

**ASSEMBLY BILL**

**No. 862**

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**Introduced by Assembly Member Knight**

February 26, 2009

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An act to amend Section 261 of the Penal Code, relating to sexual assault.

LEGISLATIVE COUNSEL'S DIGEST

AB 862, as introduced, Knight. Sexual assault.

Existing law establishes various sexual assault offenses, including the offense of rape.

This bill would make a technical, nonsubstantive change to the provisions establishing the offense of rape.

Vote: 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 261 of the Penal Code is amended to  
2     read:  
3     261. (a) Rape is an act of sexual intercourse accomplished  
4     with a person *who is* not the spouse of the perpetrator, under any  
5     of the following circumstances:  
6     (1) Where a person is incapable, because of a mental disorder  
7     or developmental or physical disability, of giving legal consent,  
8     and this is known or reasonably should be known to the person  
9     committing the act. Notwithstanding the existence of a  
10    conservatorship pursuant to the provisions of the  
11    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 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 because the victim meets 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.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

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

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by

1 a governmental agency who has the authority, as part of that  
2 position, to incarcerate, arrest, or deport another. The perpetrator  
3 does not actually have to be a public official.

4 (b) As used in this section, “duress” means a direct or implied  
5 threat of force, violence, danger, or retribution sufficient to coerce  
6 a reasonable person of ordinary susceptibilities to perform an act  
7 which otherwise would not have been performed, or acquiesce in  
8 an act to which one otherwise would not have submitted. The total  
9 circumstances, including the age of the victim, and his or her  
10 relationship to the defendant, are factors to consider in appraising  
11 the existence of duress.

12 (c) As used in this section, “menace” means any threat,  
13 declaration, or act which shows an intention to inflict an injury  
14 upon another.