

AMENDED IN ASSEMBLY MARCH 18, 2021

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL

No. 939

Introduced by Assembly Member Cervantes

February 17, 2021

An act to amend Section ~~240~~ 1103 of the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

AB 939, as amended, Cervantes. ~~Evidence: unavailability of witness. Sex offenses: evidence.~~

Existing law prohibits, during the prosecution of specified sex crimes, the admission of evidence of the manner in which the victim was dressed, when offered by either the prosecution or the defendant on the issue of consent, unless the court finds the evidence relevant and admissible in the interests of justice.

This bill would prohibit the court from admitting evidence, in the above circumstances, of the manner in which the victim was dressed, upon a finding that the evidence is relevant and admissible in the interests of justice.

The California Constitution provides that relevant evidence shall not be excluded in any criminal proceeding except as provided by statute enacted by a $\frac{2}{3}$ vote of the membership of each house of the Legislature. Because this bill would limit the admissibility of evidence in criminal proceedings, it would require a $\frac{2}{3}$ vote.

~~Existing law defines “unavailable as a witness,” for purposes of the Evidence Code, to mean that the declarant is exempted or precluded on the ground of privilege, disqualified, dead or unable to testify because of illness or infirmity, absent for a specified reason, or persistent in~~

~~refusing to testify despite having been found in contempt for refusal to testify. Existing law provides additional limitations on establishing the unavailability of a witness.~~

~~This bill would make nonsubstantive changes to this provision.~~

Vote: ~~majority~~^{2/3}. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. *This act shall be known, and may be cited, as the*
2 *Denim Day Act of 2021.*

3 SEC. 2. *Section 1103 of the Evidence Code is amended to read:*

4 1103. (a) In a criminal action, evidence of the character or a
5 trait of character (in the form of an opinion, evidence of reputation,
6 or evidence of specific instances of conduct) of the victim of the
7 crime for which the defendant is being prosecuted is not made
8 inadmissible by Section 1101 if the evidence is:

9 (1) Offered by the defendant to prove conduct of the victim in
10 conformity with the character or trait of character.

11 (2) Offered by the prosecution to rebut evidence adduced by
12 the defendant under paragraph (1).

13 (b) In a criminal action, evidence of the defendant’s character
14 for violence or trait of character for violence (in the form of an
15 opinion, evidence of reputation, or evidence of specific instances
16 of conduct) is not made inadmissible by Section 1101 if the
17 evidence is offered by the prosecution to prove conduct of the
18 defendant in conformity with the character or trait of character and
19 is offered after evidence that the victim had a character for violence
20 or a trait of character tending to show violence has been adduced
21 by the defendant under paragraph (1) of subdivision (a).

22 (c) (1) Notwithstanding any other provision of this code to the
23 contrary, and except as provided in this subdivision, in any
24 prosecution under Section 261, 262, or 264.1 of the Penal Code,
25 or under Section 286, 287, or 289 of, or former Section 288a of,
26 the Penal Code, or for assault with intent to commit, attempt to
27 commit, or conspiracy to commit a crime defined in any of those
28 sections, except where the crime is alleged to have occurred in a
29 local detention facility, as defined in Section 6031.4, or in a state
30 prison, as defined in Section 4504, opinion evidence, reputation
31 evidence, and evidence of specific instances of the complaining

1 witness' sexual conduct, or any of that evidence, is not admissible
2 by the defendant in order to prove consent by the complaining
3 witness.

4 (2) Notwithstanding paragraph (3), evidence of the manner in
5 which the victim was dressed at the time of the commission of the
6 offense shall not be admissible when offered by either party on
7 the issue of consent in any prosecution for an offense specified in
8 paragraph (1), ~~unless the evidence is determined by the court to~~
9 ~~be relevant and admissible in the interests of justice. The proponent~~
10 ~~of the evidence shall make an offer of proof outside the hearing~~
11 ~~of the jury. The court shall then make its determination and at that~~
12 ~~time, state the reasons for its ruling on the record. (1).~~ For the
13 purposes of this paragraph, "manner of dress" does not include
14 the condition of the victim's clothing before, during, or after the
15 commission of the offense.

16 (3) Paragraph (1) shall not be applicable to evidence of the
17 complaining witness' sexual conduct with the defendant.

18 (4) If the prosecutor introduces evidence, including testimony
19 of a witness, or the complaining witness as a witness gives
20 testimony, and that evidence or testimony relates to the
21 complaining witness' sexual conduct, the defendant may
22 cross-examine the witness who gives the testimony and offer
23 relevant evidence limited specifically to the rebuttal of the evidence
24 introduced by the prosecutor or given by the complaining witness.

25 (5) ~~Nothing in this~~ This subdivision shall *not* be construed to
26 make inadmissible any evidence offered to attack the credibility
27 of the complaining witness as provided in Section 782.

28 (6) As used in this section, "complaining witness" means the
29 alleged victim of the crime charged, the prosecution of which is
30 subject to this subdivision.

31 SECTION 1. ~~Section 240 of the Evidence Code is amended to~~
32 ~~read:~~

33 240. ~~(a) Except as otherwise provided in subdivision (b),~~
34 ~~"unavailable as a witness" means that the declarant is any of the~~
35 ~~following:~~

36 (1) ~~Exempted or precluded on the ground of privilege from~~
37 ~~testifying concerning the matter to which the declarant's statement~~
38 ~~is relevant.~~

39 (2) ~~Disqualified from testifying to the matter.~~

- 1 ~~(3) Dead or unable to attend or to testify at the hearing because~~
2 ~~of then-existing physical or mental illness or infirmity.~~
- 3 ~~(4) Absent from the hearing and the court is unable to compel~~
4 ~~the declarant's attendance by its process.~~
- 5 ~~(5) Absent from the hearing and the proponent of the declarant's~~
6 ~~statement has exercised reasonable diligence but has been unable~~
7 ~~to procure the declarant's attendance by the court's process.~~
- 8 ~~(6) Persistent in refusing to testify concerning the subject matter~~
9 ~~of the declarant's statement despite having been found in contempt~~
10 ~~for refusal to testify.~~
- 11 ~~(b) A declarant is not unavailable as a witness if the exemption,~~
12 ~~preclusion, disqualification, death, inability, or absence of the~~
13 ~~declarant was brought about by the procurement or wrongdoing~~
14 ~~of the proponent of the declarant's statement for the purpose of~~
15 ~~preventing the declarant from attending or testifying.~~
- 16 ~~(e) (1) Expert testimony that establishes that physical or mental~~
17 ~~trauma resulting from an alleged crime has caused harm to a~~
18 ~~witness of sufficient severity that the witness is physically unable~~
19 ~~to testify or is unable to testify without suffering substantial trauma~~
20 ~~may constitute a sufficient showing of unavailability pursuant to~~
21 ~~paragraph (3) of subdivision (a). As used in this section, the term~~
22 ~~"expert" means a physician and surgeon, including a psychiatrist,~~
23 ~~or a person described by subdivision (b), (c), or (e) of Section~~
24 ~~1010.~~
- 25 ~~(2) The introduction of evidence to establish the unavailability~~
26 ~~of a witness under this subdivision shall not be deemed~~
27 ~~procurement of unavailability, in absence of proof to the contrary.~~