

AMENDED IN SENATE SEPTEMBER 3, 2021

AMENDED IN ASSEMBLY MAY 17, 2021

AMENDED IN ASSEMBLY MARCH 18, 2021

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL

No. 939

**Introduced by Assembly Members ~~Cervantes and Bauer-Kahan~~
*Cervantes, Bauer-Kahan, and Lorena Gonzalez***

(Principal coauthor: Senator Rubio)

**(Coauthors: Assembly Members Aguiar-Curry, Boerner Horvath,
Burke, Calderon, Carrillo, Friedman, Cristina Garcia,
~~Lorena Gonzalez~~, Irwin, Low, Petrie-Norris, Quirk-Silva, Reyes,
Luz Rivas, Blanca Rubio, Seyarto, Ward, Akilah Weber, and
Wicks)**

*(Coauthors: Senators Caballero, Durazo, Gonzalez, Hurtado, Laird,
Limón, Skinner, and Wiener)*

February 17, 2021

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

LEGISLATIVE COUNSEL'S DIGEST

AB 939, as amended, Cervantes. Sex offenses: evidence.

Existing

(1) 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.

(2) *This bill would incorporate additional changes to Section 1103 of the Evidence Code proposed by AB 1171 to be operative only if this bill and AB 1171 are enacted and this bill is enacted last.*

The

(3) *The California Constitution provides that relevant evidence shall not be excluded in any criminal proceeding except as provided by statute enacted by a 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 2/3 vote.*

Vote: 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).

1 (c) (1) Notwithstanding any other provision of this code to the
2 contrary, and except as provided in this subdivision, in any
3 prosecution under Section 261, 262, or 264.1 of the Penal Code,
4 or under Section 286, 287, or 289 of, or former Section 288a of,
5 the Penal Code, or for assault with intent to commit, attempt to
6 commit, or conspiracy to commit a crime defined in any of those
7 sections, except where the crime is alleged to have occurred in a
8 local detention facility, as defined in Section 6031.4, or in a state
9 prison, as defined in Section 4504, opinion evidence, reputation
10 evidence, and evidence of specific instances of the complaining
11 witness' sexual conduct, or any of that evidence, is not admissible
12 by the defendant in order to prove consent by the complaining
13 witness.

14 (2) Notwithstanding paragraph (3), evidence of the manner in
15 which the victim was dressed at the time of the commission of the
16 offense shall not be admissible when offered by either party on
17 the issue of consent in any prosecution for an offense specified in
18 paragraph (1). For the purposes of this paragraph, "manner of
19 dress" does not include the condition of the victim's clothing
20 before, during, or after the commission of the offense.

21 (3) Paragraph (1) does not apply to evidence of the complaining
22 witness' sexual conduct with the defendant.

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

30 (5) This subdivision shall not be construed to make inadmissible
31 any evidence offered to attack the credibility of the complaining
32 witness as provided in Section 782.

33 (6) As used in this ~~section~~, *subdivision*, "complaining witness"
34 means the alleged victim of the crime charged, the prosecution of
35 which is subject to this subdivision.

36 *SEC. 2.1. Section 1103 of the Evidence Code is amended to*
37 *read:*

38 1103. (a) In a criminal action, evidence of the character or a
39 trait of character (in the form of an opinion, evidence of reputation,
40 or evidence of specific instances of conduct) of the victim of the

1 crime for which the defendant is being prosecuted is not made
2 inadmissible by Section 1101 if the evidence is:

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

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

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

16 (c) (1) Notwithstanding any other provision of this code to the
17 contrary, and except as provided in this subdivision, in any
18 prosecution under Section ~~261, 262, 261~~ or 264.1 of the Penal
19 Code, or under Section 286, 287, or 289 of, or former Section 288a
20 of, the Penal Code, or for assault with intent to commit, attempt
21 to commit, or conspiracy to commit a crime defined in any of those
22 sections, except where the crime is alleged to have occurred in a
23 local detention facility, as defined in Section 6031.4, or in a state
24 prison, as defined in Section 4504, opinion evidence, reputation
25 evidence, and evidence of specific instances of the complaining
26 witness' sexual conduct, or any of that evidence, is not admissible
27 by the defendant in order to prove consent by the complaining
28 witness.

29 (2) Notwithstanding paragraph (3), evidence of the manner in
30 which the victim was dressed at the time of the commission of the
31 offense ~~shall not be~~ *is not* admissible when offered by either party
32 on the issue of consent in any prosecution for an offense specified
33 in paragraph (1), ~~unless the evidence is determined by the court~~
34 ~~to be relevant and admissible in the interests of justice. The~~
35 ~~proponent of the evidence shall make an offer of proof outside the~~
36 ~~hearing of the jury. The court shall then make its determination~~
37 ~~and at that time, state the reasons for its ruling on the record. (1).~~
38 For the purposes of this paragraph, "manner of dress" does not
39 include the condition of the victim's clothing before, during, or
40 after the commission of the offense.

1 (3) Paragraph (1) ~~shall not be applicable~~ *does not apply* to
2 evidence of the complaining witness' sexual conduct with the
3 defendant.

4 (4) If the prosecutor introduces evidence, including testimony
5 of a witness, or the complaining witness as a witness gives
6 testimony, and that evidence or testimony relates to the
7 complaining witness' sexual conduct, the defendant may
8 cross-examine the witness who gives the testimony and offer
9 relevant evidence limited specifically to the rebuttal of the evidence
10 introduced by the prosecutor or given by the complaining witness.

11 (5) ~~Nothing in this subdivision shall be construed to~~ *This*
12 *subdivision does not* make inadmissible any evidence offered to
13 attack the credibility of the complaining witness as provided in
14 Section 782.

15 (6) As used in this ~~section, subdivision,~~ "complaining witness"
16 means the alleged victim of the crime charged, the prosecution of
17 which is subject to this subdivision.

18 *SEC. 3. Section 2.1 of this bill incorporates amendments to*
19 *Section 1103 of the Evidence Code proposed by both this bill and*
20 *Assembly Bill 1171. That section of this bill shall only become*
21 *operative if (1) both bills are enacted and become effective on or*
22 *before January 1, 2022, (2) each bill amends Section 1103 of the*
23 *Evidence Code, and (3) this bill is enacted after Assembly Bill*
24 *1171, in which case Section 2 of this bill shall not become*
25 *operative.*