## WEST VIRGINIA LEGISLATURE 2024 REGULAR SESSION

**Committee Substitute** 

for

House Bill 5344

By Delegates Heckert, Jennings, Sheedy, Barnhart,

DeVault, Crouse, and Criss

[Originating in the Committee on the Judiciary;

Reported on February 23, 2024]

A BILL to amend and reenact §61-8B-5 of the Code of West Virginia, 1931, as amended, relating to creating an offense of relating to sexual assault in the third degree sexual assault in the third degree relating to a mentally defective or mentally incapacitated victim and creating criminal penalties and fines relating to said offense; relating to sexual assault in the third degree; creating criminal penalties; and clarifying when a mentally defective victim may be allowed to testify using two-way videoconferencing, or two-way closed circuit television.

Be it enacted by the Legislature of West Virginia:

ARTICLE 8B. SEXUAL OFFENSES.

- §61-8B-5. Sexual Assault in the third degree relating to a mentally defective or mentally incapacitated victim; Sexual assault in the third degree; testimony through the use of two-way closed circuit, or two-way videoconferencing, testimony by mentally defective victims.
- (a) A person is guilty of sexual assault in the third degree relating to a mentally defective or mentally incapacitated victim, when: the person engages in sexual intercourse, or sexual intrusion, with another person who is mentally defective or mentally incapacitated. Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for a determinate sentence of not less than five years nor more than 10 years, or fined not more than \$10,000 and imprisoned in a state correctional facility for a determinate sentence of not less than five years nor more than 10 years.
- (1) The person engages in sexual intercourse or sexual intrusion with another person who is mentally defective or mentally incapacitated; or
- (2) (b) A person is guilty of sexual assault in the third degree, a felony when The the person, being 16 years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than 16 years old and who is at least four years younger than the defendant and is not married to the defendant, and upon conviction thereof, shall be imprisoned in a state

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14	correctional facility not less than one year nor more than five years, or fined not more than \$10,000
15	and imprisoned in a state correctional facility not less than one year nor more than five years.

- (b) Any person violating the provisions of this section is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year 10 years nor more than five 20 years, or fined not more than \$10,000 and imprisoned in a state correctional facility not less than one year nor more than five years.
- (c) Notwithstanding any provision of law to the contrary, a person who is the victim of sexual assault under this section, and who is mentally defective as defined in §61-8B-1 of this code, may be allowed to testify by two-way closed-circuit television or by the use of two-way videoconferencing technology: *Provided*, That in order for two-way closed-circuit television, or the two-way videoconferencing technology, to be utilized for testimonial purposes by the victim the trial court must make findings of fact addressing the following:
  - (1) The victim shall be required to give testimony under oath;
- (2) The defendant shall have an opportunity to contemporaneously cross-examine the victim;
  - (3) The jury and the defendant shall possess the ability to observe the demeanor of the victim; and
  - (4) That such two-way videoconference, or two-way closed circuit-television, examination of the victim reduces risk that the victim will wrongfully implicate an innocent defendant when testifying.

NOTE: The purpose of this bill is to clarify when a mentally incapacitated victim may not be required to testify in open court; and providing judicial discretion to determine the appropriateness of a mentally capacitated victim to testify.

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