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OFFICE OF
SECRETARY OF STATE
STATE OF WEST VIRGINIA

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1976

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ENROLLED

Committee Substitute for

SENATE BILL NO. 154

(By *Miss Hernston, et al*)

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PASSED March 11, 1976

In Effect ninety days from Passage

FILED IN THE OFFICE OF
SECRETARY OF STATE OF
WEST VIRGINIA

THIS DATE 3/29/76

ENROLLED
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 154

(MISS HERNDON, MR. DARBY and MR. NEELEY, *original sponsors*)

[Passed March 11, 1976; in effect ninety days from passage.]

AN ACT to repeal sections fifteen and fifteen-a, article two, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal sections thirteen, twenty-eight and twenty-nine, article eight of said chapter sixty-one; to repeal section seven, article nine, chapter sixty-two of said code; and to further amend said chapter sixty-one by adding thereto a new article, designated article eight-b, relating to sexual assault and sexual offenses; defining terms; lack of consent; various degrees of sexual assault; degrees of sexual abuse; sexual misconduct; public indecency; evidence and defenses; and providing criminal penalties for violations.

Be it enacted by the Legislature of West Virginia:

That sections fifteen and fifteen-a, article two, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections thirteen, twenty-eight and twenty-nine, article eight of said chapter sixty-one be repealed; that section seven, article nine, chapter sixty-two of said code be repealed; and that said chapter sixty-one be amended by adding thereto a new article, designated article eight-b, to read as follows:

ARTICLE 8B. SEXUAL OFFENSES.

§61-8B-1. Definition of terms.

- 1 In this article, unless a different meaning plainly is
- 2 required:

3 (1) "Forcible compulsion" means:

4 (a) Physical force that overcomes such earnest resis-
5 tance as might reasonably be expected under the cir-
6 cumstances; or

7 (b) Threat or intimidation, expressed or implied, plac-
8 ing a person in fear of immediate death or bodily injury
9 to himself or another person or in fear that he or another
10 person will be kidnapped.

11 For the purposes of this definition "resistance" includes
12 physical resistance or any clear communication of the
13 victim's lack of consent.

14 (2) "Marriage," for the purposes of this article in addi-
15 tion to its legal meaning, includes persons living together
16 as man and wife regardless of the legal status of their
17 relationship.

18 (3) "Mentally defective" means that a person suffers
19 from a mental disease or defect which renders him in-
20 capable of appraising the nature of his conduct.

21 (4) "Mentally incapacitated" means that a person is
22 rendered temporarily incapable of appraising or control-
23 ling his conduct as a result of the influence of a controlled
24 or intoxicating substance administered to him without
25 his consent or as a result of any other act committed
26 upon him without his consent.

27 (5) "Physically helpless" means that a person is un-
28 conscious or for any other reason is physically unable to
29 communicate unwillingness to an act.

30 (6) "Sexual contact" means any touching of the anus or
31 any part of the sex organs of another person, or the breasts
32 of a female eleven years old or older, where the victim is
33 not married to the actor and the touching is done for the
34 purpose of gratifying the sexual desire of either party.

35 (7) "Sexual intercourse" means any act between per-
36 sons not married to each other involving penetration,
37 however slight, of the female sex organ by the male
38 sex organ or involving contact between the sex organs
39 of one person and the mouth or anus of another person.

40 (8) "Bodily injury" means substantial physical pain,
41 illness or any impairment of physical condition.

42 (9) "Serious bodily injury" means bodily injury which
43 creates a substantial risk of death, which causes serious
44 and prolonged disfigurement, prolonged impairment of
45 health, or prolonged loss or impairment of the function of
46 any bodily organ.

47 (10) "He" includes any human being.

48 (11) "Deadly weapon" means any instrument, device,
49 or thing capable of inflicting death or serious bodily injury,
50 and designed or specially adapted for use as a weapon,
51 or possessed, carried, or used as a weapon.

§61-8B-2. Lack of consent.

1 (a) Whether or not specifically stated, it is an element
2 of every offense defined in this article that the sexual act
3 was committed without consent of the victim.

4 (b) Lack of consent results from:

5 (1) Forcible compulsion; or

6 (2) Incapacity to consent; or

7 (3) If the offense charged is sexual abuse, any cir-
8 cumstances in addition to the forcible compulsion or
9 incapacity to consent in which the victim does not express-
10 ly or impliedly acquiesce in the actor's conduct.

11 (c) A person is deemed incapable of consent when
12 he is:

13 (1) Less than sixteen years old; or

14 (2) Mentally defective; or

15 (3) Mentally incapacitated; or

16 (4) Physically helpless.

§61-8B-3. Sexual assault in the first degree.

1 (a) A person is guilty of sexual assault in the first
2 degree when:

3 (1) He engages in sexual intercourse with another per-
4 son by forcible compulsion; and:

5 (i) He inflicts serious bodily injury upon anyone; or

6 (ii) He employed a deadly weapon in commission of the
7 crime; or

8 (iii) The victim was not a voluntary social companion of
9 the actor on the occasion of the crime; or

10 (2) He engages in sexual intercourse with another
11 person who is incapable of consent because he is physically
12 helpless; or

13 (3) He, being fourteen years old or more, engages in
14 sexual intercourse with another person who is incapable
15 of consent because he is less than eleven years old.

16 (b) Any person who violates the provisions of this
17 section shall be guilty of a felony, and, upon conviction
18 thereof shall be imprisoned not less than ten nor more
19 than twenty years, or fined not more than ten thousand
20 dollars and imprisoned in the penitentiary not less than
21 ten nor more than twenty years.

§61-8B-4. Sexual assault in the second degree.

1 (a) A person is guilty of sexual assault in the second
2 degree when:

3 (1) He engages in sexual intercourse with another
4 person by forcible compulsion; or

5 (2) By forcible compulsion, he causes penetration,
6 however slight, of the female sex organ or of the anus
7 of any person, by any inanimate object for the purpose
8 of gratifying the sexual desire of either party.

9 (b) Any person who violates the provisions of this
10 section shall be guilty of a felony, and, upon conviction
11 thereof, shall be imprisoned in the penitentiary not less
12 than five nor more than ten years, or fined not more than
13 ten thousand dollars and imprisoned in the penitentiary
14 not less than five nor more than ten years.

§61-8B-5. Sexual assault in the third degree.

1 (a) A person is guilty of sexual assault in the third
2 degree when:

3 (1) He engages in sexual intercourse with another per-
4 son who is incapable of consent because he is mentally
5 defective or mentally incapacitated; or

6 (2) Being sixteen years old or more, he engages in
7 sexual intercourse with another person who:

8 (i) Is incapable of consent because he is less than six-
9 teen years old; and

10 (ii) Is at least four years younger than the defendant.

11 (b) Any person who violates the provisions of this
12 section shall be guilty of a felony, and, upon conviction
13 thereof, shall be imprisoned in the penitentiary not less
14 than one year nor more than five years, or fined not
15 more than ten thousand dollars and imprisoned in the
16 penitentiary not less than one year nor more than five
17 years.

§61-8B-6. Sexual abuse in the first degree.

1 (a) A person is guilty of sexual abuse in the first de-
2 gree when:

3 (1) He subjects another person to sexual contact by
4 forcible compulsion; or

5 (2) He subjects another person to sexual contact who
6 is incapable of consent because he is physically helpless;
7 or

8 (3) He, being fourteen years old or more, subjects
9 another person to sexual contact who is incapable of con-
10 sent because he is less than eleven years old.

11 (b) Any person who violates the provisions of this
12 section shall be guilty of a felony, and, upon conviction
13 thereof, shall be imprisoned in the penitentiary not less
14 than one year nor more than five years, or fined not more
15 than ten thousand dollars and imprisoned in the peniten-
16 tiary not less than one year nor more than five years.

§61-8B-7. Sexual abuse in the second degree.

1 (a) A person is guilty of sexual abuse in the second
2 degree when he subjects another person to sexual contact
3 who is incapable of consent because he is mentally de-
4 fective or mentally incapacitated.

5 (b) Any person who violates the provisions of this
6 section shall be guilty of a misdemeanor, and, upon con-
7 viction thereof, shall be confined in the county jail not
8 more than twelve months, or fined not more than five
9 hundred dollars and confined in the county jail not more
10 than twelve months.

§61-8B-8. Sexual abuse in the third degree.

1 (a) A person is guilty of sexual abuse in the third
2 degree when he subjects another person to sexual contact

3 without the latter's consent, when such lack of consent
4 is due to the victim's incapacity to consent by reason
5 of being less than sixteen years.

6 (b) In any prosecution under this section it is a de-
7 fense that:

8 (1) The defendant was less than sixteen years old; or

9 (2) The defendant was less than four years older than
10 the victim.

11 (c) Any person who violates the provisions of this
12 section shall be guilty of a misdemeanor, and, upon con-
13 viction thereof, shall be confined in the county jail not
14 more than ninety days, or fined not more than five hun-
15 dred dollars and confined in the county jail not more
16 than ninety days.

§61-8B-9. Sexual misconduct.

1 (a) A person is guilty of sexual misconduct when he
2 engages in sexual intercourse with another person with-
3 out the latter's consent or engages in sexual intercourse
4 with another person knowing that such other person
5 mistakenly supposes that he is a third person.

6 (b) Any person who violates the provisions of this
7 section shall be guilty of a misdemeanor, and, upon con-
8 viction thereof, shall be confined in the county jail not
9 more than twelve months, or fined not more than five
10 hundred dollars and confined in the county jail not more
11 than twelve months.

§61-8B-10. Indecent exposure.

1 (a) A person is guilty of indecent exposure when he
2 intentionally exposes his sex organs or anus under cir-
3 cumstances in which he knows his conduct is likely to
4 cause affront or alarm.

5 (b) Any person who violates the provisions of this
6 section shall be guilty of a misdemeanor, and, upon con-
7 viction thereof, shall be confined in the county jail not
8 more than ninety days, or fined not more than two hun-
9 dred fifty dollars and confined in the county jail not more
10 than ninety days.

§61-8B-11. Public indecency.

1 (a) A person is guilty of public indecency when, know-
2 ing his conduct is likely to be observed by others who
3 would be affronted or alarmed:

4 (1) He engages in any overt act of sexual gratification;
5 or

6 (2) He intentionally exposes the private or intimate
7 parts of his body or the body of another person.

8 (b) Any person who violates the provisions of this
9 section shall be guilty of a misdemeanor, and, upon con-
10 viction thereof, shall be fined not more than two hundred
11 fifty dollars.

§61-8B-12. Sexual offenses—Evidence.

1 (a) In any prosecution under this article in which the
2 victim's lack of consent is based solely on his incapacity to
3 consent because he was below a critical age, evidence of
4 specific instances of the victim's sexual conduct, opinion
5 evidence of the victim's sexual conduct and reputation
6 evidence of the victim's sexual conduct shall not be ad-
7 missible. In any other prosecution under this article,
8 evidence of specific instances of the victim's prior sexual
9 conduct with the defendant shall be admissible on the
10 issue of consent: *Provided*, That such evidence heard first
11 out of the presence of the jury is found by the judge to
12 be relevant.

13 (b) In any prosecution under this article evidence of
14 specific instances of the victim's sexual conduct with
15 persons other than the defendant, opinion evidence of the
16 victim's sexual conduct and reputation evidence of the
17 victim's sexual conduct shall not be admissible: *Provided*,
18 That such evidence shall be admissible solely for the
19 purpose of impeaching credibility, if the victim first
20 makes his previous sexual conduct an issue in the trial
21 by introducing evidence with respect thereto.

§61-8B-13. Sexual offenses—A defense.

1 (a) In any prosecution under this article in which the
2 victim's lack of consent is based solely on his incapacity
3 to consent because he was below a critical age, mentally
4 defective, mentally incapacitated or physically helpless,
5 it is an affirmative defense that the defendant at the time

6 he engaged in the conduct constituting the offense did
7 not know of the facts or conditions responsible for such
8 incapacity to consent, unless the defendant is reckless in
9 failing to know such facts or conditions.

10 (b) The affirmative defense provided in subsection (a)
11 of this section shall not be available in any prosecution
12 under subsection (a) (3), section three and under sub-
13 section (a) (3), section six of this article.

PRESENTED TO THE
GOVERNOR

Date 3/22/76

Time 11:40a.m.