

ASSEMBLY BILL

No. 2599

Introduced by Assembly Member Gipson

February 19, 2016

An act to amend Sections 261 and 262 of the Penal Code, relating to rape.

LEGISLATIVE COUNSEL'S DIGEST

AB 2599, as introduced, Gipson. Rape: consent.

Under existing law, rape is an act of sexual intercourse accomplished under certain circumstances, including, among others, circumstances in which sexual intercourse is accomplished where the person was prevented from resisting because of intoxication or where the person is incapable of resisting because the victim was unconscious of the nature of the act.

This bill would instead provide that rape is accomplished where the person was incapable of giving consent because of intoxication or where the person is incapable of giving consent because the victim was unconscious of the nature of the act. By changing the definition of a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

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

SECTION 1. Section 261 of the Penal Code is amended to read:

261. (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is ~~prevented from resisting~~ *incapable of giving consent* by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of ~~resisting~~ *giving consent* because the victim meets any one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

1 (5) Where a person submits under the belief that the person
2 committing the act is someone known to the victim other than the
3 accused, and this belief is induced by any artifice, pretense, or
4 concealment practiced by the accused, with intent to induce the
5 belief.

6 (6) Where the act is accomplished against the victim's will by
7 threatening to retaliate in the future against the victim or any other
8 person, and there is a reasonable possibility that the perpetrator
9 will execute the threat. As used in this paragraph, "threatening to
10 retaliate" means a threat to kidnap or falsely imprison, or to inflict
11 extreme pain, serious bodily injury, or death.

12 (7) Where the act is accomplished against the victim's will by
13 threatening to use the authority of a public official to incarcerate,
14 arrest, or deport the victim or another, and the victim has a
15 reasonable belief that the perpetrator is a public official. As used
16 in this paragraph, "public official" means a person employed by
17 a governmental agency who has the authority, as part of that
18 position, to incarcerate, arrest, or deport another. The perpetrator
19 does not actually have to be a public official.

20 (b) As used in this section, "duress" means a direct or implied
21 threat of force, violence, danger, or retribution sufficient to coerce
22 a reasonable person of ordinary susceptibilities to perform an act
23 which otherwise would not have been performed, or acquiesce in
24 an act to which one otherwise would not have submitted. The total
25 circumstances, including the age of the victim, and his or her
26 relationship to the defendant, are factors to consider in appraising
27 the existence of duress.

28 (c) As used in this section, "menace" means any threat,
29 declaration, or act which shows an intention to inflict an injury
30 upon another.

31 SEC. 2. Section 262 of the Penal Code is amended to read:

32 262. (a) Rape of a person who is the spouse of the perpetrator
33 is an act of sexual intercourse accomplished under any of the
34 following circumstances:

35 (1) Where it is accomplished against a person's will by means
36 of force, violence, duress, menace, or fear of immediate and
37 unlawful bodily injury on the person or another.

38 (2) Where a person is ~~prevented from resisting~~ *incapable of*
39 *giving consent* by any intoxicating or anesthetic substance, or any

1 controlled substance, and this condition was known, or reasonably
2 should have been known, by the accused.

3 (3) Where a person is at the time unconscious of the nature of
4 the act, and this is known to the accused. As used in this paragraph,
5 “unconscious of the nature of the act” means incapable of ~~resisting~~
6 *giving consent* because the victim meets one of the following
7 conditions:

8 (A) Was unconscious or asleep.

9 (B) Was not aware, knowing, perceiving, or cognizant that the
10 act occurred.

11 (C) Was not aware, knowing, perceiving, or cognizant of the
12 essential characteristics of the act due to the perpetrator’s fraud in
13 fact.

14 (4) Where the act is accomplished against the victim’s will by
15 threatening to retaliate in the future against the victim or any other
16 person, and there is a reasonable possibility that the perpetrator
17 will execute the threat. As used in this paragraph, “threatening to
18 retaliate” means a threat to kidnap or falsely imprison, or to inflict
19 extreme pain, serious bodily injury, or death.

20 (5) Where the act is accomplished against the victim’s will by
21 threatening to use the authority of a public official to incarcerate,
22 arrest, or deport the victim or another, and the victim has a
23 reasonable belief that the perpetrator is a public official. As used
24 in this paragraph, “public official” means a person employed by
25 a governmental agency who has the authority, as part of that
26 position, to incarcerate, arrest, or deport another. The perpetrator
27 does not actually have to be a public official.

28 (b) As used in this section, “duress” means a direct or implied
29 threat of force, violence, danger, or retribution sufficient to coerce
30 a reasonable person of ordinary susceptibilities to perform an act
31 which otherwise would not have been performed, or acquiesce in
32 an act to which one otherwise would not have submitted. The total
33 circumstances, including the age of the victim, and his or her
34 relationship to the defendant, are factors to consider in appraising
35 the existence of duress.

36 (c) As used in this section, “menace” means any threat,
37 declaration, or act that shows an intention to inflict an injury upon
38 another.

1 (d) If probation is granted upon conviction of a violation of this
2 section, the conditions of probation may include, in lieu of a fine,
3 one or both of the following requirements:

4 (1) That the defendant make payments to a battered women's
5 shelter, up to a maximum of one thousand dollars (\$1,000).

6 (2) That the defendant reimburse the victim for reasonable costs
7 of counseling and other reasonable expenses that the court finds
8 are the direct result of the defendant's offense.

9 For any order to pay a fine, make payments to a battered
10 women's shelter, or pay restitution as a condition of probation
11 under this subdivision, the court shall make a determination of the
12 defendant's ability to pay. In no event shall any order to make
13 payments to a battered women's shelter be made if it would impair
14 the ability of the defendant to pay direct restitution to the victim
15 or court-ordered child support. Where the injury to a married person
16 is caused in whole or in part by the criminal acts of his or her
17 spouse in violation of this section, the community property may
18 not be used to discharge the liability of the offending spouse for
19 restitution to the injured spouse, required by Section 1203.04, as
20 operative on or before August 2, 1995, or Section 1202.4, or to a
21 shelter for costs with regard to the injured spouse and dependents,
22 required by this section, until all separate property of the offending
23 spouse is exhausted.

24 SEC. 3. No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution because
26 the only costs that may be incurred by a local agency or school
27 district will be incurred because this act creates a new crime or
28 infraction, eliminates a crime or infraction, or changes the penalty
29 for a crime or infraction, within the meaning of Section 17556 of
30 the Government Code, or changes the definition of a crime within
31 the meaning of Section 6 of Article XIII B of the California
32 Constitution.