

AMENDED IN ASSEMBLY MAY 29, 2013

AMENDED IN ASSEMBLY MAY 8, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 336

Introduced by Assembly Member Ammiano

February 13, 2013

An act to ~~amend Sections 647 and 653.22 of~~ *add Section 782.1 to the Penal Evidence Code*, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

AB 336, as amended, Ammiano. Crimes: prostitution: evidence.

Existing law requires that in any of specified circumstances, including, but not limited to, rape, unlawful sexual intercourse, or sodomy, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness, specified procedures be followed. Existing law includes, among those procedures, a requirement that a written motion be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. Existing law requires the written motion to be accompanied by an affidavit, filed and sealed, in which the offer of proof is stated. Existing law requires if the court finds that the offer of proof is sufficient, the court to order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant. Existing law permits 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 found inadmissible, the court to make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. Existing law states that the defendant may then offer that specified evidence pursuant to the order of the court.

This bill would require that in any prosecution for committing an act of disorderly conduct or for loitering in any public place with the intent to commit prostitution, if the possession of one or more condoms is to be introduced as evidence in support of the commission of the crime, specified procedures be followed that are similar to existing law, except that the written motion would be made by the prosecutor to the court and to the defendant stating that the prosecution has an offer of proof of the relevancy of the possession by the defendant of one or more condoms. The bill would permit, at the conclusion of the hearing, if the court finds that evidence proposed to be offered by the prosecutor regarding the possession of condoms is relevant and is not inadmissible, the court to make an order stating what evidence may be introduced by the prosecutor. The bill would then permit the prosecutor to offer that specified evidence pursuant to the order of the court.

~~Under existing law, a person is guilty of disorderly conduct, a misdemeanor, based on various acts, including when a person solicits or agrees to engage in or engages in any act of prostitution, as specified. Existing also law makes it unlawful for any person to loiter in any public place with the intent to commit prostitution and, in determining whether a person has violated this provision, permits consideration of circumstances including, but not limited to, that the person repeatedly beckons to, stops, engages in conversations with, or attempts to stop or engage in conversations with, passersby, indicative of soliciting for prostitution.~~

~~This bill would, for purposes of both crimes, exclude the possession of one of more condoms as evidence of a violation of that crime.~~

~~The California Constitution provides for the Right to Truth in Evidence that requires a $\frac{2}{3}$ vote of the Legislature to exclude any relevant evidence from any criminal proceeding, as specified.~~

~~Because this bill would exclude possession of one or more condoms as evidence of crimes, it requires a $\frac{2}{3}$ vote of the Legislature.~~

Vote: $\frac{2}{3}$ -majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

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

1 *SECTION 1. Section 782.1 is added to the Evidence Code, to*
2 *read:*

3 *782.1. In any prosecution under Sections 647 and 653.22 of*
4 *the Penal Code, if the possession of one or more condoms is to be*
5 *introduced as evidence in support of the commission of the crime,*
6 *the following procedure shall be followed:*

7 *(a) A written motion shall be made by the prosecutor to the*
8 *court and to the defendant stating that the prosecution has an offer*
9 *of proof of the relevancy of the possession by the defendant of one*
10 *or more condoms.*

11 *(b) The written motion shall be accompanied by an affidavit in*
12 *which the offer of proof shall be stated. The affidavit shall be filed*
13 *under seal and only unsealed by the court to determine if the offer*
14 *of proof is sufficient to order a hearing pursuant to subdivision*

15 *(c). After that determination, the affidavit shall be resealed by the*
16 *court.*

17 *(c) If the court finds that the offer of proof is sufficient, the court*
18 *shall order a hearing out of the presence of the jury, if any, and*
19 *at the hearing allow questioning regarding the offer of proof made*
20 *by the prosecution.*

21 *(d) At the conclusion of the hearing, if the court finds that*
22 *evidence proposed to be offered by the prosecutor regarding the*
23 *possession of condoms is relevant pursuant to Section 210, and is*
24 *not inadmissible pursuant to Section 352, the court may make an*
25 *order stating what evidence may be introduced by the prosecutor.*
26 *The prosecutor may then offer evidence pursuant to the order of*
27 *the court.*

28 *(e) An affidavit resealed by the court pursuant to subdivision*
29 *(b) shall remain sealed, unless the defendant raises an issue on*
30 *appeal or collateral review relating to the offer of proof contained*
31 *in the sealed document. If the defendant raises that issue on appeal,*
32 *the court shall allow the Attorney General and appellate counsel*
33 *for the defendant access to the sealed affidavit. If the issue is raised*
34 *on collateral review, the court shall allow the district attorney and*
35 *defendant's counsel access to the sealed affidavit. The use of the*
36 *information contained in the affidavit shall be limited solely to the*
37 *pending proceeding.*

1 SECTION 1. Section 647 of the Penal Code is amended to read:

2 647. Except as provided in subdivision (l), every person who
3 commits any of the following acts is guilty of disorderly conduct,
4 a misdemeanor:

5 (a) ~~Who solicits anyone to engage in or who engages in lewd
6 or dissolute conduct in any public place or in any place open to
7 the public or exposed to public view.~~

8 (b) ~~Who solicits or who agrees to engage in or who engages in
9 any act of prostitution. A person agrees to engage in an act of
10 prostitution when, with specific intent to so engage, he or she
11 manifests an acceptance of an offer or solicitation to so engage,
12 regardless of whether the offer or solicitation was made by a person
13 who also possessed the specific intent to engage in prostitution.
14 No agreement to engage in an act of prostitution shall constitute
15 a violation of this subdivision unless some act, in addition to the
16 agreement, is done within this state in furtherance of the
17 commission of an act of prostitution by the person agreeing to
18 engage in that act. Possession of one or more condoms shall not
19 be used as evidence of a violation of this subdivision. As used in
20 this subdivision, "prostitution" includes any lewd act between
21 persons for money or other consideration.~~

22 (c) ~~Who accosts other persons in any public place or in any
23 place open to the public for the purpose of begging or soliciting
24 alms.~~

25 (d) ~~Who loiters in or about any toilet open to the public for the
26 purpose of engaging in or soliciting any lewd or lascivious or any
27 unlawful act.~~

28 (e) ~~Who lodges in any building, structure, vehicle, or place,
29 whether public or private, without the permission of the owner or
30 person entitled to the possession or in control of it.~~

31 (f) ~~Who is found in any public place under the influence of
32 intoxicating liquor, any drug, controlled substance, toluene, or any
33 combination of any intoxicating liquor, drug, controlled substance,
34 or toluene, in a condition that he or she is unable to exercise care
35 for his or her own safety or the safety of others, or by reason of
36 his or her being under the influence of intoxicating liquor, any
37 drug, controlled substance, toluene, or any combination of any
38 intoxicating liquor, drug, or toluene, interferes with or obstructs
39 or prevents the free use of any street, sidewalk, or other public
40 way.~~

1 ~~(g) When a person has violated subdivision (f), a peace officer,~~
2 ~~if he or she is reasonably able to do so, shall place the person, or~~
3 ~~cause him or her to be placed, in civil protective custody. The~~
4 ~~person shall be taken to a facility, designated pursuant to Section~~
5 ~~5170 of the Welfare and Institutions Code, for the 72-hour~~
6 ~~treatment and evaluation of inebriates. A peace officer may place~~
7 ~~a person in civil protective custody with that kind and degree of~~
8 ~~force which would be lawful were he or she effecting an arrest for~~
9 ~~a misdemeanor without a warrant. No person who has been placed~~
10 ~~in civil protective custody shall thereafter be subject to any criminal~~
11 ~~prosecution or juvenile court proceeding based on the facts giving~~
12 ~~rise to this placement. This subdivision shall not apply to the~~
13 ~~following persons:~~

14 ~~(1) Any person who is under the influence of any drug, or under~~
15 ~~the combined influence of intoxicating liquor and any drug.~~

16 ~~(2) Any person who a peace officer has probable cause to believe~~
17 ~~has committed any felony, or who has committed any misdemeanor~~
18 ~~in addition to subdivision (f).~~

19 ~~(3) Any person who a peace officer in good faith believes will~~
20 ~~attempt escape or will be unreasonably difficult for medical~~
21 ~~personnel to control.~~

22 ~~(h) Who loiters, prowls, or wanders upon the private property~~
23 ~~of another, at any time, without visible or lawful business with the~~
24 ~~owner or occupant. As used in this subdivision, "loiter" means to~~
25 ~~delay or linger without a lawful purpose for being on the property~~
26 ~~and for the purpose of committing a crime as opportunity may be~~
27 ~~discovered.~~

28 ~~(i) Who, while loitering, prowling, or wandering upon the private~~
29 ~~property of another, at any time, peeks in the door or window of~~
30 ~~any inhabited building or structure, without visible or lawful~~
31 ~~business with the owner or occupant.~~

32 ~~(j) (1) Any person who looks through a hole or opening, into,~~
33 ~~or otherwise views, by means of any instrumentality, including,~~
34 ~~but not limited to, a periscope, telescope, binoculars, camera,~~
35 ~~motion picture camera, camcorder, or mobile phone, the interior~~
36 ~~of a bedroom, bathroom, changing room, fitting room, dressing~~
37 ~~room, or tanning booth, or the interior of any other area in which~~
38 ~~the occupant has a reasonable expectation of privacy, with the~~
39 ~~intent to invade the privacy of a person or persons inside. This~~

1 ~~subdivision shall not apply to those areas of a private business~~
2 ~~used to count currency or other negotiable instruments.~~

3 ~~(2) Any person who uses a concealed camcorder, motion picture~~
4 ~~camera, or photographic camera of any type, to secretly videotape,~~
5 ~~film, photograph, or record by electronic means, another,~~
6 ~~identifiable person under or through the clothing being worn by~~
7 ~~that other person, for the purpose of viewing the body of, or the~~
8 ~~undergarments worn by, that other person, without the consent or~~
9 ~~knowledge of that other person, with the intent to arouse, appeal~~
10 ~~to, or gratify the lust, passions, or sexual desires of that person and~~
11 ~~invade the privacy of that other person, under circumstances in~~
12 ~~which the other person has a reasonable expectation of privacy.~~

13 ~~(3) (A) Any person who uses a concealed camcorder, motion~~
14 ~~picture camera, or photographic camera of any type, to secretly~~
15 ~~videotape, film, photograph, or record by electronic means, another,~~
16 ~~identifiable person who may be in a state of full or partial undress,~~
17 ~~for the purpose of viewing the body of, or the undergarments worn~~
18 ~~by, that other person, without the consent or knowledge of that~~
19 ~~other person, in the interior of a bedroom, bathroom, changing~~
20 ~~room, fitting room, dressing room, or tanning booth, or the interior~~
21 ~~of any other area in which that other person has a reasonable~~
22 ~~expectation of privacy, with the intent to invade the privacy of that~~
23 ~~other person.~~

24 ~~(B) Neither of the following is a defense to the crime specified~~
25 ~~in this paragraph:~~

26 ~~(i) The defendant was a cohabitant, landlord, tenant, cotenant,~~
27 ~~employer, employee, or business partner or associate of the victim,~~
28 ~~or an agent of any of these.~~

29 ~~(ii) The victim was not in a state of full or partial undress.~~

30 ~~(k) (1) In any accusatory pleading charging a violation of~~
31 ~~subdivision (b), if the defendant has been once previously convicted~~
32 ~~of a violation of that subdivision, the previous conviction shall be~~
33 ~~charged in the accusatory pleading. If the previous conviction is~~
34 ~~found to be true by the jury, upon a jury trial, or by the court, upon~~
35 ~~a court trial, or is admitted by the defendant, the defendant shall~~
36 ~~be imprisoned in a county jail for a period of not less than 45 days~~
37 ~~and shall not be eligible for release upon completion of sentence,~~
38 ~~on probation, on parole, on work furlough or work release, or on~~
39 ~~any other basis until he or she has served a period of not less than~~
40 ~~45 days in a county jail. In all cases in which probation is granted,~~

1 the court shall require as a condition thereof that the person be
2 confined in a county jail for at least 45 days. In no event does the
3 court have the power to absolve a person who violates this
4 subdivision from the obligation of spending at least 45 days in
5 confinement in a county jail.

6 (2) ~~In any accusatory pleading charging a violation of~~
7 ~~subdivision (b), if the defendant has been previously convicted~~
8 ~~two or more times of a violation of that subdivision, each of these~~
9 ~~previous convictions shall be charged in the accusatory pleading.~~
10 ~~If two or more of these previous convictions are found to be true~~
11 ~~by the jury, upon a jury trial, or by the court, upon a court trial, or~~
12 ~~are admitted by the defendant, the defendant shall be imprisoned~~
13 ~~in a county jail for a period of not less than 90 days and shall not~~
14 ~~be eligible for release upon completion of sentence, on probation,~~
15 ~~on parole, on work furlough or work release, or on any other basis~~
16 ~~until he or she has served a period of not less than 90 days in a~~
17 ~~county jail. In all cases in which probation is granted, the court~~
18 ~~shall require as a condition thereof that the person be confined in~~
19 ~~a county jail for at least 90 days. In no event does the court have~~
20 ~~the power to absolve a person who violates this subdivision from~~
21 ~~the obligation of spending at least 90 days in confinement in a~~
22 ~~county jail.~~

23 (3) ~~In addition to any punishment prescribed by this section, a~~
24 ~~court may suspend, for not more than 30 days, the privilege of the~~
25 ~~person to operate a motor vehicle pursuant to Section 13201.5 of~~
26 ~~the Vehicle Code for any violation of subdivision (b) that was~~
27 ~~committed within 1,000 feet of a private residence and with the~~
28 ~~use of a vehicle. In lieu of the suspension, the court may order a~~
29 ~~person's privilege to operate a motor vehicle restricted, for not~~
30 ~~more than six months, to necessary travel to and from the person's~~
31 ~~place of employment or education. If driving a motor vehicle is~~
32 ~~necessary to perform the duties of the person's employment, the~~
33 ~~court may also allow the person to drive in that person's scope of~~
34 ~~employment.~~

35 (l) (1) ~~A second or subsequent violation of subdivision (j) is~~
36 ~~punishable by imprisonment in a county jail not exceeding one~~
37 ~~year, or by a fine not exceeding two thousand dollars (\$2,000), or~~
38 ~~by both that fine and imprisonment.~~

39 (2) ~~If the victim of a violation of subdivision (j) was a minor at~~
40 ~~the time of the offense, the violation is punishable by imprisonment~~

1 in a county jail not exceeding one year, or by a fine not exceeding
2 two thousand dollars (\$2,000), or by both that fine and
3 imprisonment.

4 SEC. 2. Section 653.22 of the Penal Code is amended to read:

5 653.22. (a) It is unlawful for any person to loiter in any public
6 place with the intent to commit prostitution. This intent is
7 evidenced by acting in a manner and under circumstances that
8 openly demonstrate the purpose of inducing, enticing, or soliciting
9 prostitution, or procuring another to commit prostitution.

10 (b) Among the circumstances that may be considered in
11 determining whether a person loiters with the intent to commit
12 prostitution are that the person:

13 (1) Repeatedly beckons to, stops, engages in conversations with,
14 or attempts to stop or engage in conversations with passersby,
15 indicative of soliciting for prostitution.

16 (2) Repeatedly stops or attempts to stop motor vehicles by
17 hailing the drivers, waving arms, or making any other bodily
18 gestures, or engages or attempts to engage the drivers or passengers
19 of the motor vehicles in conversation, indicative of soliciting for
20 prostitution.

21 (3) Has been convicted of violating this section, subdivision (a)
22 or (b) of Section 647, or any other offense relating to or involving
23 prostitution, within five years of the arrest under this section.

24 (4) Circles an area in a motor vehicle and repeatedly beckons
25 to, contacts, or attempts to contact or stop pedestrians or other
26 motorists, indicative of soliciting for prostitution.

27 (5) Has engaged, within six months prior to the arrest under this
28 section, in any behavior described in this subdivision, with the
29 exception of paragraph (3), or in any other behavior indicative of
30 prostitution activity.

31 (c) The list of circumstances set forth in subdivision (b) is not
32 exclusive. The circumstances set forth in subdivision (b) should
33 be considered particularly salient if they occur in an area that is
34 known for prostitution activity. Any other relevant circumstances
35 may be considered in determining whether a person has the
36 requisite intent. Moreover, no one circumstance or combination
37 of circumstances is in itself determinative of intent. Intent must
38 be determined based on an evaluation of the particular
39 circumstances of each case.

- 1 ~~(d) Possession of one or more condoms shall not be used as~~
- 2 ~~evidence of a violation of this section.~~

O