

Senate Bill No. 607

(By Senators Barnes, Cann, Carmichael, Edgell, Green, Jenkins,
Laird, Palumbo, Sypolt, Tucker, Plymale, Fitzsimmons, Yost, M.
Hall, Cookman, D. Hall and Wells)

[Introduced February 17, 2014; referred to the Committee on the
Judiciary.]

A BILL to amend and reenact §61-2-9 and §61-2-28 of the Code of
West Virginia, 1931, as amended; and to amend and reenact §61-
8B-1 and §61-8B-3 of said code, all relating to crimes against
the person; providing that an act of domestic violence or
sexual offense by strangling is an aggravated felony offense;
and providing criminal penalties.

Be it enacted by the Legislature of West Virginia:

That §61-2-9 and §61-2-28 of the Code of West Virginia, 1931,
as amended, be amended and reenacted; and that §61-8B-1 and §61-8B-
3 of said code be amended and reenacted, all to read as follows:

ARTICLE 2. CRIMES AGAINST THE PERSON.

**§61-2-9. Malicious or unlawful assault; assault; battery;
penalties.**

1 (a) If any person maliciously shoots, stabs, cuts, strangles
2 or wounds any person, or by any means causes him or her bodily
3 injury with intent to maim, disfigure, disable or kill, he or she
4 ~~shall~~, except where it is otherwise provided, ~~be~~ is guilty of a
5 felony and, upon conviction, shall be punished by confinement in
6 ~~the penitentiary~~ a state correctional facility not less than two
7 nor more than ten years. If ~~such~~ the act ~~be~~ is done unlawfully,
8 but not maliciously, with the intent aforesaid, the offender ~~shall~~
9 ~~be~~ is guilty of a felony and, upon conviction, shall, ~~in the~~
10 ~~discretion of the court,~~ either be confined in ~~the penitentiary~~ a
11 state correctional facility not less than one nor more than five
12 years, or be confined in jail not exceeding twelve months and fined
13 not exceeding \$500.

14 (b) *Assault.* -- If any person unlawfully attempts to commit a
15 violent injury to the person of another or unlawfully commits an
16 act which places another in reasonable apprehension of immediately
17 receiving a violent injury, he or she ~~shall be~~ is guilty of a
18 misdemeanor and, upon conviction, shall be confined in jail for not
19 more than six months, or fined not more than \$100, or both ~~such~~
20 ~~fine and imprisonment~~ fined and confined.

21 (c) *Battery.* -- If any person unlawfully and intentionally
22 makes physical contact of an insulting or provoking nature with the
23 person of another or unlawfully and intentionally causes physical

1 harm to another person, he or she ~~shall be~~ is guilty of a
2 misdemeanor and, upon conviction, shall be confined in jail for not
3 more than twelve months, or fined not more than \$500, or both ~~such~~
4 ~~fine and imprisonment~~ fined and confined.

5 (d) Any person convicted of a violation of subsection (b) or
6 (c) of this section who has, in the ten years prior to said
7 conviction, been convicted of a violation of either subsection (b)
8 or (c) of this section where the victim was a current or former
9 spouse, current or former sexual or intimate partner, a person with
10 whom the defendant has a child in common, a person with whom the
11 defendant cohabits or has cohabited, a parent or guardian, the
12 defendant's child or ward or a member of the defendant's household
13 at the time of the offense or convicted of a violation of section
14 twenty-eight of this article or has served a period of pretrial
15 diversion for an alleged violation of subsection (b) or (c) of this
16 section or section twenty-eight of this article when the victim has
17 ~~such~~ a present or past relationship ~~shall~~ upon conviction ~~be~~ is
18 subject to the penalties set forth in section twenty-eight of this
19 article for a second, third or subsequent criminal act of domestic
20 violence offense, as appropriate.

21 (e) As used in this section, "strangle" means knowingly
22 impeding the normal breathing or circulation of the blood of
23 another person by applying pressure on the neck of the other person

1 or blocking the nose or mouth of the other person.

2 **§61-2-28. Domestic violence -- Criminal acts.**

3 (a) *Domestic battery.* -- Any person who unlawfully and
4 intentionally makes physical contact of an insulting or provoking
5 nature with his or her family or household member or unlawfully and
6 intentionally causes physical harm to his or her family or
7 household member, is guilty of a misdemeanor and, upon conviction
8 thereof, shall be confined in ~~a county or regional~~ jail for not
9 more than twelve months, or fined not more than \$500, or both fined
10 and confined.

11 (b) *Domestic assault.* -- Any person who unlawfully attempts to
12 commit a violent injury against his or her family or household
13 member or unlawfully commits an act which places his or her family
14 or household member in reasonable apprehension of immediately
15 receiving a violent injury, is guilty of a misdemeanor and, upon
16 conviction thereof, shall be confined in ~~a county or regional~~ jail
17 for not more than six months, or fined not more than \$100, or both
18 fined and confined.

19 (c) *Second offense.* -- Domestic assault or domestic battery.

20 A person convicted of a violation of subsection (a) of this
21 section after having been previously convicted of a violation of
22 subsection (a) or (b) of this section, after having been convicted
23 of a violation of subsection (b) or (c), section nine of this

1 article or subsection (a), section fourteen-g of this article where
2 the victim was his or her current or former spouse, current or
3 former sexual or intimate partner, person with whom the defendant
4 has a child in common, person with whom the defendant cohabits or
5 has cohabited, a parent or guardian, the defendant's child or ward
6 or a member of the defendant's household at the time of the offense
7 or who has previously been granted a period of pretrial diversion
8 pursuant to section twenty-two, article eleven of this chapter for
9 a violation of subsection (a) or (b) of this section, or a
10 violation of subsection (b) or (c), section nine of this article or
11 subsection (a), section fourteen-g of this article where the victim
12 was a current or former spouse, current or former sexual or
13 intimate partner, person with whom the defendant has a child in
14 common, person with whom the defendant cohabits or has cohabited,
15 a parent or guardian, the defendant's child or ward or a member of
16 the defendant's household at the time of the offense is guilty of
17 a misdemeanor and, upon conviction thereof, shall be confined in ~~a~~
18 ~~county or regional~~ jail for not less than sixty days nor more than
19 one year, or fined not more than \$1,000, or both fined and
20 confined.

21 A person convicted of a violation of subsection (b) of this
22 section after having been previously convicted of a violation of
23 subsection (a) or (b) of this section, after having been convicted

1 of a violation of subsection (b) or (c), section nine of this
2 article or subsection (a), section fourteen-g of this article where
3 the victim was a current or former spouse, current or former sexual
4 or intimate partner, person with whom the defendant has a child in
5 common, person with whom the defendant cohabits or has cohabited,
6 a parent or guardian, the defendant's child or ward or a member of
7 the defendant's household at the time of the offense or having
8 previously been granted a period of pretrial diversion pursuant to
9 section twenty-two, article eleven of this chapter for a violation
10 of subsection (a) or (b) of this section or subsection (b) or (c),
11 section nine of this article or subsection (a), section fourteen-g
12 of this article where the victim was a current or former spouse,
13 current or former sexual or intimate partner, person with whom the
14 defendant has a child in common, person with whom the defendant
15 cohabits or has cohabited, a parent or guardian, the defendant's
16 child or ward or a member of the defendant's household at the time
17 of the offense shall be confined in ~~a county or regional~~ jail for
18 not less than thirty days nor more than six months, or fined not
19 more than \$500, or both fined and confined.

20 (d) Any person who has been convicted of a third or subsequent
21 violation of the provisions of subsection (a) or (b) of this
22 section, a third or subsequent violation of the provisions of
23 section nine of this article or subsection (a), section fourteen-g

1 of this article where the victim was a current or former spouse,
2 current or former sexual or intimate partner, person with whom the
3 defendant has a child in common, person with whom the defendant
4 cohabits or has cohabited, a parent or guardian, the defendant's
5 child or ward or a member of the defendant's household at the time
6 of the offense or who has previously been granted a period of
7 pretrial diversion pursuant to section twenty-two, article eleven
8 of this chapter for a violation of subsection (a) or (b) of this
9 section or a violation of the provisions of section nine of this
10 article or subsection (a), section fourteen-g of this article in
11 which the victim was a current or former spouse, current or former
12 sexual or intimate partner, person with whom the defendant has a
13 child in common, person with whom the defendant cohabits or has
14 cohabited, a parent or guardian, the defendant's child or ward or
15 a member of the defendant's household at the time of the offense,
16 or any combination of convictions or diversions for these offenses,
17 is guilty of a felony if the offense occurs within ten years of a
18 prior conviction of any of these offenses and, upon conviction
19 thereof, shall be ~~confined~~ imprisoned in a state correctional
20 facility not less than one nor more than five years or fined not
21 more than \$2,500, or both fined and imprisoned.

22 (e) Any person who unlawfully and intentionally makes physical
23 contact by strangling his or her family or household member or

1 unlawfully and intentionally causes physical harm to his or her
2 family or household member as a result thereof, is guilty of an
3 aggravated felony and, upon conviction thereof, shall be fined not
4 more than \$5,000 or imprisoned in a state correctional facility for
5 not more than one year nor more than three years, or both fined and
6 imprisoned.

7 ~~(e)~~ (f) As used in this section, "family or household member"
8 means "family or household member" as defined in §48-27-204 of this
9 code.

10 ~~(f)~~ (g) A person charged with a violation of this section may
11 not also be charged with a violation of subsection (b) or (c),
12 section nine of this article for the same act.

13 ~~(g)~~ (h) No law-enforcement officer may be subject to any civil
14 or criminal action for false arrest or unlawful detention for
15 effecting an arrest pursuant to this section or pursuant to §48-27-
16 1002 of this code.

17 **ARTICLE 8B. SEXUAL OFFENSES.**

18 **§61-8B-1. Definition of terms.**

19 In this article, unless a different meaning plainly is
20 required:

21 (1) "Forcible compulsion" means:

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

1 (b) Threat or intimidation, expressed or implied, placing a
2 person in fear of immediate death or bodily injury to himself or
3 herself or another person or in fear that he or she or another
4 person will be kidnaped; or

5 (c) Fear by a person under sixteen years of age caused by
6 intimidation, expressed or implied, by another person who is at
7 least four years older than the victim.

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

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

14 (3) "Mentally defective" means that a person suffers from a
15 mental disease or defect which renders that person incapable of
16 appraising the nature of his or her conduct.

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

23 (5) "Physically helpless" means that a person is unconscious

1 or for any reason is physically unable to communicate unwillingness
2 to an act.

3 (6) "Sexual contact" means any intentional touching, either
4 directly or through clothing, of the breasts, buttocks, anus or any
5 part of the sex organs of another person, or intentional touching
6 of any part of another person's body by the actor's sex organs,
7 where the victim is not married to the actor and the touching is
8 done for the purpose of gratifying the sexual desire of either
9 party.

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

14 (8) "Sexual intrusion" means any act between persons involving
15 penetration, however slight, of the female sex organ or of the anus
16 of any person by an object for the purpose of degrading or
17 humiliating the person so penetrated or for gratifying the sexual
18 desire of either party.

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

21 (10) "Serious bodily injury" means bodily injury which creates
22 a substantial risk of death, which causes serious or prolonged
23 disfigurement, prolonged impairment of health or prolonged loss or

1 impairment of the function of any bodily organ.

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

6 (12) "Forensic medical examination" means an examination
7 provided to a possible victim of a violation of the provisions of
8 this article by medical personnel qualified to gather evidence of
9 the violation in a manner suitable for use in a court of law, to
10 include: An examination for physical trauma; a determination of
11 penetration or force; a patient interview; and the collection and
12 evaluation of other evidence that is potentially relevant to the
13 determination that a violation of the provisions of this article
14 occurred and to the determination of the identity of the assailant.

15 (13) "Strangles" means knowingly impeding the normal breathing
16 or circulation of the blood of another person by applying pressure
17 on the neck of the other person or blocking the nose or mouth of
18 the other person.

19 **§61-8B-3. Sexual assault in the first degree.**

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

22 (1) The person engages in sexual intercourse or sexual
23 intrusion with another person and, in so doing:

1 (i) Strangles or inflicts serious bodily injury upon anyone;

2 or

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

4 (2) The person, being fourteen years old or more, engages in
5 sexual intercourse or sexual intrusion with another person who is
6 younger than twelve years old and is not married to that person.

7 (b) Any person violating the provisions of this section is
8 guilty of a felony and, upon conviction thereof, shall be
9 imprisoned in a state correctional facility not less than fifteen
10 nor more than thirty-five years, or fined not less than \$1,000 nor
11 more than \$10,000 and imprisoned in a state correctional facility
12 not less than fifteen nor more than thirty-five years.

13 (c) Notwithstanding the provisions of subsection (b) of this
14 section, the penalty for any person violating the provisions of
15 subsection (a) of this section who is eighteen years of age or
16 older and whose victim is younger than twelve years of age, shall
17 be imprisonment in a state correctional facility for not less than
18 twenty-five nor more than one hundred years and a fine of not less
19 than \$5,000 nor more than \$25,000.

NOTE: The purpose of this bill is to provide that an act of

domestic violence or a sexual offense by strangling is an aggravated felony offense.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.