immediately after the assault on Irene and traveled to Santa Cruz, where he was apprehended while waiting for a bus bound for Reno. He was charged with a number of felony sexual offenses and the case proceeded to a jury trial.

During the trial, appellant testified on his own behalf. He admitted that he had strangled Irene, but denied any sexual assault. He claimed that Irene had approached him about buying a laptop, but when she came to his room to look at it she did not have the money she had promised to pay. Instead, she took her clothes off and lay on his bed. Appellant was repulsed because Irene appeared to have semen "between her legs in her privates." He panicked when she attempted to orally copulate him and he grabbed her by the throat. Irene told him she would make him pay.

During the sexual assault examination, it had come to light that earlier in the day, Irene had consensual sex with her boyfriend. The defense sought to introduce this evidence to show that the injuries to Irene's genital area and mouth could have been caused by this consensual encounter and to corroborate his testimony that he had seen semen between her legs. The court excluded the evidence without holding a hearing on its admissibility.<sup>1</sup>

Appellant was convicted of forcible digital penetration (Pen. Code, § 289, subd. (a)),<sup>2</sup> forcible oral copulation (§ 288a, subd. (c)(2)), and assault with intent to commit rape, digital penetration and oral copulation (§ 220). 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, subs. (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 term of 75 years to life plus 14 years on the oral copulation count and ordered that the sentences on the other counts would run concurrently. Appellant was ordered to pay restitution fines of \$8,000 each under sections 1202.4, subd. (b), and 1202.45, along with a fine of \$15,000 under section 667.6.

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<sup>1</sup> After the trial, the court did hold a limited hearing on the issue. The Supreme Court concluded that the testimony given by Irene at this hearing was sufficient to show that during the consensual encounter, the boyfriend did not do anything that would have injured Irene's cervix. (*Fontana, supra*, 49 Cal.4th at p. 367.)

<sup>2</sup> Unless otherwise indicated, further statutory references are to the Penal Code.

## II. DISCUSSION<sup>3</sup>

### A. *Exclusion of Impeachment Evidence Regarding Irene's Employment at the Bargain Warehouse*

Appellant contends the trial court abused its discretion and violated his constitutional right to confront witnesses when it excluded evidence that, contrary to her testimony at trial, Irene had told a deputy district attorney that she received an allowance or some “cash under the table” for working at the discount store owned by Shaikh. We disagree.

Irene testified that she did not receive any compensation for working for Shaikh, explaining, “I don't see it as a job. It's more like community service.” She denied telling anyone that Shaikh had paid her cash under the table. Shaikh similarly testified that Irene worked as a volunteer and was not paid anything. However, an assistant district attorney who interviewed Irene during the investigation memorialized their conversation as follows: “[Irene] indicated that the store where she met the defendant was near her home and that she didn't work there as a scheduled or paid employee, but would sometimes watch [the] cash register when the owner was not there and be paid an allowance or some cash under the table for doing this.” The court excluded evidence of this prior inconsistent statement, concluding that it amounted to impeachment on a collateral issue.

Although the right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination.” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (*Van Arsdall*).) Under Evidence Code section 352, a trial court has broad discretion to exclude impeachment evidence to “ ‘prevent criminal trials from degenerating into nitpicking

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<sup>3</sup> We do not separately discuss the issues relating to the victim's prior sexual conduct, which were fully resolved by the Supreme Court's decision. With respect to those issues, we incorporate by reference the analysis in *Fontana, supra*, 49 Cal.4th at pp. 361-370.

wars of attrition over collateral credibility issues.’ ” (*People v. Ayala* (2000) 23 Cal.4th 225, 301.)

A trial court’s limitation on cross-examination pertaining to the credibility of a witness does not violate the Confrontation Clause unless a reasonable jury might have received a significantly different impression of the witness’s credibility had the excluded cross-examination been permitted. (*Van Arsdall, supra*, 475 U.S. at p. 680; *People v. Quartermain* (1997) 16 Cal.4th 600, 623.) Thus, where evidence would impeach a witness on a collateral matter and is “only slightly probative of [the witness’s] veracity, application of Evidence Code section 352 to exclude the evidence [does] not infringe [a defendant’s] constitutional right to confront the witnesses against him.” (*People v. Jennings* (1991) 53 Cal.3d 334, 372.)

In this case, evidence that Irene had lied about receiving cash under the table would not have significantly affected her believability as a witness. A person’s willingness to conceal a small amount of taxable income or to protect a friend from scrutiny by the tax authorities does not make that person more likely to falsely accuse someone of sexual assault. Appellant complains that the prosecution was allowed to falsely portray Irene as a recent immigrant who was trying to better her situation through hard work and education. But the portrait painted by the prosecution was supported by the evidence, and it would not be significantly altered by information that Irene had received a small amount of cash under the table for working a few hours here and there for a friend. The trial court did not abuse its discretion in restricting the impeachment evidence on this point and did not violate appellant’s rights under the Confrontation Clause.

#### B. *Prosecutorial Misconduct*

Appellant argues that the prosecutor committed prejudicial misconduct during closing argument by: (1) asking the jurors to draw inferences regarding the injuries to Irene’s mouth and vagina that they might not have drawn if they had known about the consensual sex with her boyfriend that was excluded from evidence; (2) falsely claiming that it was impossible for appellant to have observed semen in Irene’s vagina when the

prosecutor knew about the earlier consensual sex; (3) falsely describing the terms of Irene's employment when evidence excluded from the trial indicated that she had been paid under the table for her work; and (4) repeatedly arguing, contrary to the evidence, that Irene had been "raped." The defense did not lodge a timely objection to the remarks now complained of and has not argued on appeal that an objection would have been futile or that an admonition would have been insufficient to cure the harm. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 501.) Appellant has therefore forfeited his claim of prosecutorial misconduct on appeal. (*Ibid.*)

#### C. Cumulative Error

Appellant argues that the errors he has alleged require reversal when considered as a whole even if they are harmless when considered individually. The Supreme Court has concluded that errors concerning the evidence of Irene's prior sexual conduct were harmless. We find no synergy between those errors and the issues now before us that would create cumulative prejudice. (See *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

#### D. Fine Under Section 667.6

Section 667.6, subdivision (f) provides for a fine in addition to any enhancement imposed under subdivision (a) or (b) of that same section: "*In addition to any enhancement imposed pursuant to subdivision (a) or (b), the court may impose a fine not to exceed twenty thousand dollars (\$20,000) for anyone sentenced under those provisions.*" (Italics added.) The trial court imposed a \$15,000 fine under section 667.6, even though no enhancement under that statute was alleged, found true or imposed in appellant's case. Appellant argues, and the People concede, that the fine must be stricken because no enhancement was imposed. We shall order the judgment modified accordingly.

### III. DISPOSITION

The \$15,000 fine imposed under section 667.6 is stricken. The superior court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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DONDERO, J.\*

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\* Associate Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.