

No: 2032

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WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1984

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ENROLLED

HOUSE BILL No. 2032

(By MR. Del Davis + Del Casey)

— ● —

Passed March 9, 1984

In Effect July 1, 1984 ~~Passage~~



ENROLLED

H. B. 2032

(By DELEGATE DAVIS and DELEGATE CASEY)

[Passed March 9, 1984; in effect July 1, 1984.]

AN ACT to repeal section thirteen, article eight-b, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section twelve, article eight of said chapter sixty-one; and to amend and reenact sections one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve of said article eight-b, all relating to sex offenses generally; defining certain terms relating to the offense of incest; defining the felony offense of incest and establishing the penalty therefor; defining certain terms relating to the offenses of sexual assault, sexual abuse, sexual assault of a spouse and indecent exposure; providing that lack of consent is an element of every offense defined in article eight-b, chapter sixty-one of said code and delineating when lack of consent results or when a person is deemed incapable of consent; defining the felony offense of sexual assault in the first degree and establishing the penalty therefor; defining the felony offense of sexual assault in the second degree and establishing the penalty therefor; defining the felony offense of sexual assault in the third degree and establishing the penalty therefor; defining the felony offense of sexual assault of a spouse and establishing the penalty therefor; defining the felony offense of sexual abuse in the first degree and establishing the penalty therefor; defining the misdemeanor offense of sexual abuse in the second degree and establishing the penalty therefor; defining the misdemeanor offense of sexual abuse in the third degree and establishing the penalty therefor; defining the misdemeanor offense of indecent

exposure and establishing the penalty therefor; restricting the admissibility of certain types of evidence upon the trial of a person for offenses defined under the provisions of said article eight-b; providing that neither age nor mental capacity of the victim shall preclude the victim from testifying; and providing an affirmative defense for certain offenses charged under the provisions of said article eight-b.

Be it enacted by the Legislature of West Virginia:

That section thirteen, article eight-b, chapter sixty-one of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section twelve, article eight of said chapter sixty-one be amended and reenacted; and that sections one, two, three, four, five, six, seven, eight, nine, ten, eleven and twelve of said article eight-b be amended and reenacted, all to read as follows:

ARTICLE 8. CRIMES AGAINST CHASTITY, MORALITY AND DECENCY.

§61-8-12. Incest; penalty.

1 (a) For the purposes of this section:

2 (1) "Aunt" means the sister of a person's mother or father;

3 (2) "Brother" means the son of a person's mother or
4 father;

5 (3) "Daughter" means a person's natural daughter, adop-
6 tive daughter, or the daughter of a person's husband or wife;

7 (4) "Father" means a person's natural father, adoptive
8 father, or the husband of a person's mother;

9 (5) "Granddaughter" means the daughter of a person's son
10 or daughter;

11 (6) "Grandfather" means the father of a person's father or
12 mother;

13 (7) "Grandmother" means the mother of a person's father
14 or mother;

15 (8) "Grandson" means the son of a person's son or daugh-
16 ter;

17 (9) "Mother" means a person's natural mother, adoptive
18 mother, or the wife of a person's father;

19 (10) "Niece" means the daughter of a person's brother or
20 sister;

21 (11) "Nephew" means the son of a person's brother or
22 sister;

23 (12) "Sexual intercourse" means any act between persons
24 involving penetration, however slight, of the female sex organ
25 by the male sex organ or involving contact between the sex
26 organs of one person and the mouth or anus of another person.

27 (13) "Sexual intrusion" means any act between persons in-
28 volving penetration, however slight, of the female sex organ or
29 of the anus of any person by an object for the purpose of de-
30 grading or humiliating the person so penetrated or for gratify-
31 ing the sexual desire of either party.

32 (14) "Sister" means the daughter of a person's father or
33 mother;

34 (15) "Son" means a person's natural son, adoptive son, or
35 the son of a person's husband or wife;

36 (16) "Uncle" means the brother of a person's father or
37 mother.

38 (b) A person is guilty of incest when such person engages
39 in sexual intercourse or sexual intrusion with his or her father,
40 mother, brother, sister, daughter, son, grandfather, grand-
41 mother, grandson, granddaughter, nephew, niece, uncle or
42 aunt.

43 (c) Any person who violates the provisions of this section
44 shall be guilty of a felony, and, upon conviction thereof, shall
45 be imprisoned in the penitentiary not less than five years nor
46 more than ten years, or fined not more than five thousand
47 dollars and imprisoned in the penitentiary not less than five
48 years nor more than ten years.

ARTICLE 8B. SEXUAL OFFENSES.

§61-8B-1. Definition of terms.

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

3 (1) "Forcible compulsion" means:

4 (a) Physical force that overcomes such earnest resistance
5 as might reasonably be expected under the circumstances; or

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

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

13 (2) "Married", for the purposes of this article in addition
14 to its legal meaning, includes persons living together as man
15 and wife regardless of the legal status of their relationship.

16 (3) "Mentally defective" means that a person suffers from
17 a mental disease or defect which renders such person incap-
18 able of appraising the nature of his conduct.

19 (4) "Mentally incapacitated" means that a person is rendered
20 temporarily incapable of appraising or controlling his or her
21 conduct as a result of the influence of a controlled or intoxicat-
22 ing substance administered to such person without his or her
23 consent or as a result of any other act committed upon such
24 person without his or her consent.

25 (5) "Physically helpless" means that a person is uncon-
26 scious or for any reason is physically unable to communicate
27 unwillingness to an act.

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

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

39 (8) "Sexual intrusion" means any act between persons not
40 married to each other involving penetration, however slight,
41 of the female sex organ or of the anus of any person by an
42 object for the purpose of degrading or humiliating the person
43 so penetrated or for gratifying the sexual desire of either party.

44 (9) "Bodily injury" means substantial physical pain, illness
45 or any impairment of physical condition.

46 (10) "Serious bodily injury" means bodily injury which
47 creates a substantial risk of death, which causes serious or pro-
48 longed disfigurement, prolonged impairment of health, or pro-
49 longed loss or impairment of the function of any bodily organ.

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

§61-8B-2. Lack of consent.

1 (a) Whether or not specifically stated, it is an element of
2 every offense defined in this article that the sexual act was
3 committed without the 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 circumstances
8 in addition to the forcible compulsion or incapacity to consent
9 in which the victim does not expressly or impliedly acquiesce
10 in the actor's conduct.

11 (c) A person is deemed incapable of consent when such
12 person 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 degree
2 when:

3 (1) Such person engages in sexual intercourse or sexual in-
4 trusion with another person and, in so doing:

5 (i) Inflicts serious bodily injury upon anyone; or

6 (ii) Employs a deadly weapon in the commission of the
7 act; or

8 (2) Such person, being fourteen years old or more, en-
9 gages in sexual intercourse or sexual intrusion with another
10 person who is eleven years old or less.

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

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

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

3 (1) Such person engages in sexual intercourse or sexual
4 intrusion with another person without the person's consent,
5 and the lack of consent results from forcible compulsion; or

6 (2) Such person engages in sexual intercourse or sexual in-
7 trusion with another person who is physically helpless.

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

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

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

3 (1) Such person engages in sexual intercourse or sexual
4 intrusion with another person who is mentally defective or
5 mentally incapacitated; or

6 (2) Such person, being sixteen years old or more, engages
7 in sexual intercourse or sexual intrusion with another person
8 who is less than sixteen years old and who is at least four
9 years younger than the defendant.

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

§61-8B-6. Sexual assault of a spouse.

1 (a) For the purposes of this subsection:

2 (1) "Sexual intercourse" means any act between persons
3 married to each other involving penetration, however slight, of
4 the female sex organ by the male sex organ or involving con-
5 tact between the sex organs of one person and the mouth or
6 anus of his or her spouse.

7 (2) "Sexual intrusion" means any act between persons mar-
8 ried to each other involving penetration of the female sex
9 organ or of the anus of either person by an object for the
10 purpose of degrading or humiliating the person so penetrated or
11 for gratifying the sexual desire of either party.

12 (b) A person is guilty of sexual assault of a spouse when
13 such person engages in sexual penetration or sexual intrusion
14 with his or her spouse without the consent of such spouse;
15 and

16 (i) The lack of consent results from forcible compulsion; or

17 (ii) Such person inflicts serious bodily injury upon anyone;
18 or

19 (iii) Such person employs a deadly weapon in the com-
20 mission of the offense.

21 (c) Any person who violates the provisions of this section

22 shall be guilty of a felony, and, upon conviction thereof, shall
23 be confined in the penitentiary not less than two nor more
24 than ten years, or fined not more than five thousand dollars
25 and confined in the penitentiary not less than two nor more
26 than ten years.

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

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

3 (1) Such person subjects another person to sexual contact
4 without their consent, and the lack of consent results from
5 forcible compulsion; or

6 (2) Such person subjects another person to sexual con-
7 tact who is physically helpless; or

8 (3) Such person, being fourteen years old or more, sub-
9 jects another person to sexual contact who is eleven years old
10 or less.

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

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

1 (a) A person is guilty of sexual abuse in the second
2 degree when such person subjects another person to sexual
3 contact who is mentally defective or mentally incapacitated.

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

§61-8B-9. Sexual abuse in the third degree.

1 (a) A person is guilty of sexual abuse in the third degree
2 when he subjects another person to sexual contact without the

3 latter's consent, when such lack of consent is due to the victim's
4 incapacity to consent by reason of being less than sixteen years
5 old.

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 section
12 shall be guilty of a misdemeanor, and, upon conviction there-
13 of, shall be confined in the county jail not more than ninety
14 days, or fined not more than five hundred dollars and con-
15 fined in the county jail not more than ninety days.

§61-8B-10. Indecent exposure.

1 (a) A person is guilty of indecent exposure when such
2 person intentionally exposes his or her sex organs or anus or
3 the sex organs or anus of another person or engages in any
4 overt act of sexual gratification, and does so under circum-
5 stances in which the person knows that the conduct is likely
6 to cause affront or alarm.

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

§61-8B-11. Sexual offenses—Evidence.

1 (a) In any prosecution under this article in which the
2 victim's lack of consent is based solely on the incapacity to
3 consent because such victim was below a critical age, evidence
4 of specific instances of the victim's sexual conduct, opinion evi-
5 dence of the victim's sexual conduct and reputation evidence of
6 the victim's sexual conduct shall not be admissible. In any
7 other prosecution under this article, evidence of specific in-
8 stances of the victim's prior sexual conduct with the defendant
9 shall be admissible on the issue of consent: *Provided*, That such

10 evidence heard first out of the presence of the jury is found by
11 the judge to be relevant.

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

20 (c) In any prosecution under this article, neither age nor
21 mental capacity of the victim shall preclude the victim from
22 testifying.

§61-8B-12. Same—Defense.

1 (a) In any prosecution under this article in which the
2 victim's lack of consent is based solely on the incapacity to
3 consent because such victim was below a critical age, mentally
4 defective, mentally incapacitated or physically helpless, it is
5 an affirmative defense that the defendant, at the time he or
6 she engaged in the conduct constituting the offense, did not
7 know of the facts or conditions responsible for such incapacity
8 to consent, unless the defendant is reckless in failing to know
9 such facts or conditions.

*ord
Donald I. Kopp, Clerk
By
Suzanne M. Snow
Assistant Clerk
Washington*

(b) The affirmative defense provided in subsection (a) of
this section shall not be available in any prosecution under
subdivision (2), subsection (a), section three, and under sub-
division (3), subsection (a), section seven of this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

James L. Davis

Chairman Senate Committee

Ronald Anello

Chairman House Committee

Originating in the House.

Takes effect July 1, 1984.

Todd C. Wells

Clerk of the Senate

Donald L. Kopp

Clerk of the House of Delegates

Walter R. Roberts

President of the Senate

John M. See, Jr.

Speaker House of Delegates

The within *is approved* this the *30*
day of *March*, 1984.

John S. Poyser

Governor

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STENOGRAPHER
SECY. OF STATE