Office of Senate Floor Analyses
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THIRD READING

Bill No: AB 939
Author: Cervantes (D) and Bauer-Kahan (D), et al.
Amended: 5/17/21 in Assembly
Vote: 27

SENATE PUBLIC SAFETY COMMITTEE: 5-0, 7/13/21
AYES: Bradford, Ochoa Bogh, Durazo, Kamlager, Skinner

ASSEMBLY FLOOR: 75-0, 5/24/21 - See last page for vote

SUBJECT: Sex offenses: evidence

SOURCE: Author

DIGEST: This bill prohibits the court from admitting evidence of the manner in which the victim was dressed during the prosecution of specified sex crimes, by either the prosecution or defense on the issue of consent, regardless of whether the evidence is relevant or admissible in the interests of justice.

ANALYSIS:

Existing law:

1) States that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, §§ 350, 351.)

2) Defines "relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

3) Authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

4) Provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory role of evidence relating to privilege or hearsay, or inadmissibility. (Cal. Const., art. I, § 28, as adopted June 8, 1982.)

5) Allows the credibility of a witness to be attacked or supported by any party including the party calling him. (Evid. Code, § 785.)

6) Provides for the following procedure if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness in specified sex offense cases:

   a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of the evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

   b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing. After that determination, the affidavit shall be resealed by the court.

   c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

   d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and is not inadmissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the court's order.

   e) An affidavit resealed by the court shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on

appeal, the court shall allow the Attorney General and the appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding. (Evid. Code, § 782, subd. (a).)

7) States, except as provided, that in the prosecution of specified sex offenses, the introduction of opinion evidence, reputation evidence, and 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. (Evid. Code, § 1103, subd. (c)(1).)

8) States, except as provided, that evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for the specified sex offenses, unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or after the commission of the offense. (Evid. Code, § 1103, subd. (c)(2).)

9) States that evidence of a victim's sexual conduct or their manner of dress at the time of the commission of the offense may still be admissible when offered to attack the credibility of the complaining witness using the procedure specified in Penal Code Section 782. (Evid. Code, § 1103, subd. (c)(5).)

This bill:

1) Prohibits the admissibility of evidence of the manner in which the victim was dressed at the time of the commission of the offense on the issue of consent in the prosecution of specified sex crimes regardless of whether the court finds the evidence to be relevant and admissible in the interests of justice.

2) States that its provisions shall be known, and may be cited, as Denim Day Act.

Comments

According to the author of this bill:

> Assembly Bill 939 seeks to address the ambiguity in current law to ensure that we do not further traumatize survivors of sexual violence. There are deep negative implications for Rape and Sexual Harassment cases when we make clothing probative of intent. Assembly Bill 939 will prohibit the courts from admitting evidence that deals with the sexual characterization of their clothing if the courts decide that it must be admissible in the "interest of justice." We need trauma-informed policies that ensure that we do not victim blame in the pursuit of justice. Current law fails to consider the power imbalance that exists between survivor and perpetrator. To even consider whether a survivor's manner of dress should be admitted as evidence of consent wrongly scrutinizes the actions of the survivor, instead of placing that scrutiny where it truly belongs: on the actions of the perpetrator. When we trivialize sexual assault, we uphold stereotypical beliefs that survivors of sexual assault invite their own rapes and sexual assaults. When we maintain inadequate policies, we enable violence, silence survivors, and reduce access to justice. Assembly Bill 939 will reinforce and improve court procedures to ensure that we address policy weaknesses and ensure trauma-informed practices.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 7/14/21)

Alameda County District Attorney's Office
Associated Students of the University of California
Fem Dems of Sacramento
Work Equity Action

OPPOSITION: (Verified 7/14/21)

American Civil Liberties Union California Action
California Attorneys for Criminal Justice
California Public Defenders Association
San Francisco Public Defender's Office

ARGUMENTS IN SUPPORT: According to the Alameda County District Attorney's Office:

> Evidence offered in a criminal case is generally admissible if it is relevant to any issue in the case. For evidence of the victim's clothing to be admissible in a sexual assault case, as evidence of either consent or lack thereof, the party seeking to introduce the evidence must first make an offer of proof as to how the evidence would be relevant. That offer of proof must take place outside the presence of the jury. Once the offer of proof has been made, the judge must determine that the evidence is, in fact, relevant to the issue of consent, and also that admitting the evidence would be in the interests of justice. The court must also state the reasons for making the determination on the record.
>
> Assembly Bill 939 seeks to address the ambiguity in current law to ensure that we do not further traumatize survivors of sexual violence. There are deep negative implications for Rape and Sexual Harassment cases when we make clothing probative of intent. Assembly Bill 939 will prohibit the courts from admitting evidence that deals with sexual characterization of their clothing if the courts decide that it must be admissible in the "interest of justice." We need trauma-informed policies that ensure that we do not victim blame in the pursuit of justice. Current law fails to consider the power imbalance that exists between survivor and perpetrator. When we maintain inadequate policies, we enable violence, silence, and reduce access to justice. Assembly Bill 939 will reinforce and improve court procedures to ensure that we address policy weaknesses and ensure trauma-informed practices.

ARGUMENTS IN OPPOSITION: According to the San Francisco Public Defender's Office:

> Under existing law, Evidence Code Section 1103(c)(2), evidence of the manner of dress offered on the issue of consent *is not admissible unless a judge rules that the evidence is "relevant and in the interests of justice."* Outside the presence of the jury, the judge listens to the party that seeks to have the evidence admitted to hear what the evidence is, why it is relevant, and why it is necessary to admit it. Then the judge decides stating the reason for the decision on the record.

AB 939 is not necessary. Evidence Code Section 1103(c)(2) is fair and balanced. The entire process takes place outside the jury and is not unfairly prejudiced if the judge decides not to admit the evidence of how the victim was dressed. Moreover, the evidence is not admitted, unless and until, the judge has heard from both parties about why the evidence should be admitted. This protects the rights of both prosecution and defense.

AB 939 abrogates judicial discretion and is fundamentally unfair. California judges weigh evidence and balance the competing constitutional rights of the victim's right to privacy and the defendant's right to a fair trial routinely. Judges have been entrusted with that responsibility in all kinds of settings. AB 939 seeks to strip discretion and decision-making ability from judges and have a one size fits all approach.

ASSEMBLY FLOOR: 75-0, 5/24/21
AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Davies, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Lackey, Lee, Levine, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Nguyen, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Smith, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood, Rendon
NO VOTE RECORDED: Bigelow, Flora, Kiley

Prepared by: Stella Choe / PUB. S. /
7/26/21 10:19:36

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