

ESSB 5576 – Concerning sexual assault procedures.

WACDL and WDA oppose SB 5576 because it improperly and unintentionally sweeps into RCW 9A.44.020 (the “rape shield statute”) social media evidence and other communications that would be highly relevant to protecting a criminal defendant’s constitutional right to present a defense and to confront and cross-examine witnesses against her/him.

The proposed amendment to RCW 9A.44.020(3) provides that evidence relating to “social media account[s], including any text, image, video, or picture, which depict sexual content, sexual history, nudity or partial nudity, intimate sexual activity, communications about sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest **is not admissible if offered to attack the credibility of the victim.**” (emphasis supplied)

This proposed language covers unintended situations that were clearly not intended by the drafters.

Here are some basic examples demonstrating the error of this amendment:

Example A:

An alleged victim testifies in a trial that he/she was not sexually attracted to a defendant and the alleged victim had never sent the defendant any sexually suggestive messages. But the defendant has hundreds of text messages from the alleged victim expressing his/her desire to have sexual contact with the defendant, including hundreds of sexually explicit photographs of the alleged victim. Clearly, the defendant should be entitled to rebut the alleged victim’s false testimony. But under the proposed amendment to RCW 9A.44.020(3), this evidence would not be admissible because it was “offered to attack the credibility of the victim.” Similarly, the evidence would be excluded under the proposed amendment to RCW 9A.44.020(2) because it would be “inadmissible on the issue of credibility.”

Example B:

A defendant is being prosecuted for Rape in the Second Degree under a theory that the alleged victim was incapacitated due to intoxication. The alleged victim testifies that he/she was too intoxicated to consent to the sex with the defendant. But the alleged victim video-recorded the sexual encounter and sent the video to the defendant with the message: “Thanks for last night, I really enjoyed having sex with you.” The video demonstrates that the alleged victim was not incapacitated and was willingly engaged in the sexual encounter. Clearly, the defendant should be entitled to present this video and the alleged victim’s message, because it critically undermines the alleged victim’s credibility with respect to his/her testimony. But under the proposed amendment, this evidence would not be admissible because it was “offered to attack the credibility of the victim.”

RCW 9A.44.020 was originally enacted to prohibit the defense from using evidence of sexual conduct evidence to “impeach[] the victim’s *general credibility* for truth and veracity. The old

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common law rule apparently recognized a woman's promiscuity somehow had an effect on her character and ability to relate the truth, whereas no such effect existed as to men. *State v. Hudlow*, 99 Wn.2d 1, 8–9 (1983)(emphasis in original). *Accord State v. Sheets*, 128 Wn. App. 149, 155 (2005), as amended (Aug. 2, 2005)(“[t]he purpose of the rape shield statute is to prevent prejudice arising from promiscuity and by suggesting a logical nexus between chastity and veracity”); *State v. Jones*, 168 Wn.2d 713 (2010)(purpose of the statute is to “erase the misogynistic and antiquated notion that a woman's past sexual behavior somehow affected her credibility”).

This proposed amendment would encompass entirely unintended evidence and eliminate a criminal defendant's basic right to defend herself/himself. Caselaw and the present iteration of RCW 9A.44.020 are sufficient to protect the present concerns: Evidence of past sexual behavior is not admissible to impeach the general credibility of an alleged victim (in other words, the impermissible argument is that the alleged victim should not be believed because he/she is unchaste). This principle is well protected by caselaw and the present statute. And, if the defendant wants to attempt to offer evidence of prior sexual conduct that is relevant to consent (which would include social media, text messages, etc.) then the defense needs to follow the procedure prescribed by the statute. All of this is covered by the present statutory scheme. This amendment confuses the state of the law and – on its face – excludes constitutionally permissible evidence.

As a result, the amendment to the statute is likely unconstitutional. See *Jones*, 168 Wn.2d at 724 (2010) (“If the evidence is of high probative value, however, no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22”).

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