

# OFFICE OF JUDICIAL EDUCATION

## 3/2026



RELEASE NO. 70

EDITION (1980)

MARCH 2026

**TO:** Consumers of the Wisconsin Jury Instructions – Criminal

**FROM:** Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 70 for the 1980 edition of Wis JI-Criminal. The release contains material approved by the Wisconsin Criminal Jury Instructions Committee through February 2026.

The following material is included in Release No. 70:

| 832   | 1201B | 1203A | 1205A | 1208A | 1209A | 1211A | 1212A |
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**Questions.** If you have any questions concerning the publication process, this release, or the criminal jury instructions project in general, please direct them to Bryce Pierson at [Bryce.pierson@wicourts.gov](mailto:Bryce.pierson@wicourts.gov).

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# WISCONSIN JURY INSTRUCTIONS

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## CRIMINAL

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## VOLUME I

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**Wisconsin Criminal Jury  
Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 3/2026 Supplement (Release No. 70)

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# WISCONSIN JURY INSTRUCTIONS — CRIMINAL

## Committee Member List

Prepared for the Wisconsin Judicial Conference by its Criminal Jury Instructions Committee, with assistance from the Attorney General's Office, the State Public Defender's Office, and the Office of Judicial Education.

| Committee Members   Judges |                                            |
|----------------------------|--------------------------------------------|
| Name                       | Role / Title                               |
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| Hon. Nicholas McNamara     | Member                                     |
| Hon. Michael Moran         | Member                                     |
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| Hon. Ralph Ramirez         | Member                                     |
| Hon. Laura Crivello        | Member                                     |
| Hon. Mark Sanders          | Member                                     |
| Hon. Scott Blader          | Member                                     |
| Assistance Provided By     |                                            |
| Christine Remington        | Assistant Attorney General                 |
| Katie York                 | Assistant State Public Defender            |
| Bryce Pierson              | Office of Judicial Education Legal Advisor |

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# Wisconsin Jury Instructions

## Criminal

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| 940.225(3)     | 1218A, 1218B                                              |
| 940.225(3m)    | 1219                                                      |
| 940.225(4)     | 1200C                                                     |
| 940.225(4)(b)  | 1200D                                                     |
| 940.225(4)(c)  | 1200E                                                     |
| 940.225(5)(b)  | 1200A                                                     |
| 940.225(5)(c)  | 1200B                                                     |
| 940.225(6)     | 1200F                                                     |
| 940.23         | 1250                                                      |
| 940.23(1)      | 1250                                                      |
| 940.23(2)      | 1252                                                      |

## WIS JI-CRIMINAL

|                 |                                                |
|-----------------|------------------------------------------------|
| 940.235         | 1255                                           |
| 940.24          | 1260                                           |
| 940.245         | 2654 (1261 INSTRUCTION WITHDRAWN)              |
| 940.25          | 1185A                                          |
| 940.25(1)(a)    | 1262                                           |
| 940.25(1)(am)   | 1266                                           |
| 940.25(1)(b)    | 1263, 1263A                                    |
| 940.25(1b)      | 999, 999A                                      |
| 940.27          | (1264 INSTRUCTION WITHDRAWN)                   |
| 940.28          | (1265 INSTRUCTION WITHDRAWN)                   |
| 940.285         | 1268                                           |
| 940.285(2)(b)1m | 1268 EXAMPLE                                   |
| 940.285(2)(b)3  | (1269 INSTRUCTION WITHDRAWN)                   |
| 940.29          | 1270                                           |
| 940.291         | 1273                                           |
| 940.295         | 1271, 1272                                     |
| 940.295(3)(b)1m | 1271 EXAMPLE                                   |
| 940.30          | 1275                                           |
| 940.302         | 1276, 1276 EXAMPLE                             |
| 940.302(2)(b)   | 1279                                           |
| 940.302(2)(c)   | 1277                                           |
| 940.305         | 1278                                           |
| 940.31(1)(a)    | 1280                                           |
| 940.31(1)(b)    | 1281                                           |
| 940.31(1)(c)    | 1282                                           |
| 940.32          | 1284, 1284A, 1284B                             |
| 940.42          | 1292 (1290, 1292A INSTRUCTIONS WITHDRAWN)      |
| 940.43          | 1292 (1292A INSTRUCTION WITHDRAWN)             |
| 940.43(3)       | (1292A INSTRUCTION WITHDRAWN)                  |
| 940.44          | 1296, 1296A, 1297 (1294 INSTRUCTION WITHDRAWN) |
| 940.45          | 1296, 1296A, 1297                              |
| 940.60(1)       | 1220, 1220A                                    |
| 940.60(2)       | 1222, 1222A                                    |
| 940.60(3)(a)    | 1224, 1224A                                    |
| 940.60(3)(b)    | 1225, 1225A                                    |
| 940.60(3)(c)    | 1226                                           |
| 940.61(1)       | 1229                                           |

## WIS JI-CRIMINAL

|                     |                                     |
|---------------------|-------------------------------------|
| 940.61(2)(a)        | 1228, 1228A                         |
| 940.62(1)(a)        | 1234                                |
| 940.62(1)(b)        | 1245                                |
| 940.62(1)(d)        | 1235                                |
| 940.62(1)(e)1       | 1236                                |
| 940.62(2)(a)        | 1240A, 1240C, 1241A, 1232A, 1238A   |
| 940.62(2)(b)        | 1231                                |
| 940.62(2)(c)        | 1242, 1244                          |
| 940.62(2)(d)        | 1230                                |
| 940.62(2)(e)        | 1247A                               |
| 940.65(1), (2), (3) | 1227                                |
| 940.66(2)(a)        | 1249A                               |
| 940.66(2)(b)        | 1249B                               |
| 940.66(2)(c)        | 1249C                               |
| 940.66(3)(a)        | 1249D                               |
| 940.66(3)(b)        | 1249E                               |
| 940.66(3)(c)        | 1249F                               |
| 941.01              | 1300                                |
| 941.01(1)           | 1300                                |
| 941.03              | 1302                                |
| 941.10              | 1310                                |
| 941.10(1)           | 1310                                |
| 941.12(1)           | 1310                                |
| 941.12(2)           | 1319                                |
| 941.13              | 1316                                |
| 941.20(1)(a)        | 1320                                |
| 941.20(1)(b)        | 1321                                |
| 941.20(1)(c)        | 1322                                |
| 941.20(1)(d)        | 1323                                |
| 941.20(1m)          | 1322A                               |
| 941.20(2)           | 1324                                |
| 941.20(3)           | 1327                                |
| 941.21              | 1328                                |
| 941.22              | (1325, 1326 INSTRUCTIONS WITHDRAWN) |
| 941.23              | 1335, 1335A, 1335B                  |
| 941.235             | 1337                                |
| 941.237             | 1338                                |

## WIS JI-CRIMINAL

|                     |                              |
|---------------------|------------------------------|
| 941.237(3)(a)-(j)   | 1338A                        |
| 941.24              | 1340                         |
| 941.26(1)(a)        | 1340A, 1341A                 |
| 941.26(4)(b)        | 1341, 1341B                  |
| 941.26(4)(d)        | 1341A, 1341C                 |
| 941.26(4)(L)        | 1341B, 1341D                 |
| 941.28              | 1342                         |
| 941.29              | 650, 1343, 1344              |
| 941.29(1)(f)(g)     | 1344                         |
| 941.29(1m)(bm)-(em) | 1343D                        |
| 941.29(4)           | 1343B                        |
| 941.2905            | 1343C                        |
| 941.291             | 650                          |
| 941.295             | 1344A                        |
| 941.30(1)           | 1345                         |
| 941.30(2)           | 1347                         |
| 941.31(1)           | 1350                         |
| 941.31(2)           | 1351A, 1351B                 |
| 941.32              | 1352                         |
| 941.325             | 1354                         |
| 941.37(3)           | 1360                         |
| 941.375             | 1365                         |
| 941.39              | 1375                         |
| 942.01              | 1380                         |
| 942.04(1)           | (1390 INSTRUCTION WITHDRAWN) |
| 942.04(1)(b)        | (1391 INSTRUCTION WITHDRAWN) |
| 942.04(1)(c)        | (1392 INSTRUCTION WITHDRAWN) |
| 942.08(2)(a)        | 1392                         |
| 942.08(2)(d)        | 1395                         |
| 942.09              | 1396                         |
| 942.09(1)           | 1398A                        |
| 942.09(2)           | 1396                         |
| 942.09(2)(am)4      | 1396A                        |
| 942.09(3m)          | 1398A, 1398B                 |
| 942.09(3m)(a)1      | 1398A                        |
| 942.09(3m)(a)2      | 1398B                        |
| 942.09(3m)(a)3      | 1398C                        |

## WIS JI-CRIMINAL

|              |                                              |
|--------------|----------------------------------------------|
| 942.09(4)    | 1399                                         |
| 943.01(1)    | 1400                                         |
| 943.01(2g)   | 1400A                                        |
| 943.01(2k)   | 1400B                                        |
| 943.011      | 1400C                                        |
| 943.012(1)   | 1401, 1401A                                  |
| 943.012(2)   | 1401A                                        |
| 943.012(3)   | 1401B                                        |
| 943.012(4)   | 1401C                                        |
| 943.013      | 1402A                                        |
| 943.015      | 1402B                                        |
| 943.017      | 1403                                         |
| 943.02(1)(a) | 1404                                         |
| 943.02(1)(b) | 1405                                         |
| 943.03       | 1408                                         |
| 943.04       | 1410                                         |
| 943.06       | 1417, 1418                                   |
| 943.10       | 581 EXAMPLE, 1032 EXAMPLE                    |
| 943.10(1m)   | 1421, 1423, 1424, 1425A, 1425B, 1425C, 1425E |
| 943.10(2)    | (1422 INSTRUCTION WITHDRAWN)                 |
| 943.10(2)(a) | 1425A                                        |
| 943.10(2)(b) | 1425B                                        |
| 943.10(2)(d) | 1425C                                        |
| 943.10(2)(e) | 1425E                                        |
| 943.11       | 1426                                         |
| 943.12       | 1431                                         |
| 943.125      | 1433                                         |
| 943.14       | 1437                                         |
| 943.143      | 1440                                         |
| 943.145      | 1439                                         |
| 943.15       | 1438                                         |
| 943.20(1)    | 1453, 1453A, 1453B                           |
| 943.20(1)(a) | 1441 (1442 INSTRUCTION WITHDRAWN)            |
| 943.20(1)(b) | 1443, 1443A, 1444                            |
| 943.20(1)(c) | 1450                                         |
| 943.20(1)(d) | 1453, 1453A, 1453B, 1453C                    |
| 943.20(1)(e) | 1455                                         |



## WIS JI-CRIMINAL

|               |                              |
|---------------|------------------------------|
| 943.20(3)(d)  | 1441B                        |
| 943.20(3)(d)2 | (1442 INSTRUCTION WITHDRAWN) |
| 943.201(2)    | 1458                         |
| 943.203(2)    | 1459                         |
| 943.204       | 1457                         |
| 943.209       | 1460                         |
| 943.21        | 1461                         |
| 943.215(1)    | 1462                         |
| 943.213(2)(3) | 1462A                        |
| 943.23(1g)    | 1463                         |
| 943.23(2)     | 1464, 1464A, 1465A           |
| 943.23(3)     | 1464A, 1465, 1465A           |
| 943.23(3m)    | 1465A                        |
| 943.23(4m)    | 1466                         |
| 943.23(5)     | 1467                         |
| 943.24        | 1468                         |
| 943.24(2)     | 1469A, 1469B                 |
| 943.25        | 1470                         |
| 943.28(2)     | 1472A                        |
| 943.28(3)     | 1472B                        |
| 943.28(4)     | 1472C                        |
| 943.30(1)     | 1473A, 1473B                 |
| 943.31        | 1474                         |
| 943.32        | 582 EXAMPLE                  |
| 943.32(1)(a)  | 1475, 1479                   |
| 943.32(1)(b)  | 1477, 1479                   |
| 943.32(2)     | 1480, 1480A                  |
| 943.34        | 1481                         |
| 943.37(3)     | 1488                         |
| 943.38(1)     | 1491                         |
| 943.38(2)     | 1492, 1493                   |
| 943.39(1)     | 1485                         |
| 943.39(2)     | 1486                         |
| 943.395(1)(a) | 1494                         |
| 943.41        | 1496, 1497                   |
| 943.41(5)     | 1497A                        |
| 943.41(6m)    | 1497B                        |

## WIS JI-CRIMINAL

|                      |                                   |
|----------------------|-----------------------------------|
| 943.45(1)(a)         | 1495                              |
| 943.45(3)(c)         | 1495                              |
| 943.50(1m)(a)-(e)    | 1498                              |
| 943.50(1m)(f)        | 1498A                             |
| 943.50(1m)(g)        | 1498B                             |
| 943.50(1m)(h)        | 1498D                             |
| 943.50(1r)           | 1498C                             |
| 943.60               | 1499                              |
| 943.70(2)            | 1504, 1505                        |
| 943.70(3)            | 1506                              |
| 943.80-.92           | 1508                              |
| 943.82(1)            | 1512                              |
| 943.82(2)            | 1514                              |
| 943.84(2)            | 1470                              |
| 943.895(2)(a)1-2.    | 1524                              |
| 943.895(2)(a)3.      | 1525                              |
| 943.895(2)(a)4.      | 1526                              |
| 944.06               | 1510, 1532                        |
| 944.12               | (1530 INSTRUCTION WITHDRAWN)      |
| 944.15               | 1535 (1536 INSTRUCTION WITHDRAWN) |
| 944.17(2)(a)         | 1537                              |
| 944.17(2)(b)         | (1538 INSTRUCTION WITHDRAWN)      |
| 944.20(1)(a)         | 1544A                             |
| 944.20(1)(b)         | 1544B                             |
| 944.20(3)            | (1545 INSTRUCTION WITHDRAWN)      |
| 944.30(1m)(a)        | 1560                              |
| 944.30(1m)(b)        | 1561                              |
| 944.31               | 1564                              |
| 944.32               | 1566                              |
| 944.33(1)(b) and (2) | 1568                              |
| 944.34(1)            | 1570                              |
| 944.34(2)            | 1571                              |
| 945.03(1)            | 1601                              |
| 945.03(2)            | 1602                              |
| 945.03(5)            | 1605                              |
| 945.03(7)            | 1607                              |
| 945.04(1)            | 1610                              |

## WIS JI-CRIMINAL

|                        |                        |
|------------------------|------------------------|
| 945.47(1)(b)           | 1791                   |
| 946.02(1)              | 1705                   |
| 946.10(1)              | 1720, 1721             |
| 946.10(2)              | 1723                   |
| 946.12(1)              | 1730                   |
| 946.12(2)              | 1731                   |
| 946.12(3)              | 1732                   |
| 946.12(4)              | 1733                   |
| 946.12(5)              | 1734                   |
| 946.13(1)(a)           | 1740                   |
| 946.13(1)(b)           | 1741, 1742             |
| 946.31                 | 1750                   |
| 946.32(1)(a)           | 1754                   |
| 946.32(1)(b)           | 1755                   |
| 946.32(2)              | 1756                   |
| 946.41                 | 1765, 1766             |
| 946.41(2)(a)           | 1766A                  |
| 946.415                | 1768                   |
| 946.42(2)              | 1770, 1771             |
| 946.42(3)(a)           | 1772, 1773, 1774       |
| 946.42(3)(e)           | 1770, 1771             |
| 946.42(3m)             | 1775                   |
| 946.42(4)              | 1775A                  |
| 946.425(1)             | 1776                   |
| 946.425(1m)            | 1777A                  |
| 946.425(1r)(a) and (b) | 1777B                  |
| 946.43(1)              | 1778                   |
| 946.43(2)              | 1779                   |
| 946.43(2m)             | 1779A                  |
| 946.44                 | 1780, 1781, 1782, 1783 |
| 946.465(1)             | 1789A                  |
| 946.465(2)             | 1789B                  |
| 946.47(1)(a)           | 1790                   |
| 946.47(1)(b)           | 1791                   |
| 946.49(1)              | 1795                   |
| 946.61(1)(a)           | 1808A                  |
| 946.61(1)(b)           | 1808B                  |

## WIS JI-CRIMINAL

|                |                                             |
|----------------|---------------------------------------------|
| 946.62         | 994                                         |
| 946.63         | <i>(1810 INSTRUCTION WITHDRAWN)</i>         |
| 946.64         | 1812                                        |
| 946.645        | 1813                                        |
| 946.65         | 1815                                        |
| 946.68         | 1825                                        |
| 946.70(1)      | 1830                                        |
| 946.70(2)      | 1831                                        |
| 946.71(1)      | <i>(1832 INSTRUCTION WITHDRAWN)</i>         |
| 946.71(2)      | <i>(1833 INSTRUCTION WITHDRAWN)</i>         |
| 946.71(3)      | <i>(1834 INSTRUCTION WITHDRAWN)</i>         |
| 946.71(4)      | <i>(1835, 1835A INSTRUCTIONS WITHDRAWN)</i> |
| 946.715        | <i>(1838 INSTRUCTION WITHDRAWN)</i>         |
| 946.83(1)      | 1881                                        |
| 946.83(2)      | 1882                                        |
| 946.83(3)      | 1883                                        |
| 946.91(2)(a)   | 1870                                        |
| 946.92(2)(a)   | 1862                                        |
| 946.93         | 1850, 1851, 1852, 1853, 1854                |
| 946.93(2)      | 1850                                        |
| 946.93(3)(a)   | 1851                                        |
| 946.93(3)(b)   | <i>(1852 INSTRUCTION WITHDRAWN)</i>         |
| 946.93(3)(c)   | <i>(1854 INSTRUCTION WITHDRAWN)</i>         |
| 947.01         | 1900                                        |
| 947.011        | 1901, 1901A                                 |
| 947.012(1)     | 1902                                        |
| 947.012(1)(a)  | 1902                                        |
| 947.012(1)(b)  | 1903                                        |
| 947.012(1)(c)  | 1904                                        |
| 947.012(2)     | 1903                                        |
| 947.012(2)(b)  | 1906                                        |
| 947.012(2)(c)  | 1907                                        |
| 947.012(3)     | 1904                                        |
| 947.012(4)     | 1907                                        |
| 947.012(5)     | 1906                                        |
| 947.0125(2)(a) | 1908                                        |
| 947.0125(2)(c) | 1909                                        |

## WIS JI-CRIMINAL

|                     |                                         |
|---------------------|-----------------------------------------|
| 947.013(1r),(1m)(a) | 1910, 1910.1                            |
| 947.013(1r),(1m)(b) | 1912                                    |
| 947.014             | 1919                                    |
| 947.015             | 1905, 1920                              |
| 947.019(1)(a)-(d)   | 1925A                                   |
| 947.019(1)(e)       | 1925B                                   |
| 947.06(3)           | 1930                                    |
| 947.15(1)(a)        | (1960 INSTRUCTION WITHDRAWN)            |
| 947.15(1)(b)        | (1961 INSTRUCTION WITHDRAWN)            |
| 948.01(3)           | 2106A                                   |
| 948.01(5)           | 2101A                                   |
| 948.01(6)           | 2101B                                   |
| 948.02(1)           | 2102, 2102A                             |
| 948.02(1)(am)       | 2012F                                   |
| 948.02(1)(b)        | 2102B                                   |
| 948.02(1)(c)        | 2102C                                   |
| 948.02(1)(d)        | 2102D                                   |
| 948.02(1)(e)        | 2102E, 2102G                            |
| 948.02(2)           | 2104, 2104A, 2105A, 2105B, 2105C, 2105D |
| 948.02(3)           | 2106                                    |
| 948.02(3m)          | 2114                                    |
| 948.025             | 2107                                    |
| 948.025(1)(b)       | 2107 EXAMPLE                            |
| 948.025(2m)         | 2114                                    |
| 948.03(2)(a)        | 2108                                    |
| 948.03(2)(b)        | 2109                                    |
| 948.03(2)(c)        | 2110                                    |
| 948.03(3)(a)        | 2111                                    |
| 948.03(3)(b)        | 2112                                    |
| 948.03(3)(c)        | 2113                                    |
| 948.03(4)(a)        | 2108A, 2108B                            |
| 948.03(5)           | 2114                                    |
| 948.04              | 2116                                    |
| 948.05(1)(b)        | 2120, 2120A                             |
| 948.05(1m)          | 2122                                    |
| 948.05(2)           | 2123                                    |
| 948.05(3)           | 2120A                                   |

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|               |                                             |
|---------------|---------------------------------------------|
| 948.051       | 2124                                        |
| 948.055       | 2125, 2125A                                 |
| 948.06(1)     | 2130, 2130A                                 |
| 948.06(1m)    | 2131, 2131A                                 |
| 948.07        | 2134, 2134A, 2134B                          |
| 948.075       | 2135                                        |
| 948.08        | 2136                                        |
| 948.081       | 2136A                                       |
| 948.085       | 2137A, 2137B                                |
| 948.085(1)    | 2137C                                       |
| 948.085(2)    | 2137D                                       |
| 948.09        | 2138                                        |
| 948.093       | 2138A, 2138B                                |
| 948.095       | 2139, 2139A                                 |
| 948.095(2)    | 2139C                                       |
| 948.095(3)    | 2139D                                       |
| 948.098       | 2139B                                       |
| 948.10        | 2140, 2141                                  |
| 948.11(2)(a)  | 2142, 2142A                                 |
| 948.11(2)(am) | 2143                                        |
| 948.11(2)(c)  | 2142A                                       |
| 948.12(1m)    | 2146A ( <i>2146 INSTRUCTION WITHDRAWN</i> ) |
| 948.12(2m)    | 2146B                                       |
| 948.125       | 2146C                                       |
| 948.13        | 2147                                        |
| 948.14        | 1984, 2196                                  |
| 948.20        | 2148                                        |
| 948.21        | 2150, 2150A                                 |
| 948.215       | 2151                                        |
| 948.22        | 2152, 2152A                                 |
| 948.23(1)(a)  | 2154A                                       |
| 948.23(3)     | 2154B                                       |
| 948.30(1)(a)  | 2160                                        |
| 948.30(1)(b)  | 2161                                        |
| 948.30(2)(a)  | 2162                                        |
| 948.30(2)(b)  | 2163                                        |
| 948.31(1)(b)  | 2166                                        |

## WIS JI-CRIMINAL

|               |                         |
|---------------|-------------------------|
| 948.31(2)     | 2167, 2167A             |
| 948.31(3)(a)  | 2168                    |
| 948.31(4)     | 2169                    |
| 948.40(1)     | 2170, 2170A             |
| 948.40(2)     | 2171                    |
| 948.45        | 2173                    |
| 948.53(2)(a)  | 2175                    |
| 948.55(2)     | 2185                    |
| 948.60        | 2176, 2177              |
| 948.60(2)(c)  | 2177A                   |
| 948.605(2)    | 2178A                   |
| 948.605(3)    | 2178B                   |
| 948.61        | 2179                    |
| 948.62        | 2180                    |
| 951.02        | 1980                    |
| 951.03        | 1983                    |
| 951.08        | 1986, 1988              |
| 951.095       | 1981                    |
| 951.13        | 1982                    |
| 951.14        | 1984                    |
| 951.18(1)     | 1983                    |
| 951.18(2m)    | 1981                    |
| 961.01(4m)    | 6005, 6020A             |
| 961.41        | 6031                    |
| 961.41(1)     | 6001, 6020, 6020A, 6021 |
| 961.41(1m)    | 6001, 6035, 6036        |
| 961.41(3g)    | 6030, 6031              |
| 961.41(4)(am) | 6040                    |
| 961.41(4)(bm) | 6042                    |
| 961.42        | 6037, 6037A, 6037B      |
| 961.43(1)(a)  | 6038                    |
| 961.437(2)(a) | 6044                    |
| 961.455       | 6046, 6047              |
| 961.46        | 6002                    |
| 961.465       | 6003                    |
| 961.49        | 6004                    |
| 961.573(1)    | 6050                    |

## WIS JI-CRIMINAL

|                |                                                     |
|----------------|-----------------------------------------------------|
| 961.573(3)     | 6053                                                |
| 961.65         | 6065                                                |
| 968.06         | <i>(SM-10 INSTRUCTION WITHDRAWN)</i>                |
| 968.075(5)     | 2044                                                |
| 968.12, .13    | <i>(SM-62 INSTRUCTION WITHDRAWN)</i>                |
| 968.26         | SM-12                                               |
| 968.27-.33     | <i>(SM-62 INSTRUCTION WITHDRAWN)</i>                |
| 969.01(2)      | SM-30A                                              |
| 969.01(2)(b)   | <i>(SM-39 INSTRUCTION WITHDRAWN)</i>                |
| 970.02         | SM-25, SM-30                                        |
| 970.03         | SM-31                                               |
| 971.04         | SM-18                                               |
| 971.08         | SM-32                                               |
| 971.11(2)(b)   | 1200G                                               |
| 971.12(3)      | 220, 220A, 220B                                     |
| 971.14         | SM-50                                               |
| 971.15-.175    | 600-662                                             |
| 971.17(1)      | SM-50A                                              |
| 971.19(1)      | 267                                                 |
| 971.20         | <i>(SM-15 INSTRUCTION WITHDRAWN)</i>                |
| 971.31         | <i>(SM-60, SM-61, SM-62 INSTRUCTIONS WITHDRAWN)</i> |
| 972.01         | SM-20                                               |
| 972.08         | 246, SM-55                                          |
| 972.10(1)      | 55, 56, 101, 102, SM-9                              |
| 972.11(2)(b)2  | 1200G                                               |
| 973.01-.17     | SM-34                                               |
| 973.015        | SM-36                                               |
| 973.15(8)      | SM-30A, SM-39                                       |
| 973.155        | SM-34A                                              |
| 974.06         | <i>(SM-70, SM-33B INSTRUCTIONS WITHDRAWN)</i>       |
| 975.01, et al. | <i>(1550-1553, SM-40 INSTRUCTIONS WITHDRAWN)</i>    |
| 975.17         | SM-41                                               |
| 976.05         | SM-90                                               |
| Ch. 980        | 2501, 2502, 2503, 2505, 2506                        |



**790 COERCION — § 939.46**

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.<sup>1</sup>

**Coercion**

The defense of coercion is an issue in this case. The defense of coercion allows a person to engage in conduct that would otherwise be criminal under certain circumstances.

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully under the defense of coercion.<sup>2</sup>

The law allows the defendant to act under the defense of coercion when:

1. A threat by another person [other than the defendant's co-conspirator]<sup>3</sup> caused the defendant to believe that (his) (her) act was the only means of preventing imminent death or great bodily harm to (himself) (herself) (or to others).<sup>4</sup>

A belief may be reasonable even though mistaken, and what is reasonable must be judged in light of the defendant's situation, and may include any prior experiences that bear on the threat the defendant faced.<sup>5</sup>

2. The threat caused the defendant to act as (he) (she) did.
3. The circumstances establishing coercion continued throughout the defendant's conduct.<sup>6</sup>

This means that (a) the threat persisted, (b) the defendant's reasonable belief that the act was the only means of preventing imminent death or great bodily harm persisted, and (c) the threat continued to cause the defendant to act.

[ADD THE FOLLOWING FOR ONGOING OFFENSES]

If you find that, at some point while the defendant engaged in the conduct, there was a reasonable, safe alternative and the defendant could no longer reasonably believe that the act was the only means of preventing imminent death or great bodily harm, then the defense of coercion no longer applies from that point forward.]<sup>7</sup>

**Determining Whether Beliefs Were Reasonable**

In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense, including (his) (her) prior experiences that bear upon the threat. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now.

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all \_\_\_\_\_ elements of this offense have been proved,<sup>8</sup> and that the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 790 was originally published in 1984 and revised in 1995 and 2004. This revision was approved by the Committee in February 2026. It incorporated the holding of *State v. Stetzer*, 2025 WI

34, 417 Wis.2d 373, 22 N.W.3d 893, by clarifying that the elements of coercion must be satisfied throughout the entire course of the defendant's conduct and that, in evaluating the reasonableness of the defendant's belief, the jury may consider the defendant's relevant personal history.

This instruction deals with the defense of coercion which is defined by § 939.46 as follows:

**§ 939.46 Coercion.** (1) A threat by a person other than the actor's co conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for first-degree intentional homicide the degree of the crime is reduced to second degree intentional homicide.

(2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse.

Coercion is closely related to the defense of necessity, see § 939.47 and Wis JI-Criminal 792. The distinction between the two defenses is that with coercion, the outside force which influences the actor has its source in the actions of other human beings. Necessity involves natural physical forces beyond the actor's control which force him to choose committing the crime as the lesser of two evils. United States v. Bailey, 444 U.S. 394 (1980). For application of this defense to prison or jail escape, see Comment to Wis JI-Criminal 1774.

In State v. Stetzer, 2025 WI 34, 417 Wis.2d 373, 22 N.W.3d 893, the Court held that the elements of coercion must be satisfied throughout the entire period an ongoing offense is committed; the defense terminates once the defendant has a reasonable, safe alternative. It also clarified that the trier of fact may consider the defendant's relevant personal history (e.g., prior domestic abuse) when evaluating the reasonableness of the defendant's belief.

Coercion is a complete defense to all crimes except first-degree intentional homicide, which coercion reduces to second-degree intentional homicide. See §§ 939.46(1) and 940.01(2)(d). For cases where first-degree intentional homicide is charged, coercion should be handled in the same manner as other mitigating circumstances, such as adequate provocation (see Wis JI-Criminal 1014) and unnecessary defensive force (see Wis JI-Criminal 1016). For cases involving criminal recklessness, coercion is best addressed by including its consideration as part of the determination whether the conduct presents an unreasonable and substantial risk. In cases involving first-degree reckless charges, whether the circumstances show "utter disregard for human life" also requires evaluation of facts relating to coercion. See Wis JI-Criminal 1020 for a model.

For a case finding the evidence insufficient to raise the coercion defense, see State v. Keeran, 2004 WI App 4, 268 Wis.2d 761, 674 N.W.2d 570.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Coercion can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee

recommends combining the instruction on coercion with that for the underlying crime by inserting Wis JI–Criminal 790 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as “the better policy.” State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

2. In Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979), the Wisconsin Supreme Court held that the burden is on the state to disprove an asserted coercion defense beyond a reasonable doubt.

3. The threat must come from someone “other than the actor’s co-conspirator.” § 939.46(1). If there is an issue about the threat coming from a co-conspirator the phrase should be included in the instruction. It may also be appropriate to instruct the jury on the meaning of “co-conspirator.” Wis JI–Criminal 570 defines the crime of “conspiracy.”

4. The defense apparently applies where the threat is made to any third person, without limitation. In this respect, coercion has been likened to the defense of others under § 939.48(4), Wis. Stat. See 1950 Report on the Criminal Code of the Wisconsin Legislative Council, pages 35-36 and 38-39.

5. The reasonableness of the defendant’s belief that their act was the only means of preventing imminent harm is evaluated from the defendant’s perspective at the time of the act—an objective standard that is nevertheless informed by situational context. In State v. Stetzer, 2025 WI 34, ¶¶26–29, 417 Wis.2d 373, 22 N.W.3d 893, the Wisconsin Supreme Court clarified that a defendant’s personal history may be relevant to this inquiry. Accordingly, the factfinder may consider the defendant’s past experiences—such as a history of domestic abuse or prior interactions with law enforcement—as those experiences may shape what a reasonable person in the defendant’s position would have believed under the circumstances.

6. Although the coercion defense may attach at the outset of an ongoing offense, it persists only while the defendant’s conduct “occurs under circumstances of coercion”—that is, only so long as all three elements in § 939.46(1) continue to be satisfied. If circumstances change so that the act is no longer occurring under circumstances of coercion, the defense becomes unavailable. See Wis. Stat. §§ 939.45(1), 939.46(1); State v. Stetzer, 2025 WI 34, ¶ 20, 417 Wis.2d 373, 22 N.W.3d 893.

7. See State v. Stetzer, 2025 WI 34, ¶¶18–23, 417 Wis.2d 373, 22 N.W.3d 893.

8. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, *supra*. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as coercion, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979).

Using battery as an example, combining the elements with the absence of coercion would result in the following:

If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant did not act lawfully under the defense of coercion, you should find the defendant guilty.

(See Wis JI–Criminal 1220, Battery.)

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**825 PRIVILEGE: DEFENSE OF OTHERS: FORCE LESS THAN THAT  
LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)**

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE  
DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

**Defense of Others**

Defense of others is an issue in this case. The law of defense of others allows the  
defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person); and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person); and,
- the defendant's beliefs were reasonable.

**Determining Whether Beliefs Were Reasonable**

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE –  
SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK ON THE THIRD PERSON, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 832.]

### **State's Burden of Proof**

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all \_\_\_\_ elements of \_\_\_\_\_ have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 825 was originally published in 1966 and revised in 1994 and 2025. This revision was approved by the Committee in December 2025. It amended the instruction to include a cross-reference to Wis JI-Criminal 832, which addresses provocation by the defendant in defense-of-others situations.

In State v. Cross, 2025 WI App 72, 419 Wis. 2d 186, 30 N.W.3d 431, the Court of Appeals clarified that under Wis. Stat. § 939.48(2) and (4), a defendant may, in limited circumstances, lawfully exercise the privilege of defense of others even if the defendant's own unlawful conduct provoked the attack, provided the statutory conditions are satisfied.

The 1994 revision of this instruction changed its format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI-Criminal 800.



This instruction is for cases where less than deadly force is involved. For deadly force cases, see Wis JI-Criminal 830.

1. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: “. . . that all four elements of battery have been proved . . .” See Wis JI-Criminal 1220A. If the crime does not have a convenient short title, use “this offense” instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: “that both elements of this offense were proved, . . .” See Wis JI-Criminal 1222A.

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**830 PRIVILEGE: DEFENSE OF OTHERS: FORCE INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48(4)**

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.

**Defense of Others**

Defense of others is an issue in this case. The law of defense of others allows the defendant to threaten or intentionally use force to defend another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the person of (name of third person); and,
- the defendant believed that (name of third person) was entitled to use or to threaten to use force in self-defense; and,
- the defendant believed that the amount of force used or threatened by the defendant was necessary for the protection of (name of third person); and,
- the defendant's beliefs were reasonable.

The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (name of third person).

**Determining Whether Beliefs Were Reasonable**

A belief may be reasonable, even though mistaken. In determining whether the defendant's beliefs were reasonable the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs

must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

[IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.]

[IF THERE IS EVIDENCE THAT THE THIRD PERSON PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 835.]

[IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK ON THE THIRD PERSON, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 832.]

### **State's Burden of Proof**

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in defense of others.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all \_\_\_\_ elements of \_\_\_\_\_<sup>1</sup> have been proved and that the defendant did not act lawfully in defense of others, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 830 was originally published in 1966 and revised in 1989, 1994, and 2005. This revision was approved by the Committee in December 2025. It amended the instruction to include a cross-reference to Wis JI-Criminal 832, which addresses provocation by the defendant in defense-of-others situations.

In State v. Cross, 2025 WI App 72, 419 Wis.2d 186, 30 N.W.3d 431, the Court of Appeals clarified that under Wis. Stat. § 939.48(2) and (4), a defendant may, in limited circumstances, lawfully exercise the privilege of defense of others even if the defendant's own unlawful conduct provoked the attack, provided the statutory conditions are satisfied.

This instruction deals with the privilege to use or threaten the use of “deadly force” in the defense of a third person. See § 939.48(4).

The 1994 revision of this instruction changed the format to allow integrating the description of defense of others with the instruction for the crime charged. See the Comment to Wis JI–Criminal 800.

This instruction was revised in 1988 in response to State v. Ambuehl, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988). Ambuehl held that the 1966 version of Wis JI–Criminal 830 was in error because it referred only to “use of force” and did not mention the other alternative, “threat of force.” The 1994 revision includes reference to “use” and “threat of use” of force throughout.

The facts in Ambuehl illustrate why the omission of “threat of force” may be a problem. Ambuehl was charged with attempted murder and injury by conduct regardless of life. The charges arose from a barroom fight during which a gun Ambuehl was holding went off, injuring one of the combatants. Ambuehl claimed she intentionally pointed the gun at the man who was fighting with her friend, and the gun went off accidentally. Thus, she claimed she intentionally threatened force but did not intentionally use force – the actual use was accidental. In this situation, the court of appeals found that the instruction's failure to include reference to the threat of force alternative “was likely to divert the jury from Ambuehl's version of the shooting to a version which she denied had occurred.” 145 Wis. 2d 343, 373. This resulted in the real controversy not being tried and required reversal, even though the instruction had not been objected to.

1. In the two blanks provided, insert the number of elements that the crime has and the name of that crime, where the crime has a convenient short title. For example, for a case involving simple battery under § 940.19(1), the sentence would read as follows: “. . . that all four elements of battery have been proved . . .” See Wis JI–Criminal 1220A. If the crime does not have a convenient short title, use “this offense” instead. For example, for a case involving substantial battery under § 940.19(2), the sentence would read: “that both elements of this offense were proved, . . .” See Wis JI–Criminal 1222A.

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**832 PRIVILEGE: DEFENSE OF OTHERS: EFFECT OF PROVOCATION BY DEFENDANT — § 939.48(2) and (4)**

ADD THE FOLLOWING TO WIS JI-CRIMINAL 825 OR 830 WHEN SUPPORTED BY THE EVIDENCE.

You should consider whether (name of defendant) provoked the attack on (name of third person). A person who engages in unlawful conduct that is likely to provoke others to attack, and who does provoke an attack, is not entitled to claim the privilege of defense of others against that attack.

[USE ANY OF THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.]

[However, if the attack which follows causes the defendant to reasonably believe that (name of third person) was in imminent danger of death or great bodily harm, the defendant may lawfully act in defense of (name of third person). But the defendant may not use or threaten force intended or likely to cause death or great bodily harm unless the defendant reasonably believes (he) (she) has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.]

[A person who provokes an attack may regain the right to act in defense of others if the person in good faith withdraws from the encounter and gives adequate notice of that withdrawal to the assailant.]

[A person who provokes an attack whether by lawful or unlawful conduct with the intent to use such an attack as an excuse to cause death or great bodily harm to another is not entitled to the privilege of defense of others.]

However, even if (name of defendant) had provoked the attack, (name of defendant) would still be allowed to act in defense of (name of third person) if (name of defendant) actually and reasonably believed that (name of third person) was entitled to act in his or her own defense.

#### COMMENT

Wis JI–Criminal 832 was approved by the Committee in December 2025.

This instruction is intended for use with Wis JI–Criminal 825 or 830, if applicable.

This instruction was first created in 2025 in response to State v. Cross, 2025 WI App 72, 419 Wis.2d 186, 30 N.W.3d 431, which held that a defendant who provokes an attack may still be entitled to act in defense of others under limited statutory conditions. This instruction is to be used in conjunction with Wis JI–Criminal 825 or 830 when there is evidence that the defendant provoked the attack on the third person.

In State v. Cross, 2025 WI App 72, 419 Wis.2d 186, 30 N.W.3d 431, the court of appeals addressed the application of the self-defense privilege when a defendant acts to defend a third party after having provoked an attack. The court concluded that the statutory limits on self-defense following provocation under Wis. Stat. § 939.48(2) also apply to the privilege of defense of others under § 939.48(4). Specifically, a defendant who unlawfully provokes an attack may still claim the privilege of defense of others if the conditions in § 939.48(2)(a)–(c) are met, including that the defendant reasonably believed the third person faced imminent death or great bodily harm and that there was no other reasonable means to avoid the harm.

See Wis JI–Criminal 835 when the evidence supports a claim that the third party provoked the confrontation.





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# **WISCONSIN JURY INSTRUCTIONS**

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## **CRIMINAL**

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### **VOLUME II**

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**Wisconsin Criminal Jury  
Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 3/2026 Supplement (Release No. 70)

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**1030 FELONY MURDER: UNDERLYING CRIME COMPLETED — § 940.03****Statutory Definition of the Crime**

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing the crime of (name of crime).<sup>1</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

**Elements of Felony Murder That the State Must Prove**

1. The defendant committed the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).<sup>2</sup>

**Determining Whether the Defendant Committed (name of crime)**

The first element of felony murder requires that the defendant committed the crime of (name of crime).

(Name of crime), as defined in section \_\_\_\_\_<sup>3</sup> of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).<sup>4</sup>

**Determining Whether Death was Caused by the Commission of (name of crime)**

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).

**The Meaning of “Cause”**

“Cause” means that the commission of the (name of crime) was a substantial factor in producing the death.<sup>5</sup>

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A CRIME.<sup>6</sup>

[The phrase “the commission of” the crime includes the period of immediate flight from that crime.]

**Jury’s Decision on Felony Murder**

If you are satisfied beyond a reasonable doubt that the defendant committed the crime of (name of crime) and that the death of (name of victim) was caused by the commission of the (name of crime), you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI–Criminal 1030 was originally published in 1989 and revised in 1994, 1998, 2003, 2007, 2013, 2022, and 1/2024. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. The 2022 revision reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022]. This revision was approved by the Committee in February 2026. It updated the comment to reflect 2025 Wisconsin Act 24’s recodification of the battery predicate statutes and to clarify that § 940.03’s predicate list is keyed to an enumerated list of statutes—so it can encompass Class A misdemeanor battery under sub. (1).

This instruction is for a felony murder case based on the complete commission of the underlying crime. For cases involving an attempt to commit the underlying crime, see Wis JI–Criminal 1031. For cases based on committing the crime as a party to the crime, see Wis JI–Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.60(1) Battery
- § 940.65(1) Battery to an unborn child
- § 940.61 & 940.62 Battery: special circumstances
- § 940.62(2)(a) Battery to witness
- § 947.016(1) Threat to witness
- § 940.62(2)(a) Battery to judge
- § 947.016(1) Threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

Under 2025 Wisconsin Act 24 [effective date: August 9, 2025], Wis. Stat. §§ 940.19, 940.195, 940.20, 940.201, and 940.203 were recodified and reorganized as §§ 940.60(1), 940.65(1), 940.61, 940.62, and 940.62(2)(a), respectively.

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- § 940.62 Battery to health care providers and staff or their family member
- § 947.016(3) Threat to health care providers and staff or their family member

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that 2005 Wisconsin Act 313 added two offenses to the felony murder statute—§ 940.60(1) and § 940.65(1)—both of which define Class A misdemeanor conduct. Because § 940.03 (as amended by Act 313) enumerates specific statutes as predicate offenses, without limiting them to felony classifications or particular subsections, the statute’s plain text encompasses violations of these offenses even when charged as misdemeanors under sub. (1). Notably, Wisconsin previously recognized misdemeanor manslaughter offenses prior to the 1955 Criminal Code revision. See, e.g., § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new “unclassified felony” under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

This instruction is for a violation of § 940.03, created by 1987 Wisconsin Act 399 as part of the revision of the homicide statutes. The statute applies to offenses committed on or after January 1, 1989. For a discussion of the homicide revision generally and of the offense covered by this instruction, see “The

Importance of Clarity in the Law of Homicide: The Wisconsin Revision,” by Walter Dickey, David Schultz, and James L. Fullin, Jr., 1989 Wisconsin Law Review 1325.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as a separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining “third degree murder.” The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that “the correct procedure” would be:

in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.

5 Wis.2d 595, 60809.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

In Oimen, the court also addressed the proper way to integrate party to the crime with felony murder: “. . . [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.” 184 Wis.2d 423, 449. The court of appeals affirmed a conviction for felony murder, party to the crime, in a case decided shortly before Oimen. See State v. Chambers, 183 Wis.2d 316, 515 N.W.2d 531 (Ct. App. 1994). See Wis JI–Criminal 1032 and 1032 EXAMPLE for uniform instructions combining felony murder and party to the underlying crime.

In State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App. 1998), the court held that there is no crime of “attempted felony murder,” meaning that the defendant must be allowed to withdraw his negotiated plea of no contest to that offense. Briggs and his accomplice were interrupted by the victim as they were stealing her car and ordered her back into the house at gunpoint. They forced her to the floor, placed a pillow over her head, and Briggs’s companion shot her in the head, causing her very serious, permanent injuries. Briggs was charged as a party to the crimes of attempted first degree intentional homicide, armed car theft, armed robbery, armed burglary, and criminal damage to property. He reached an agreement with the state to plead no contest to both counts of an amended information charging him with attempted felony murder and armed burglary, both as a party to crime. He later moved to vacate his conviction, contending that the circuit court lacked subject-matter jurisdiction because the crime of attempted felony murder does not exist. The court of appeals agreed, relying in part on State v. Carter, 44 Wis.2d 151, 155, 170 N.W.2d

681, 683 (1969), which had concluded that felony murder does not require intent, and therefore, “is not reconcilable with the concept of attempt.”

1. As amended by 2021 Wisconsin Act 209, § 940.03 specifies statutes defining crimes that can be the basis for a felony murder charge. The predicate offenses currently specified in § 940.03 are:

- § 940.60(1) Battery
- § 940.65(1) Battery to an unborn child
- § 940.61 & 940.62 Battery: special circumstances
- § 940.62(2)(a) Battery to witness and
- § 947.016(1) Threat to witness
- § 940.62(2)(a) Battery to judge
- § 947.016(1) Threat to judge
- § 940.62 Battery to health care providers and staff or their family member
- § 947.016(3) Threat to health care providers and staff or their family member
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) “Carjacking”
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

- (a) without consent and causing pregnancy or great bodily harm
- (b) without consent by use or threat of a dangerous weapon or article
- (c) without consent, while aided and abetted and by use or threat of force.

2. “While committing or attempting to commit” is the phrase used by § 940.03 to identify the connection between the underlying criminal offense and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the criminal offense and the commission of the criminal offense caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused “as a natural and probable consequence of the commission of or attempt to commit a felony.” The nature of the connection between the criminal offense and the death has been a source of considerable difficulty in many states that have felony murder statutes. See the Introductory Comment at Wis JI–Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the criminal offense has been the result of the wide range of criminal offenses to which the felony murder rule could apply. Wisconsin’s statute, as revised in 1989, addressed that problem by specifying a limited

number of felonies – 5 – that could be predicates for felony murder. One felony was added by 2001 Wisconsin Act 109 – s. 943.23(1g). Seven crimes were added by 2005 Wisconsin Act 313. One more felony was added by 2021 Wisconsin Act 209 – s. 940.204. Thus, at least with the original limited list of predicate criminal offenses, it could be argued that it is appropriate to extend liability for deaths caused by those criminal offenses, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the criminal offense was committed. Since § 940.03 specifically includes attempts to commit the named criminal offenses, the primary questions are likely to arise with respect to deaths caused after the criminal offense is technically complete. For example, does the statute apply to deaths caused by the offender while fleeing the scene of the crime? Statutes in some states include deaths caused “while fleeing immediately after committing” a criminal offense (§ 2903.01, Ohio Rev. Codes) or those caused in the “immediate flight after committing” the criminal offense (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the criminal offense and deaths caused after the criminal offense is committed are best resolved by asking: Did the commission of the criminal offense cause the death? As stated in the LaFave treatise: “. . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant’s felony dictated his conduct which led to the homicide.” LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: “The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . .” This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.60(1) Battery – Wis JI–Criminal 1220-1226
- for § 940.65(1) Battery to an unborn child – Wis JI–Criminal 1227
- for § 940.61 & 940.62 Battery: special circumstances – Wis JI–Criminal 1228-1237
- for § 940.62(2)(a) Battery to witness – Wis JI–Criminal 1238A
- for § 947.016(1) Threat to witness – Wis JI–Criminal 1238B
- for § 940.62(2)(a) Battery to a judge or their family member – Wis JI–Criminal 1240A
- for § 947.016(1) Threat to a judge or their family member – Wis JI–Criminal 1240B
- for § 940.62 Battery to health care providers and staff or their family member – Wis JI–Criminal 1247A
- for § 947.016(3) Threat to health care providers and staff or their family member – Wis JI–Criminal 1247C
- for § 940.225(1) First Degree Sexual Assault – Wis JI–Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI–Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI–Criminal 1275
- for § 940.31 Kidnapping – Wis JI–Criminal 1280-1282
- for § 943.02 Arson – Wis JI–Criminal 1404, 1405
- for § 943.10(2) Aggravated Burglary – Wis JI–Criminal 1422, 1425A, 1425B, 1425C, 1425E
- for § 943.23(1g) “Carjacking” – Wis JI–Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI–Criminal 1480, 1480A



If an attempt to commit one of these criminal offenses is the basis for the charge, Wis JI–Criminal 1031 provides a model.

5. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with “before”:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI–Criminal 901, Cause.

6. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded “as a matter of law that the phrase in § 940.03, ‘while committing or attempting to commit’, encompasses the immediate flight from a felony.” The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the “mastermind” of an armed burglary, which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

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**1031 FELONY MURDER: UNDERLYING CRIME ATTEMPTED — § 940.03****Statutory Definition of the Crime**

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while attempting to commit the crime of (name of crime).<sup>1</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

**Elements of Felony Murder That the State Must Prove**

1. The defendant attempted to commit the crime of (name of crime).
2. The death of (name of victim) was caused by the attempt to commit (name of crime).<sup>2</sup>

**Determining Whether the Defendant Attempted to Commit (name of crime)**

The first element of felony murder requires that the defendant attempted to commit the crime of (name of crime).

The crime of attempted (name of crime), as defined in § 939.32 and § \_\_\_\_\_<sup>3</sup> of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name of crime), does acts toward the commission of that crime which demonstrate unequivocally,

under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.<sup>4</sup>

First, consider whether the defendant intended to commit (name of crime).

(Name of crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.<sup>5</sup>

The crime involved in this case, however, is not (name of crime) as defined, but an attempt to commit the crime of (name of crime).

Next, consider whether the defendant did acts toward the commission of the crime of (name of crime) that demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name of crime) except for the intervention of another person or some other extraneous factor.

### **Meaning of “Unequivocally”**

“Unequivocally” means that no other inference or conclusion can reasonably and fairly be drawn from the defendant’s acts under the circumstances.

### **Meaning of “Another Person”**

“Another person” means anyone but the defendant and may include the intended victim.

### **Meaning of “Extraneous Factor”**

An “extraneous factor” is something outside the knowledge of the defendant or outside the defendant’s control.

### **Deciding About Intent**

You cannot look into a person’s mind to find intent. Intent must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Determining Whether Death was Caused by the Attempt to**

#### **Commit of (name of crime)**

The second element of felony murder requires that the death of (name of victim) was caused by the attempt to commit (name of crime).

### **The Meaning of “Cause”**

“Cause” means that the attempt to commit (name of crime) was a substantial factor in producing the death.<sup>6</sup>

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE  
FLIGHT FROM AN ATTEMPTED FELONY.<sup>7</sup>

[The phrase “the attempt to commit” the crime includes the period of immediate flight from that crime.]

### **Jury's Decision on Felony Murder**

If you are satisfied beyond a reasonable doubt that the defendant attempted to commit the crime of (name of crime) and that the death of (name of victim) was caused by the attempt to commit (name of crime), you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

#### **COMMENT**

Wis JI–Criminal 1031 was originally published in 2003 and revised in 2007, 2013, 2022, and 1/2024. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. The 2022 revision reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022]. This revision was approved by the Committee in February 2026. It updated the comment to reflect 2025 Wisconsin Act 24's recodification of the battery predicate statutes and to clarify that § 940.03's predicate list is keyed to an enumerated list of statutes—so it can encompass Class A misdemeanor battery under sub. (1).

This instruction is for a felony murder case based on the attempt to commit the underlying felony. For cases involving the complete commission of the underlying felony, see Wis JI-Criminal 1030. For cases based on committing the felony as a party to the crime, see Wis JI–Criminal 1032.

2005 Wisconsin Act 313 amended § 940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.60(1) Battery
- § 940.65(1) Battery to an unborn child
- § 940.61 & 940.62 Battery: special circumstances
- § 940.62(2)(a) Battery to witness
- § 947.016(1) Threat to witness
- § 940.62(2)(a) Battery to judge
- § 947.016(1) Threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

Under 2025 Wisconsin Act 24 [effective date: August 9, 2025], Wis. Stat. §§ 940.19, 940.195, 940.20, 940.201, and 940.203 were recodified and reorganized as §§ 940.60(1), 940.65(1), 940.61, 940.62, and 940.62(2)(a), respectively.

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- § 940.62 Battery to health care providers and staff or their family member
- § 947.016(3) Threat to health care providers and staff or their family member

The complete list of predicate offenses is provided in footnote 1. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that 2005 Wisconsin Act 313 added two offenses to the felony murder statute—§ 940.60(1) and § 940.65(1)—both of which define Class A misdemeanor conduct. Because § 940.03 (as amended by Act 313) enumerates specific statutes as predicate offenses, without limiting them to felony classifications or particular subsections, the statute’s plain text encompasses violations of these offenses even when charged as misdemeanors under sub. (1). Notably, Wisconsin previously recognized misdemeanor manslaughter offenses prior to the 1955 Criminal Code revision. See, e.g., § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new “unclassified felony” under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. State v. Mason, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The underlying felony is a lesser included offense of felony murder. State v. Carlson, 5 Wis.2d 595, 608, 93 N.W.2d 355 (1958); State v. Gordon, 111 Wis.2d 133, 330 N.W.2d 564 (1983). Thus, the felony could be submitted to the jury as a lesser included offense if the evidentiary standard is met; it should not be charged as a separate count. Carlson dealt with § 940.03 of the statutes in effect in 1957, defining “third degree murder.” The current statute is essentially the same as the statute in Carlson, except it is limited to designated felonies. Carlson held that “the correct procedure” would be:

in the first instance to bring but a single charge of third-degree murder and for the court to submit to the jury verdicts of third-degree murder, arson, and not guilty. The arson could properly be submitted to the jury because it is an included crime within the meaning of sec. 939.66(1) of the Criminal Code. But the jury should be instructed to sign but one verdict, so that if they found the defendant guilty of third-degree murder they would make no finding with respect to the separate form of verdict of arson. On the other hand if they found the defendant not guilty of third-degree murder they might still find him guilty of arson, if they found that he set the fire but that it did not cause the death.

5 Wis.2d 595, 608-9.

The felony murder statute applies to a situation where a co-felon is killed by the intended victim of the felony. State v. Oimen, 184 Wis.2d 423, 516 N.W.2d 399 (1994). It also applies when a person present at the crime is killed by the intended victim of the felony. State v. Rivera, 184 Wis.2d 485, 516 N.W.2d 391 (1994). In both cases, the court held that the plain language of the statute applies: the defendants caused the death while committing the felony. The so-called agency approach that limits liability in similar situations in some jurisdictions was rejected.

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The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused “as a natural and probable consequence of the commission of or attempt to commit a felony.” The nature of the connection between the criminal offense and the death has been a source of considerable difficulty in many states that have felony murder statutes. See the Introductory Comment at Wis JI–Criminal 1000 and LaFave and Scott, *Substantive Criminal Law*, Vol. 2, pages 222–28 (West 1986).

Some of the difficulty in defining the connection between the causing of death and the commission of the criminal offense has been the result of the wide range of criminal offenses to which the felony murder rule could apply. Wisconsin’s statute addresses that problem by specifying a limited number of criminal offenses. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those criminal offenses, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the criminal offense was committed. Since § 940.03 specifically includes attempts to commit the named criminal offenses, the primary questions are likely to arise with respect to deaths caused after the criminal offense is technically complete. For example, does the statute apply to deaths caused by the offender while fleeing the scene of the crime? Statutes in some states include deaths caused “while fleeing immediately after committing” a criminal offense (§ 2903.01, Ohio Rev. Codes) or those caused in the “immediate flight after committing” the criminal offense (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 6, below.

The Committee concluded that questions about the connection between the criminal offense and deaths caused after the criminal offense is committed are best resolved by asking: Did the commission of the criminal offense cause the death? As stated in the LaFave treatise: “. . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant’s felony dictated his conduct which led to the homicide.” LaFave and Scott, *Substantive Criminal Law*, Vol. 2, pages 222 and 227 (West 1986).

3. Here include the statute violated, for example: “The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . .” This is the way the first sentence of the uniform instruction for the underlying felony will read.

4. This statement and the material immediately following are based on Wis JI–Criminal 580, Attempt. See the Comment and footnotes for that instruction for an explanation of the issues relating to defining attempt.

5. The uniform jury instructions for the potential underlying criminal offenses are as follows:

- for § 940.60(1) Battery – Wis JI–Criminal 1220-1226
- for § 940.65(1) Battery to an unborn child – Wis JI–Criminal 1227
- for § 940.61 & 940.62 Battery: special circumstances – Wis JI–Criminal 1228-1237
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- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI–Criminal 1208, 1209
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- for § 940.31 Kidnapping – Wis JI–Criminal 1280-1282
- for § 943.02 Arson – Wis JI–Criminal 1404, 1405
- for § 943.10(2) Aggravated Burglary – Wis JI–Criminal 1422, 1425A, 1425B, 1425C, 1425E
- for § 943.23(1g) “Carjacking” – Wis JI–Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI–Criminal 1480, 1480A

If an attempt to commit one of these criminal offenses is the basis for the charge, Wis JI–Criminal 1031 provides a model.

6. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with “before”:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI–Criminal 901, Cause.

7. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded: “as a matter of law that the phrase in § 940.03, ‘while committing or attempting to commit,’ encompasses the immediate flight from a felony.” The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the “mastermind” of an armed burglary, which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

**1032 FELONY MURDER: DEATH CAUSED WHILE COMMITTING A CRIME  
AS A PARTY TO THE CRIME: AIDING AND ABETTING — §§ 940.03 and  
939.05**

**Statutory Definition of the Crime**

Felony murder, as defined in § 940.03 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being while committing<sup>1</sup> the crime of (name of crime)<sup>2</sup> as a party to the crime.

**State's Burden of Proof**

Before you may find the defendant guilty of felony murder, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following elements were present.

**Elements of Felony Murder That the State Must Prove**

1. The defendant was a party to the crime of (name of crime).
2. The death of (name of victim) was caused by the commission of the (name of crime).<sup>3</sup>

**Determining Whether the Defendant Was A Party  
To the Crime of (name of crime)**

The first element of felony murder requires that the defendant was a party to the crime of (name of crime). This determination has two parts. I will first define what it means to be a party to the crime, which is the first part. Then I will define the elements of (name of crime), which is the second part.

### **Party to a Crime**

“Party to a crime” means that all persons concerned in the commission of a crime may be found to have committed that crime although they did not commit it directly.<sup>4</sup>

The State contends<sup>5</sup> that the defendant was concerned in the commission of the crime of (name of crime) by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

### **Definition of Aiding and Abetting**

A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either

- assists the person who commits the crime, or
- is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

To intentionally aid and abet (name of crime), the defendant must know that another person is committing or intends to commit the crime of (name of crime) and have the purpose to assist the commission of that crime.<sup>6</sup>

[USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

(However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist the commission of a crime.)

**Jury's Decision – Party to a Crime**

Before you may find that the defendant was a party to the crime of (name of crime), the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant directly committed the crime of (name of crime) or that the defendant intentionally aided and abetted the commission of that crime.

**Unanimous Agreement Not Required Regarding Theory of Party to a Crime**

All twelve jurors do not have to agree as to whether the defendant directly committed the crime or aided and abetted the commission of the crime. However, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways.<sup>7</sup>

**Elements of (name of crime) That the State Must Prove**

Now I will define the elements of (name of crime).

(Name of crime), as defined in section \_\_\_\_\_<sup>8</sup> of the Criminal Code of Wisconsin, is committed by one who (here refer to the instruction for the underlying crime to fully define the elements of that crime).<sup>9</sup>

**Determining Whether Death was Caused by the  
Commission of (name of crime)**

The second element of felony murder requires that the death of (name of victim) was caused by the commission of the (name of crime).<sup>10</sup>

### **The Meaning of “Cause”**

“Cause” means that the commission of the (name of crime) was a substantial factor in producing the death.<sup>11</sup>

ADD THE FOLLOWING IN CASES INVOLVING THE IMMEDIATE FLIGHT FROM A FELONY.<sup>12</sup>

[The phrase “the commission of” the crime includes the period of immediate flight from that crime.]

### **Jury’s Decision on Felony Murder**

If you are satisfied beyond a reasonable doubt that the defendant was a party to the crime of (name of crime) and that the death of (name of victim) was caused by the commission of (name of crime) as that crime has been defined, you should find the defendant guilty of felony murder.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1032 was originally published in 1998 and revised in 2003, 2007, 2013, and 2022. The 2007 revision reflected the addition of several felonies to the list of those that can provide the predicate for a felony murder charge. The 2022 revision reflected the addition of a new felony to the list of those that can provide the predicate for a felony murder charge based on 2021 Wisconsin Act 209 [effective date: March 25, 2022]. This revision was approved by the Committee in February 2026. It updated the comment to reflect 2025 Wisconsin Act 24’s recodification of the battery predicate statutes and to clarify that § 940.03’s predicate list is keyed to an enumerated list of statutes—so it can encompass Class A misdemeanor battery under sub. (1).

This instruction tailors Wis JI–Criminal 1030, Felony Murder, to a case based on the defendant’s being party to the felony that caused the death. It integrates material from Wis JI–Criminal 400, Party To Crime: Aiding and Abetting: Defendant Either Directly Committed Or Intentionally Aided the Crime Charged, and Wis JI–Criminal 1030, Felony Murder.

2005 Wisconsin Act 313 amended §940.03, Felony murder, to add the following offenses as predicate offenses:

- § 940.60(1) Battery
- § 940.65(1) Battery to an unborn child
- § 940.61 & 940.62 Battery: special circumstances
- § 940.62(2)(a) Battery to witness
- § 947.016(1) Threat to witness
- § 940.62(2)(a) Battery to judge
- § 947.016(1) Threat to judge
- § 940.30 False imprisonment
- § 940.31 Kidnapping

Under 2025 Wisconsin Act 24 [effective date: August 9, 2025], Wis. Stat. §§ 940.19, 940.195, 940.20, 940.201, and 940.203 were recodified and reorganized as §§ 940.60(1), 940.65(1), 940.61, 940.62, and 940.62(2)(a), respectively.

2021 Wisconsin Act 209 amended § 940.03, Felony murder, to add the following offense as a predicate offense:

- § 940.62 Battery to health care providers and staff or their family member
- § 947.016(3) Threat to health care providers and staff or their family member

The complete list of predicate offenses is provided in footnote 2. The list of uniform criminal jury instructions for the predicate offenses is provided in footnote 4.

Note that 2005 Wisconsin Act 313 added two offenses to the felony murder statute—§ 940.60(1) and § 940.65(1)—both of which define Class A misdemeanor conduct. Because § 940.03 (as amended by Act 313) enumerates specific statutes as predicate offenses, without limiting them to felony classifications or particular subsections, the statute’s plain text encompasses violations of these offenses even when charged as misdemeanors under sub. (1). Notably, Wisconsin previously recognized misdemeanor manslaughter offenses prior to the 1955 Criminal Code revision. See, e.g., § 340.10, 1953 Wis. Stats.

The penalty for violating § 940.03, as amended by 2001 Wisconsin Act 109, is imprisonment for not more than 15 years in excess of the maximum term of imprisonment for the underlying crime. This was a change from 20 years under prior law. Adding 15 years to the total term of imprisonment yields a new “unclassified felony” under § 973.01(2)(b)10. 75% of the term is the maximum period of confinement; 25% of the term is the extended supervision maximum. *State v. Mason*, 2004 WI App 176, 276 Wis.2d 434, 687 N.W.2d 526.

The proper way to integrate party to the crime with felony murder was addressed by the Wisconsin Supreme Court in *State v. Oimen*, 184 Wis.2d 423, 449, 516 N.W.2d 399 (1994):

... [W]e wish to point out that [Oimen] should not have been charged as a party to the crime of felony murder. Oimen was appropriately charged as a party to the underlying offense, attempted armed robbery. Charging felony murder as a party to the crime is redundant and unnecessary. A

person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony.

1. This instruction is for the case where the underlying criminal offense was committed. For a case based on the attempt to commit the underlying criminal offense, this instruction must be adapted to the format provided in Wis JI–Criminal 1031.

2. As amended by Wisconsin Act 209, § 940.03 specifies statutes defining crimes that can be the basis for a felony murder charge. The predicate offenses currently specified in § 940.03 are:

- § 940.60(1) Battery
- § 940.65(1) Battery to an unborn child
- § 940.61 & 940.62 Battery: special circumstances
- § 940.62(2)(a) Battery to witness
- § 947.016(1) Threat to witness
- § 940.62(2)(a) Battery to judge
- § 947.016(1) Threat to judge
- § 940.62 Battery to health care providers and staff or their family member
- § 947.016(3) Threat to health care providers and staff or their family member
- § 940.225(1) First Degree Sexual Assault
- § 940.225(2)(a) Second Degree Sexual Assault
- § 940.30 False imprisonment
- § 940.31 Kidnapping
- § 943.02 Arson
- § 943.10(2) Aggravated Burglary
- § 943.23(1g) “Carjacking”
- § 943.32(2) Armed Robbery

As to violations of § 940.225(1), note that sexual contact or sexual intercourse under three different circumstances could be involved:

- (a) without consent and causing pregnancy or great bodily harm
- (b) without consent by use or threat of a dangerous weapon or article
- (c) without consent, while aided and abetted and by use or threat of force.

3. “While committing or attempting to commit” is the phrase used by § 940.03 to identify the connection between the underlying criminal offense and the death. In applying the statutory phrase in the instruction, the Committee adopted the following rationale: the defendant causes the death if he or she was concerned in the commission of the criminal offense and the commission of the criminal offense caused the death. This is consistent with the rationale in the Oimen and Rivera cases, see the comment preceding note 1, and was approved as a correct statement of the law in State v. Krawczyk, 2003 WI App 6, ¶23, 259 Wis.2d 843, 657 N.W.2d 77.

The version of the Wisconsin felony murder statute that preceded current § 940.03 required that the death be caused “as a natural and probable consequence of the commission of or attempt to commit a felony.” The nature of the connection between the criminal offense and the death has been a source of considerable difficulty in many states which have felony murder statutes. See the Introductory Comment at Wis JI–Criminal 1000 and LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222-28 (West 1986).



Some of the difficulty in defining the connection between the causing of death and the commission of the criminal offense has been the result of the wide range of criminal offenses to which the felony murder rule could apply. Wisconsin's statute addresses that problem by specifying a limited number of criminal offenses. Thus, it could be argued that it is appropriate to extend liability for deaths caused by those criminal offense, even to those deaths that are more remote.

The other issue that may come up with respect to the cause issue involves relating the time of the death to the time the criminal offense was committed. Since § 940.03 specifically includes attempts to commit the named criminal offenses, the primary questions are likely to arise with respect to deaths caused after the felony is technically complete. For example, does the statute apply to deaths caused by the offender while fleeing the scene of the crime? Statutes in some states include deaths caused "while fleeing immediately after committing" a criminal offense (§ 2903.01, Ohio Rev. Codes) or those caused in the "immediate flight after committing" the criminal offense (17 A § 202, Me. Rev. Stats.). Wisconsin has reached the same result by case law. See note 12, below.

The Committee concluded that questions about the connection between the criminal offense and deaths caused after the criminal offense is committed are best resolved by asking: Did the commission of the criminal offense cause the death? As stated in the LaFave treatise: ". . . If this causal connection does exist, the killing may take place at some time before or after . . . whether there was sufficient causal connection between the felony and the homicide depends on whether the defendant's felony dictated his conduct which led to the homicide." LaFave and Scott, Substantive Criminal Law, Vol. 2, pages 222 and 227 (West 1986).

4. This is a paraphrase of § 939.05(2), which provides: "Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it. . . ."

5. It is recommended, but not required, that the state indicate in the charging document that a party to crime theory of liability will be relied upon. LaVigne v. State, 32 Wis.2d 190, 194, 145 N.W.2d 175 (1966). If the defendant has not been charged as a party to crime, the material in the second set of brackets should be used.

6. The definition of "intentionally" deals with the clear cut case where the defendant acted with the purpose to assist the commission of the crime charged. "Intentionally" is also defined to include one who is aware that his or her conduct is practically certain to cause the result specified. See § 939.23(3) and Wis-JI Criminal 923.2. For a case involving the "natural and probable consequences" variation of aiding and abetting, see Wis JI-Criminal 406.

7. The jurors need not be instructed that they must unanimously agree on the basis of liability, that is, whether the defendant directly committed the crime or aided and abetted its commission. Holland v. State, 91 Wis.2d 134, 280 N.W.2d 288 (1979).

8. Here include the statute violated, for example: "The crime of first degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin. . ." This is the way the first sentence of the uniform instruction for the underlying felony will read.

9. The uniform jury instructions for the potential underlying felonies are as follows:

- for § 940.60(1) Battery – Wis JI–Criminal 1220-1226
- for § 940.65(1) Battery to an unborn child – Wis JI–Criminal 1227
- for § 940.61 & 940.62 Battery: special circumstances – Wis JI–Criminal 1228-1237
- for § 940.62(2)(a) Battery to witness – Wis JI–Criminal 1238A
- for § 947.016(1) Threat to witness – Wis JI–Criminal 1238B
- for § 940.62(2)(a) Battery to a judge or their family member – Wis JI–Criminal 1240A
- for § 947.016(1) Threat to a judge or their family member – Wis JI–Criminal 1240B
- for § 940.62 Battery to health care providers and staff or their family member – Wis JI–Criminal 1247A
- for § 947.016(3) Threat to health care providers and staff or their family member– Wis JI–Criminal 1247C
- for § 940.225(1) First Degree Sexual Assault – Wis JI–Criminal 1200-1207
- for § 940.225(2)(a) Second Degree Sexual Assault – Wis JI–Criminal 1208, 1209
- for § 940.30 False imprisonment – Wis JI–Criminal 1275
- for § 940.31 Kidnapping – Wis JI–Criminal 1280-1282
- for § 943.02 Arson – Wis JI–Criminal 1404, 1405
- for § 943.10(2) Aggravated Burglary – Wis JI–Criminal 1422, 1425A, 1425B, 1425C, 1425E
- for § 943.23(1g) “Carjacking” – Wis JI–Criminal 1463
- for § 943.32(2) Armed Robbery – Wis JI–Criminal 1480, 1480A

If an attempt to commit one of these criminal offenses is the basis for the charge, Wis JI–Criminal 1031 provides a model.

10. See note 2, supra.

11. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with “before”:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see Wis JI–Criminal 901, Cause.

12. In State v. Oimen, 184 Wis.2d 423, 428, 516 N.W.2d 399 (1994), the Wisconsin Supreme Court concluded “as a matter of law that the phrase in § 940.03, ‘while committing or attempting to commit’, encompasses the immediate flight from a felony.” The court further directed that in the future, courts should utilize an instruction that includes the quoted language.

The Oimen decision upheld the felony murder conviction of the “mastermind” of an armed burglary which resulted in the shooting death of his co-felon by the intended victim of the burglary. The death occurred as the co-felon fled the scene.

**1187 HOMICIDE BY OPERATION OF A VEHICLE WITH A DETECTABLE  
AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — §  
940.09(1)(am)**

**Statutory Definition of the Crime**

Section 940.09(1)(am) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant operated<sup>1</sup> a vehicle.<sup>2</sup>

“Operate” means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.<sup>3</sup>

2. The defendant's operation of a vehicle caused the death of (name of victim).

“Cause” means that the defendant's operation of a vehicle was a substantial factor<sup>4</sup> in producing the death.

3. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant operated a vehicle.

(Name restricted controlled substance) is a restricted controlled substance.<sup>5</sup>

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta-9-tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

### **How to Use the Test Result Evidence**

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.<sup>6</sup>

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating, but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:<sup>7</sup>

**[Jury's Decision]**

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),<sup>8</sup> USE THE FOLLOWING:

**[Consider Whether the Defense is Proved]**

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence<sup>9</sup> that this defense is established.

“By the greater weight of the evidence” means evidence which, when weighed against that opposed to it, has more convincing power. “Credible evidence” is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.<sup>10</sup>

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care<sup>11</sup> does not by itself provide a defense to the crime charged against the defendant.<sup>12</sup> Consider evidence of the

conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

### **Jury's Decision**

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.<sup>13]</sup>

### **COMMENT**

Wis JI–Criminal 1187 was originally published in 2007 and revised in 2010, 2019, 2021, and 1/2024. The 2019 revision added to the comment pertaining to the mandatory period of confinement created by 2019 Wisconsin Act 31. The 2021 revision added an alternative element to the instruction and modified footnotes 5 and 6 to incorporate changes made by the 2019 Wisconsin Act 68. This revision was approved by the Committee in February 2026. It added to the comment, clarifying that methamphetamine is a “restricted controlled substance” regardless of isomer as provided in State v. Johnson, 2025 WI App 20, ¶54, 415 Wis. 2d 682, 19 N.W.3d 645.

This instruction is drafted for violations of § 940.09(1)(am), causing death while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act’s effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI–Criminal 2600 Introductory Comment, Sec. IX.

This instruction may be useful as a model for violations of § 346.63(2)(a)3., which addresses causing great bodily harm and causing injury by operating with a detectable amount of a restricted controlled substance. There is no uniform instruction for this offense.

Violations of § 940.09 are Class D felonies unless “the person has one or more prior convictions, suspensions, or revocations, as counted under s. 343.307(2).” The latter are Class C felonies. See sub. (1c)(a) and sub. (1c)(b). Although the number of priors is a fact that determines the applicable penalty level, it is not an issue that is presented to the jury. “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

Section 940.09 was revised by 2019 Wisconsin Act 31. The offense definition did not change, but sub. (1c)(a) and (b) were amended to require a mandatory minimum term of five years confinement unless the court finds “a compelling reason and places its reason on the record.” [The effective date of Act 31 is November 22, 2019; but this date does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the Department of Transportation or sentencing court.]

Section 940.09(2) provides that the defendant “has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . .” The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI–Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. The statute applies to the “operation or handling” of a vehicle. The instruction uses “operates” throughout, on the assumption that conduct causing death would virtually always involve the operation of a vehicle.

2. Section 939.22(44) defines “vehicle” as follows:

“Vehicle” means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

3. Regarding the definition of “operate,” see Wis JI–Criminal 2600 Introductory Comment, Sec. III.

4. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with “before”:

There may be more than one cause of death. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 8 below. The defense is closely related to the cause element but, in the Committee’s judgment, deals with a different issue and may apply even if the defendant’s operation was the cause of death as required by the

second element. If the defendant's operation caused the death, the defense allows the defendant to avoid liability if it is established that the death would have occurred even if the defendant had not been operating "with a detectable amount" and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI-Criminal 2600 Introductory Comment, Sec. X.

5. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines "restricted controlled substance" as follows:

(50m) 'Restricted controlled substance' means any of the following:

- (a) A controlled substance included in schedule I other than tetrahydrocannabinol.
- (b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
- (c) Cocaine or any of its metabolites.
- (d) Methamphetamine.
- (e) Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person's blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person's blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

Methamphetamine is a restricted controlled substance as defined by statute, and the statutes do not distinguish between its isomers. Accordingly, the State is not required to prove whether the methamphetamine detected was dextromethamphetamine or levomethamphetamine; proof of a detectable amount of methamphetamine is sufficient. State v. Johnson, 2025 WI App 20, ¶¶24–26, 54, 415 Wis. 2d 682, 19 N.W.3d 645.

6. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI-Criminal 2663. [The Committee's general approach to instructing on test results is discussed in Wis JI-Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in "restricted controlled substance" cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for "detectable amount of a restricted controlled substance" cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the



court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9-tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

[t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence” strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence on the issue of the person having . . .” may express a legislative intent that the analysis be admissible to prove the material issue “that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . .” as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the “prima facie” effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

7. Section 940.09(2) provides that the defendant “has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . .” When there is not “some evidence” of the defense in the case, this set of closing paragraphs should be used.

See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

8. See note 7, *supra*. When there is “some evidence” of the defense in the case, the second set of closing paragraphs should be used.

9. Section 940.09(2) expressly places the burden on the defendant to prove the defense “by a preponderance of the evidence.” The instruction describes the standard as “to a reasonable certainty, by the greater weight of the credible evidence,” because the Committee concluded that “the greater weight” will be more easily understood by the jury than “preponderance.”

10. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in *State v. Lohmeier*, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that

an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

11. The phrase “failure to exercise due care” is intended to refer to what might be characterized as “negligence” on the part of the victim. The Committee concluded that the term “negligence” should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for “negligence” would be a reference to the failure to exercise “ordinary care.” The instruction uses “due care” instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25, and 346.63. In cases involving the defense, it would be confusing to refer to “ordinary care” when referring to the victim’s conduct and to “due care” when referring to the defendant’s conduct. Because “due care” is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

12. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. “Defense” is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant’s conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a “bridging” instruction be drafted. See note 10, supra, and Wis JI–Criminal 2600 Introductory Comment, Sec. X.

13. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

- 1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
- 2) not guilty even though the elements have been proved because the defense has been established.

**1192 HOMICIDE BY OPERATION OR HANDLING OF A FIREARM OR  
AIRGUN WITH A DETECTABLE AMOUNT OF A RESTRICTED  
CONTROLLED SUBSTANCE – § 940.09(1g)(am)**

**Statutory Definition of the Crime**

Section 940.09(1g)(am) of the Criminal Code of Wisconsin is violated by a person who causes the death of another by the (operation) (handling) of (a firearm) (an airgun) while the person has a detectable amount of a restricted controlled substance in his or her blood.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant ((operated) (handled)) ((a firearm)<sup>1</sup> (an airgun)<sup>2</sup>).
2. The defendant's (operation) (handling) of the (firearm) (airgun) caused the death of (name of victim).

“Cause” means that the defendant's (operation) (handling) of the (firearm) (airgun) was a substantial factor<sup>3</sup> in producing the death.

3. At the time the defendant (operated) (handled) the (firearm) (airgun), there was a detectable amount of a restricted controlled substance in the defendant's blood.

(Name restricted controlled substance) is a restricted controlled substance.<sup>4</sup>

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta-9-tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

### **How to Use the Test Result Evidence**

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (operating) (handling).<sup>5</sup>

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the (operating) (handling), but you are not required to do so. You, the jury, are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged (operating) (handling) unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:<sup>6</sup>

**[Jury's Decision]**

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.]

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),<sup>7</sup> USE THE FOLLOWING:

**[Consider Whether the Defense is Proved]**

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in (his) (her) blood.]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence<sup>8</sup> that this defense is established.

“By the greater weight of the evidence” means evidence which, when weighed against that opposed to it, has more convincing power. “Credible evidence” is evidence which, in the light of reason and common sense, is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.<sup>9</sup>

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care<sup>10</sup> does not by itself provide a defense to the crime charged against the defendant.<sup>11</sup> Consider evidence of the

conduct of (name of victim) in deciding whether the defendant has established that the death would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in (his) (her) blood.]

### **Jury's Decision**

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.<sup>12]</sup>

### **COMMENT**

This instruction was approved by the Committee in December 2023. This revision was approved by the Committee in February 2026. It added to the comment, clarifying that methamphetamine is a “restricted controlled substance” regardless of isomer as provided in State v. Johnson, 2025 WI App 20, ¶54, 415 Wis. 2d 682, 19 N.W.3d 645.

This instruction is drafted for violations of § 940.09(1g)(am), causing death while handling a firearm or airgun with a detectable amount of a restricted controlled substance. For cases involving the death of an unborn child, see Wis JI–Criminal 1185A, which identifies the changes that should be made in the instructions.

Section 940.09(2) provides that the defendant “has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . .” The defense is addressed in the instruction by using an alternative ending, see text at footnote 4 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

1. “Firearm” has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

2. “Airgun” means a weapon which expels a missile by the expansion of compressed air or other gas. See § 939.22(2).

3. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI–Criminal 1185, and Wis JI–Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations; see footnote 6 below.

4. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 967.055(1m)(b) defines “restricted controlled substance” as follows:

(b) “Restricted controlled substance” means any of the following:

1. A controlled substance included in schedule I under ch. 961 other than a tetrahydrocannabinol.
2. A controlled substance analog, as defined in s. 961.01 (4m), of a controlled substance described in subd. 1.
3. Cocaine or any of its metabolites.
4. Methamphetamine.
5. Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person’s blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person’s blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

Methamphetamine is a restricted controlled substance as defined by statute, and the statutes do not distinguish between its isomers. Accordingly, the State is not required to prove whether the methamphetamine detected was dextromethamphetamine or levomethamphetamine; proof of a detectable amount of methamphetamine is sufficient. State v. Johnson, 2025 WI App 20, ¶¶24–26, 54, 415 Wis. 2d 682, 19 N.W.3d 645.

5. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI–Criminal 2663. [The Committee’s general approach to instructing on test results is discussed in Wis JI–Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in “restricted controlled substance” cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for “detectable amount of a restricted controlled substance” cases is

not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9-tetrahydrocannabinol in a person's blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

[t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person's blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of operating or handling;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of operating or handling.

As to the second difference – admissibility – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence” strongly implies that the analysis is admissible. As to the third difference – connection with the time of operating or handling – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence on the issue of the person having . . .” may express a legislative intent that the analysis be admissible to prove the material issue “that a person had a detectable amount of a restricted controlled substance in his or her blood while handling a firearm . . .” as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the “prima facie” effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue that it is offered to prove.

6. Section 940.09(2) provides that the defendant “has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . .” When there is not “some evidence” of the defense in the case, this set of closing paragraphs should be used.

7. See note 4, supra. When there is “some evidence” of the defense in the case, the second set of closing paragraphs should be used.

8. Section 940.09(2) expressly places the burden on the defendant to prove the defense “by a preponderance of the evidence.” The instruction describes the standard as “to a reasonable certainty, by the



greater weight of the credible evidence,” because the Committee concluded that “the greater weight” will be more easily understood by the jury than “preponderance.”

9. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

10. The phrase “failure to exercise due care” is intended to refer to what might be characterized as “negligence” on the part of the victim. The Committee concluded that the term “negligence” should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for “negligence” would be a reference to the failure to exercise “ordinary care.” The instruction uses “due care” instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25, and 346.63. In cases involving the defense, it would be confusing to refer to “ordinary care” when referring to the victim’s conduct and to “due care” when referring to the defendant’s conduct. Because “due care” is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

11. The instruction attempts to articulate a very fine distinction, which, in the abstract, may be difficult to understand. “Defense” is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant’s conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a “bridging” instruction be drafted. See note 10, supra, and Wis JI–Criminal 2600 Introductory Comment, Sec. X.

12. This statement is included to ensure that both options for a not-guilty verdict are clearly presented:

- 1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
- 2) not guilty even though the elements have been proved because the defense has been established.

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**1201 FIRST-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT  
CONSENT CAUSING GREAT BODILY HARM — § 940.225(1)(a)**

**Statutory Definition of the Crime**

First-degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin, is committed by one who, without consent, has sexual contact with a person—meaning contact undertaken with intent to (cause bodily harm) (become sexually aroused or gratified) (sexually degrade or humiliate)—and causes great bodily harm to that person.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>2</sup>
3. (Name of victim) did not consent to the sexual contact.
4. The defendant caused great bodily harm to (name of victim).<sup>3</sup>

**Meaning of Did Not Consent<sup>4</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>5</sup>

**Meaning of Great Bodily Harm**

“Great bodily harm” means serious bodily injury.<sup>6</sup> [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of first-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

This instruction was originally published in 1980 as Wis JI–Criminal 1200 [for sexual intercourse offenses] and Wis JI–Criminal 1201 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1992. A revision combining the instructions as Wis JI–Criminal 1201 was published in 1996 and revised in 1998, 2000 and 2002. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of first-degree sexual assault defined by § 940.225(1)(a): sexual contact without consent causing great bodily harm. Wis JI–Criminal 1201B is drafted for sexual intercourse without consent causing great bodily harm. Wis JI–Criminal 1201A is drafted for the other violation of this statute: sexual intercourse without consent causing pregnancy.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. In the Committee’s judgment, if the act of contact was without consent, the act itself need not cause the great bodily harm. It is sufficient if great bodily harm was caused by the defendant during the course of conduct that immediately preceded or followed the act of nonconsensual contact. This analysis was adopted as an accurate statement of the law in State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). [At that time, the statement was found at footnote 7 to Wis JI–Criminal 1200, © 1992.]

4. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an

issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

5. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

6. The Committee has concluded that defining great bodily harm as "serious bodily injury" is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute "substantial risk" for "high probability" in the phrase "substantial risk of death." See Wis JI-Criminal 914.

Whether or not an injury suffered amounts to "great bodily harm" is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 720 (1976). Although it was not a sexual assault case, Flores may be helpful in deciding when an instruction on the lesser included offense under § 940.225(2)(b), **SEXUAL INTERCOURSE CAUSING INJURY**, is appropriate. See Wis JI-Criminal 1210.

**1201B FIRST-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT CAUSING GREAT BODILY HARM — § 940.225(1)(a)**

**Statutory Definition of the Crime**

First-degree sexual assault, as defined in § 940.225(1)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and causes great bodily harm to that person.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>1</sup>

2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant caused great bodily harm to (name of victim).<sup>2</sup>

**Meaning of Did Not Consent<sup>3</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and

circumstances. This element does not require that (name of victim) offered physical resistance.<sup>4</sup>

### **Meaning of Great Bodily Harm**

“Great bodily harm” means serious bodily injury.<sup>5</sup> [Injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ, or other serious bodily injury is great bodily harm.]

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of first-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1201B was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1201, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1201 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the types of first-degree sexual assault defined by § 940.225(1)(a): sexual intercourse without consent causing great bodily harm. Wis JI–Criminal 1201 is drafted for sexual contact without consent causing great bodily harm. Wis JI–Criminal 1201A is drafted for the other violation of this statute: sexual intercourse without consent causing pregnancy.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.



2. In the Committee's judgment, if the act of intercourse was without consent, the act itself need not cause the great bodily harm. It is sufficient if great bodily harm was caused by the defendant during the course of conduct that immediately preceded or followed the act of nonconsensual intercourse. This analysis was adopted as an accurate statement of the law in State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). [At that time, the statement was found at footnote 7 to Wis JI-Criminal 1200, © 1992.]

If there was consent to the act of intercourse and it is followed by acts causing great bodily harm, the Committee concluded that there is no violation of § 940.225(1)(a). However, the acts may constitute battery, aggravated battery, or related offenses.

3. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h), and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

4. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 87 Wis.2d 804, 275 N.W.2d 715 (1979).

5. The Committee has concluded that defining great bodily harm as “serious bodily injury” is sufficient in most cases. The material in brackets is the remainder of the definition found in § 939.22(14) and should be used as needed. The definition was changed by 1987 Wisconsin Act 399 to substitute “substantial risk” for “high probability” in the phrase “substantial risk of death.” See Wis JI–Criminal 914.

Whether or not an injury suffered amounts to “great bodily harm” is an issue of fact for the jury to resolve. See Flores v. State, 76 Wis.2d 50, 250 N.W.2d 720 (1977). Although it was not a sexual assault case, Flores may be helpful in deciding when an instruction on the lesser included offense under § 940.225(2)(b), **SEXUAL INTERCOURSE CAUSING INJURY**, is appropriate. See Wis JI–Criminal 1210.

**1203 FIRST-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT  
CONSENT BY USE OR THREAT OF USE OF A DANGEROUS WEAPON  
— § 940.225(1)(b)**

**Statutory Definition of the Crime**

First-degree sexual assault, as defined in § 940.225(1)(b) of the Criminal Code of Wisconsin, is committed by one who without consent, has sexual contact with a person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—and by use or threat of use of (a dangerous weapon) (an article used or fashioned in a manner to lead the other person to reasonably believe it was a dangerous weapon).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified)  
(sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of  
victim)).<sup>2</sup>

3. (Name of victim) did not consent to the sexual contact.
4. The defendant had sexual contact with (name of victim) by use or threat of use of (a dangerous weapon) (an article used or fashioned in a manner to lead the other person to reasonably believe<sup>3</sup> it was a dangerous weapon).

This requires that the defendant actually used or threatened to use<sup>4</sup> (the dangerous weapon) (an article which (name of victim) reasonably believed capable of producing death or great bodily harm)<sup>5</sup> to compel (name of victim) to submit<sup>6</sup> to sexual contact.

### **[Meaning of “Dangerous Weapon”]**

[A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).<sup>7</sup>]

### **Meaning of “Did Not Consent”<sup>8</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>9</sup>

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of first-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

This instruction was originally published in 1980 as Wis JI–Criminal 1202 [for sexual intercourse offenses] and Wis JI–Criminal 1203 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI–Criminal 1203 was published in 1996. The instruction was revised in 2002. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of first-degree sexual assault defined by § 940.225(1)(b): sexual contact without consent by use or threat of use of a dangerous weapon. Wis JI–Criminal 1203A is drafted for sexual intercourse without consent by use or threat of use of a dangerous weapon.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. “Reasonably believe” is defined by § 939.22(32) to mean “that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous.”

4. The phrase, “by use or threat of force or violence,” as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on “use” as opposed to “threat” or on “force” as opposed to “violence.” Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one. See Wis JI–Criminal 1207, note 2, regarding the construction of the same phrase used in § 940.225(2)(a).

5. Section 940.225(1)(b) describes this alternative as “an article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.” There are three categories within the definition of dangerous weapon, see § 939.22(10) and note 7. Rather than reiterate the three alternatives of the dangerous weapon definition in the instruction, the Committee determined it was clearer to use a modified statement of the third statutory alternative: “A device likely to produce death or great bodily harm.” This alternative goes to the crux of the matter where the victim does not actually see the weapon – what did the victim believe – and is broad enough to cover the other alternatives of the dangerous weapon definition: firearm and a device designed as a weapon.

The “article used or fashioned . . .” alternative is also used in the Wisconsin armed robbery statute, § 943.32(2). The appellate decisions interpreting that provision are discussed in the footnotes to Wis JI–Criminal 1480 and 1480A.

6. Section 940.225(1)(b) states that the defendant must have had sexual contact “by use or threat of use of a dangerous weapon. . .” The nature of the connection between the contact and the use of the weapon is left unclear. The Committee feels the intent of the statute is to cover those situations where the defendant used a weapon (or article . . .) to compel the victim to submit to the contact and has expressed the connection in those terms in the instructions.

7. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which defines “dangerous weapon” as follows:

“Dangerous weapon” means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon, as defined in s. 941.295 (1c) (a); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI–Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to “dangerous weapons.”

8. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h), (i). The

following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

9. See State v. Lederer, 99 Wis. 2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 87 Wis. 2d 804, 275 N.W.2d 715 (1979).

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**1203A FIRST-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF USE OF A DANGEROUS WEAPON — § 940.225(1)(b)**

**Statutory Definition of the Crime**

First-degree sexual assault, as defined in § 940.225(1)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and by use or threat of use of (a dangerous weapon) (an article used or fashioned in a manner to lead the other person to reasonably believe it was a dangerous weapon).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>1</sup>

2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant had sexual intercourse with (name of victim) by use or threat of use of (a dangerous weapon) (an article used or fashioned in a manner to lead the other person to reasonably believe<sup>2</sup> it was a dangerous weapon).

This requires that the defendant actually used or threatened to use<sup>3</sup> (the dangerous weapon) (an article which (name of victim) reasonably believed capable of producing death or great bodily harm)<sup>4</sup> to compel (name of victim) to submit<sup>5</sup> to sexual intercourse.

### **[Meaning of “Dangerous Weapon”]**

[A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).<sup>6</sup>]

### **Meaning of “Did Not Consent”<sup>7</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>8</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of first-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI–Criminal 1203A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1203, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1203 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of first-degree sexual assault defined by § 940.225(1)(b): sexual intercourse without consent by use or threat of use of a dangerous weapon. Wis JI–Criminal 1203 is drafted for sexual contact without consent by use or threat of use of a dangerous weapon.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. “Reasonably believe” is defined by § 939.22(32) to mean “that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous.”

3. The phrase, “by use or threat of force or violence,” as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on “use” as opposed to “threat” or on “force” as opposed to “violence.” Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one. See Wis JI–Criminal 1207, note 2, regarding the construction of the same phrase used in § 940.225(2)(a).

4. Section 940.225(1)(b) describes this alternative as “an article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.” There are three categories within the definition of dangerous weapon, see § 939.22(10) and note 6. Rather than reiterate the three alternatives of the dangerous weapon definition in the instruction, the Committee determined it was clearer to use a modified statement of the third statutory alternative: “A device likely to produce death or great bodily harm.” This alternative goes to the crux of the matter where the victim does not actually see the weapon – what did the victim believe – and is broad enough to cover the other alternatives of the dangerous weapon definition: firearm and a device designed as a weapon.

The “article used or fashioned . . .” alternative is also used in the Wisconsin armed robbery statute, § 943.32(2). The appellate decisions interpreting that provision are discussed in the footnotes to Wis JI–Criminal 1480 and 1480A.

5. Section 940.225(1)(b) states that the defendant must have had sexual intercourse “by use or threat of use of a dangerous weapon. . .” The nature of the connection between the intercourse and the use of the weapon is left unclear. The Committee feels the intent of the statute is to cover those situations where the defendant used a weapon (or article . . .) to compel the victim to submit to the intercourse and has expressed the connection in those terms in the instructions.

6. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which defines “dangerous weapon” as follows:

“Dangerous weapon” means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any ligature or other instrumentality used on the throat, neck, nose, or mouth of another person to impede, partially or completely, breathing or circulation of blood; any electric weapon, as defined in s. 941.295 (1c) (a); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI–Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to “dangerous weapons.”

7. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h), (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

8. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 87 Wis.2d 804, 275 N.W.2d 715 (1979).

**1205 FIRST-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE WHILE AIDED AND ABETTED — § 940.225(1)(c)**

**Statutory Definition of the Crime**

First-degree sexual assault, as defined in § 940.225(1)(c) of the Criminal Code of Wisconsin, is committed by one who without consent, has sexual contact with a person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—and by use or threat of force or violence, and is aided and abetted<sup>1</sup> by one or more other persons.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>2</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>3</sup>
3. (Name of victim) did not consent to the sexual contact.

4. The defendant had sexual contact with (name of victim) by use or threat of force or violence.<sup>4</sup>

The use or threat of force or violence may occur before or as part of the sexual contact.<sup>5</sup>

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]<sup>6</sup>

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]<sup>7</sup>

[The phrase “by use of force” includes forcible sexual contact or force used as the means of making sexual contact.]<sup>8</sup>

5. The defendant was aided and abetted by one or more other persons.<sup>9</sup>

**Meaning of “Did Not Consent”<sup>10</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>11</sup>

**Meaning of “Aiding and Abetting”**

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual contact without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.<sup>12</sup>

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:<sup>13</sup>

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of first-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

This instruction was originally published in 1980 as Wis JI–Criminal 1204 [for sexual intercourse offenses] and Wis JI–Criminal 1205 [for sexual contact offenses]. Those instructions were revised in 1983, 1988, and 1990. A revision combining the instructions as Wis JI–Criminal 1205 was published in 1996 and revised in 2002, 2005, and 2018. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of first-degree sexual assault defined by § 940.225(1)(c): sexual contact without consent by use or threat of force or violence while aided and abetted. Wis JI–Criminal 1205A is drafted for sexual intercourse without consent by use or threat of force or violence while aided and abetted.

This offense, like the offense defined in sub. (2)(a), has an element requiring the “use or threat of force.” The case law interpreting that element has developed in cases under sub. (2)(a), but the Committee concluded that the interpretations apply to this offense as well. See footnotes 4-8.

1. Section 940.225(1)(c) uses the phrase, “aided or abetted,” (emphasis added). Since traditional criminal statutes have referred to “aiding and abetting,” the Committee has used that construction in this instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that “aided or abetted” in § 940.225(1)(c) has the same meaning as the phrase “aids and abets” in § 939.05 and therefore is not unconstitutionally vague.

2. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

3. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

4. The phrase, “by use or threat of force or violence,” as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on “use” as opposed to “threat” or on “force” as opposed to “violence.” Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

5. “[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact.” State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, *supra*. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

6. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:



The “use or threat of force or violence” element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim’s submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim’s submission.

7. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski’s argument that . . . the state must therefore establish a separate threat for each count charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.

A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.’s fear may also have been attributable to Jaworski’s alleged threats to tell other inmates as well as S.H.’s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis. 2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years’ duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

8. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim’s submission. The phrase “by use of force” includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

9. Section 940.225(1)(c) states that the defendant must have been aided or abetted and have sexual contact without consent by use or threat of force or violence. The nature of the connection between being aided and having contact is not clear. The earlier version of this instruction tried to express this connection by stating that the aiding and abetting must have “compelled the victim to submit” to the sexual assault.

This issue was discussed in State v. Thomas, 128 Wis.2d 93, 104-05, 381 N.W.2d 567 (Ct. App. 1985). In Thomas, the 1983 version of Wis JI–Criminal 1204, and relevant footnotes, were cited by the defendant in support of his argument that the statute was intended to apply only to the “gang rape situation.” The Thomas court rejected the argument, holding that “aiding and abetting” has the same meaning in § 940.225(1)(c) as it has in § 939.05. Since the Committee had not intended to suggest a different result, the 1988 revision deleted the “compelled the victim to submit” language and revised the aiding and abetting explanation to track closely the one used for purposes of § 939.05.

10. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

11. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

12. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where the actor is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of “aiding and abetting,” see Wis JI–Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to “intentionally aid and abets,” which has been interpreted as “acting with knowledge or belief that another person is committing or intends to commit a crime.” The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of first- or second-degree sexual assault? If aiding is established, the principal is guilty of the first-degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a second-degree offense, Sexual Contact or Intercourse Without Consent by use or threat of force or violence under § 940.225(2)(a). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984).

13. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

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**1205A FIRST-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE WHILE AIDED AND ABETTED — § 940.225(1)(c)**

**Statutory Definition of the Crime**

First-degree sexual assault, as defined in § 940.225(1)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and by use or threat of force or violence, and is aided and abetted<sup>1</sup> by one or more other persons.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>2</sup>

2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant had sexual intercourse with (name of victim) by use or threat of force or violence.<sup>3</sup>

The use or threat of force or violence may occur before or as part of the sexual intercourse.

## SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]<sup>4</sup>

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]<sup>5</sup>

4. The defendant was aided and abetted by one or more other persons.<sup>6</sup>

**Meaning of “Did Not Consent”<sup>7</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>8</sup>

**Meaning of “Aiding and Abetting”**

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual intercourse without consent and either:

- provided assistance to the defendant; or
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.<sup>9</sup>

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:<sup>10</sup>

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of first-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1205A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1205, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1205 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of first-degree sexual assault defined by § 940.225(1)(c): sexual intercourse without consent by use or threat of force or violence while aided and abetted. Wis JI–Criminal 1205 is drafted for sexual contact without consent by use or threat of force or violence while aided and abetted.

This offense, like the offense defined in sub. (2)(a), has an element requiring the “use or threat of force.” The case law interpreting that element has developed in cases under sub. (2)(a), but the Committee concluded that the interpretations apply to this offense as well. See footnotes 3-6.

1. Section 940.225(1)(c) uses the phrase, “aided or abetted,” (emphasis added). Since traditional criminal statutes have referred to “aiding and abetting,” the Committee has used that construction in this instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that “aided or abetted” in § 940.225(1)(c) has the same meaning as the phrase “aids and abets” in § 939.05 and therefore is not unconstitutionally vague.

2. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

3. The phrase, “by use or threat of force or violence,” as used in subsection (2)(a) of § 940.225 was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on “use” as opposed to “threat” or on “force” as opposed to “violence.” Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

4. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

The “use or threat of force or violence” element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim’s submission.

5. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski’s argument that . . . the state must therefore establish a separate threat for each count charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.

A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.’s fear may also have been attributable to Jaworski’s alleged threats to tell other inmates as well as S.H.’s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years’ duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

6. Section 940.225(1)(c) states that the defendant must have been aided or abetted and have sexual intercourse without consent by use or threat of force or violence. The nature of the connection between being aided and having intercourse is not clear. The earlier version of this instruction tried to express this connection by stating that the aiding and abetting must have “compelled the victim to submit” to the sexual assault.



This issue was discussed in State v. Thomas, 128 Wis.2d 93, 104-05, 381 N.W.2d 567 (Ct. App. 1985). In Thomas, the 1983 version of Wis JI–Criminal 1204, and relevant footnotes, were cited by the defendant in support of his argument that the statute was intended to apply only to the “gang rape situation.” The Thomas court rejected the argument, holding that “aiding and abetting” has the same meaning in § 940.225(1)(c) as it has in § 939.05. Since the Committee had not intended to suggest a different result, the 1988 revision deleted the “compelled the victim to submit” language and revised the aiding and abetting explanation to track closely the one used for purposes of § 939.05.

7. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

8. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

9. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where the actor is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime,

involves defining the culpability of the aider and abettor. For further definition of “aiding and abetting,” see Wis JI–Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to “intentionally aid and abets,” which has been interpreted as “acting with knowledge or belief that another person is committing or intends to commit a crime.” The Committee also concluded that the defendant must know of the aider’s presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of first- or second-degree sexual assault? If aiding is established, the principal is guilty of the first-degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a second-degree offense, Sexual Intercourse Without Consent by use or threat of force or violence under § 940.225(2)(a). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984).

10. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

**1208 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT  
CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE — §  
940.225(2)(a)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(a) of the Criminal Code of Wisconsin, is committed by one who, without consent, has sexual contact with a person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—by use or threat of force or violence.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>2</sup>
3. (Name of victim) did not consent to the sexual contact.

4. The defendant had sexual contact with (name of victim) by use or threat of force or violence.<sup>3</sup>

The use or threat of force or violence may occur before or as part of the sexual contact.<sup>4</sup>

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]<sup>5</sup>

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]<sup>6</sup>

[The phrase “by use of force” includes forcible sexual contact or force used as the means of making sexual contact.]<sup>7</sup>

**Meaning of “Did Not Consent”<sup>8</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>9</sup>

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

This instruction was originally published in 1980 as Wis JI–Criminal 1208 [for sexual intercourse offenses] and Wis JI–Criminal 1209 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI–Criminal 1208 was published in 1996 and revised in 2002, 2004, 2005, 2016, and 2022. The 2016 revision involved a nonsubstantive change in the text and an addition to footnote 3. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(a): sexual contact without consent by use or threat of force or violence. Wis JI–Criminal 1208A is drafted for sexual intercourse without consent by use or threat of force or violence.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. The phrase, “by use or threat of force or violence,” as used in subsection (2)(a) of § 940.225, was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on “use” as opposed to “threat” or on “force” as opposed to “violence.” Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

4. “[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact.” State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

5. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

The “use or threat of force or violence” element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim’s submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim’s submission.

Also see, State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, where the court found that the evidence was sufficient to establish the “use of force” element: “force has been used when the victim is compelled to submit.” 317 Wis.2d 92, 96.

6. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski’s argument that . . . the state must therefore establish a separate threat for each count charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.

. . . A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.’s fear may also have been attributable to Jaworski’s alleged threats to tell other inmates as well as S.H.’s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

7. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

8. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement

which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

9. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).



**1208A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE  
WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE  
— § 940.225(2)(a)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and by use or threat of force or violence.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>1</sup>

2. (Name of victim) did not consent to the sexual intercourse.

3. The defendant had sexual intercourse with (name of victim) by use or threat of force or violence.<sup>2</sup>

The use or threat of force or violence may occur before or as part of the sexual intercourse.<sup>3</sup>

**SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE**

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]<sup>4</sup>

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]<sup>5</sup>

### **Meaning of “Did Not Consent”<sup>6</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>7</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1208A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1208, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1208 to separate those topics and provide greater clarity regarding the essential elements, consistent with the

Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(a): sexual intercourse without consent by use or threat of force or violence. Wis JI–Criminal 1208 is drafted for sexual contact without consent by use or threat of force or violence.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. The phrase, “by use or threat of force or violence,” as used in subsection (2)(a) of § 940.225, was construed in State v. Baldwin, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on “use” as opposed to “threat” or on “force” as opposed to “violence.” Thus, instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one.

3. “[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact.” State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 663 N.W.2d 351, citing State v. Bonds, *supra*. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

4. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

The “use or threat of force or violence” element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim’s submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim’s submission.

Also see, State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, where the court found that the evidence was sufficient to establish the “use of force” element: “force has been used when the victim is compelled to submit.” 317 Wis.2d 92, 96.

5. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski’s argument that . . . the state must therefore establish a separate threat for each count charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence. . . . A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . . Part of S.H.’s fear may also have been attributable to Jaworski’s alleged threats to tell other inmates as well as S.H.’s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his

safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

6. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

"Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h) and (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant

believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

7. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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**1209 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT CAUSING INJURY, ILLNESS, DISEASE OR IMPAIRMENT OF A SEXUAL OR REPRODUCTIVE ORGAN, OR MENTAL ANGUISH REQUIRING PSYCHIATRIC CARE — § 940.225(2)(b)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(b) of the Criminal Code of Wisconsin, is committed by one who, without consent, has sexual contact with another person—meaning contact undertaken with intent to (cause bodily harm to that) (become sexually aroused or gratified) (sexually degrade or humiliate that)—and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>2</sup>

3. (Name of victim) did not consent to the sexual contact.
4. The defendant caused (injury to (name of victim)) (illness to (name of victim)) (disease or impairment of a sexual or reproductive organ of (name of victim)) (mental anguish requiring psychiatric care for (name of victim)).<sup>3</sup>

### **Meaning of “Did Not Consent”<sup>4</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>5</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **Comment**

This instruction was originally published in 1980 as Wis JI–Criminal 1210 [for sexual intercourse offenses] and Wis JI–Criminal 1211 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI–Criminal 1209 was published in 1996 and revised in 2001, 2009, and 2022. The 2022 revision added to the comment. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).



This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(b): sexual contact without consent causing injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care. Wis JI–Criminal 1209A is drafted for sexual intercourse without consent causing injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. No further definition is attempted for any of the alternatives for this element. Before the 2008 revision, the text referred to “bodily injury.” The Committee decided to delete “bodily” because it does not appear in the definition of the offense and may invite problems in connection with defining “injury.” “Injury” is not defined in the sexual assault statute, in the general definitions provided in Chapter 939, or by a published court decision. While the Criminal Code uses the closely related term “bodily harm,” caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether “pain” is sufficient to constitute “injury.” In a prosecution under § 940.225(2)(b), the court held that the trial court erred in defining “injury” using the Criminal Code definition of “bodily harm” [see § 939.22(4)] because “injury” does not include “pain.” State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] However, in a prosecution under § 346.63(2)(a), where “injury” is also used, the court held that the word “injury” encompasses physical pain. State v. Maddox, No. 03 0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating “injury” with “bodily harm.”

It is not clear what is intended by the reference in the statute to “sexual or reproductive organs.” The phrase is not defined in the statutes or by prior case law, although the Sexual Assault Law uses the term “intimate parts” in defining sexual contact (§ 940.225(5)(b)). According to cases from other states, “sexual

or reproductive organs” include the immediate vicinity of the genital organs as well as the organs themselves, State v. Nash, 83 N.H. 536, 145 A. 262 (N.H. 1929); and it does not include the breasts, State v. Moore, 194 Ore. 232, 241 P.2d 455 (Ore. 1952).

4. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h), (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

5. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

**1209A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT CAUSING INJURY, ILLNESS, DISEASE OR IMPAIRMENT OF A SEXUAL OR REPRODUCTIVE ORGAN, OR MENTAL ANGUISH REQUIRING PSYCHIATRIC CARE — § 940.225(2)(b)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and causes (injury) (illness) (disease or impairment of a sexual or reproductive organ) (mental anguish requiring psychiatric care).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>1</sup>

2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant caused (injury to (name of victim)) (illness to (name of victim)) (disease or impairment of a sexual or reproductive organ of (name of victim)) (mental anguish requiring psychiatric care for (name of victim)).<sup>2</sup>

**Meaning of “Did Not Consent”<sup>3</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>4</sup>

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**Comment**

Wis JI–Criminal 1209A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1209, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1209 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(b): sexual intercourse without consent causing injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care. Wis JI–Criminal 1209 is drafted for sexual contact without consent causing injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. No further definition is attempted for any of the alternatives for this element. Before the 2008 revision, the text referred to “bodily injury.” The Committee decided to delete “bodily” because it does not appear in the definition of the offense and may invite problems in connection with defining “injury.” “Injury” is not defined in the sexual assault statute, in the general definitions provided in Chapter 939, or by a published court decision. While the Criminal Code uses the closely related term “bodily harm,” caution should be used in equating the two because unpublished decisions of the Wisconsin Court of Appeals have reached conflicting results, focusing on whether “pain” is sufficient to constitute “injury.” In a prosecution under § 940.225(2)(b), the court held that the trial court erred in defining “injury” using the Criminal Code definition of “bodily harm” [see § 939.22(4)] because “injury” does not include “pain.” State v. Gonzalez, No. 2006AP2977-CR, March 20, 2008. [Ordered not published, April 30, 2008.] However, in a prosecution under § 346.63(2)(a), where “injury” is also used, the court held that the word “injury” encompasses physical pain. State v. Maddox, No. 03 0227-CR, July 8, 2003. [Ordered not published, August 27, 2003.] Neither of these decisions may be cited as authority because they were not published. See § 809.23(3). But they indicate the need for caution in equating “injury” with “bodily harm.”

It is not clear what is intended by the reference in the statute to “sexual or reproductive organs.” The phrase is not defined in the statutes or by prior case law, although the Sexual Assault Law uses the term “intimate parts” in defining sexual contact (§ 940.225(5)(b)). According to cases from other states, “sexual or reproductive organs” include the immediate vicinity of the genital organs as well as the organs themselves, State v. Nash, 83 N.H. 536, 145 A. 262 (N.H. 1929); and it does not include the breasts, State v. Moore, 194 Ore. 232, 241 P.2d 455 (Ore. 1952).

3. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (cm), (d), (g), (h), (i). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent.

Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

4. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

**1211 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITH A PERSON SUFFERING FROM MENTAL ILLNESS — § 940.225(2)(c)****Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—and the other person suffers from a mental (illness) (deficiency) which renders that person temporarily or permanently incapable of appraising their own conduct, and the person committing the act knows of such condition.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of

victim)).<sup>2</sup>

3. (Name of victim) suffered from a mental (illness) (deficiency) at the time of the sexual contact.<sup>3</sup>
4. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising (name of victim)'s own conduct.<sup>4</sup>
5. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising (name of victim)'s own conduct.<sup>5</sup>

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE FOURTH OR FIFTH ELEMENTS.<sup>6</sup>

#### **[Use of Consent Evidence]**

[Consent to sexual contact is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising (his) (her) conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising (his) (her) conduct).]

#### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five elements of second-degree



sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

#### COMMENT

This instruction was originally published in 1980 as Wis JI–Criminal 1212 [for sexual intercourse offenses] and Wis JI–Criminal 1213 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI–Criminal 1211 was published in 1996 and revised in 1998, 2002, 2015, 2023, 1/2024, and 2/2025. The 2/2025 revision modified language in the third element to clarify that the jury’s assessment should center on the victim’s ability to appraise their own conduct. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(c): sexual contact with a person suffering from mental illness. Wis JI–Criminal 1211A is drafted for sexual intercourse with a person suffering from mental illness.

Section 940.225(2)(c) provides that it is second degree sexual assault if one “[h]as sexual contact with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person’s conduct, and the defendant knows of such condition.” This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent where, in satisfying the consent element, the State relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim “suffers from a mental illness or defect which impairs capacity to appraise personal conduct.” This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim’s mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense, the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, “without consent” is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense, therefore, requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsection (2)(c).

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. The Committee decided not to define “mental illness or deficiency” in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when the involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term “mental illness or deficiency” has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: “. . . which renders that person temporarily or permanently incapable of appraising the person’s conduct.”

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals cited the discussion above with apparent approval. The court held that “[W]hen, as here, there is lay opinion testimony supported by ample testimony as to the victim’s behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony.” Also see State v. Onyeukwu, 2014AP518-CR, [not published] for an example of a decision finding the evidence sufficient to establish “mental deficiency” based on evidence showing that the 22-year-old victim “was probably functioning on a sixth-grade level.” ¶16.

4- For additional discussion on this element, see State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

5. Section 940.225(2)(c) requires that the defendant know of the victim’s condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency “renders the person temporarily or permanently incapable of appraising the person’s conduct.”

6. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g).” Thus, “without consent” is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising his or her conduct and whether the defendant knew that the victim was suffering from a mental illness that rendered him or her incapable of appraising his or her conduct.

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**1211A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE  
WITH A PERSON SUFFERING FROM MENTAL ILLNESS —  
§ 940.225(2)(c)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who suffers from a mental (illness) (deficiency) which renders that person temporarily or permanently incapable of appraising their own conduct, and the person committing the act knows of such condition.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>1</sup>

2. (Name of victim) suffered from a mental (illness) (deficiency) at the time of the sexual intercourse.<sup>2</sup>
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising (name of victim)’s own conduct.<sup>3</sup>

4. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising (name of victim)'s own conduct.<sup>4</sup>

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.<sup>5</sup>

**[Use of Consent Evidence]**

[Consent to sexual intercourse is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising (his) (her) conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising (his) (her) conduct).]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 1211A was approved by the Committee in October 2025. Previously, this material

appeared in an earlier version of Wis JI–Criminal 1211, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1211 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(c): sexual intercourse with a person suffering from mental illness. Wis JI–Criminal 1211 is drafted for sexual contact with a person suffering from mental illness.

Section 940.225(2)(c) provides that it is second degree sexual assault if one “[h]as sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person’s conduct, and the defendant knows of such condition.” This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent where, in satisfying the consent element, the State relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim “suffers from a mental illness or defect which impairs capacity to appraise personal conduct.” This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim’s mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense, the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, “without consent” is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense, therefore, requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsection (2)(c).

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. The Committee decided not to define “mental illness or deficiency” in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when the involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term “mental illness or deficiency” has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: “. . . which renders that person temporarily or permanently incapable of appraising the person’s conduct.”

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals cited the discussion above with apparent approval. The court held that “[W]hen, as here, there is lay

opinion testimony supported by ample testimony as to the victim's behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony." Also see State v. Onyeukwu, 2014AP518-CR, [not published] for an example of a decision finding the evidence sufficient to establish "mental deficiency" based on evidence showing that the 22-year-old victim "was probably functioning on a sixth-grade level." ¶16.

3. For additional discussion on this element, see State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

4. Section 940.225(2)(c) requires that the defendant know of the victim's condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency "renders the person temporarily or permanently incapable of appraising the person's conduct."

5. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g)." Thus, "without consent" is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising his or her conduct and whether the defendant knew that the victim was suffering from a mental illness that rendered him or her incapable of appraising his or her conduct.



**1212 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITH A PERSON WHO IS UNDER THE INFLUENCE OF AN INTOXICANT — § 940.225(2)(cm)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(cm) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—and the other person is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual contact with the person while the person is incapable of giving consent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified)

(sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>2</sup>

3. (Name of victim) was under the influence of an intoxicant at the time of the sexual contact.

[ \_\_\_\_\_ is an intoxicant.]<sup>3</sup>

[“Intoxicant” means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.]<sup>4</sup>

4. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.
5. The defendant had actual knowledge<sup>5</sup> that (name of victim) was incapable of giving consent.
6. The defendant had the purpose to have sexual contact while (name of victim) was incapable of giving consent.<sup>6</sup>

### **Meaning of Consent**

“Consent” means words or actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual contact.<sup>7</sup>

### **Deciding About Purpose and Actual Knowledge**

You cannot look into a person’s mind to find purpose and actual knowledge. Purpose and actual knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon

purpose and actual knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all six elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1212 was originally published in 1998 and revised in 2002, 2007, 2014, 2021, 7/2024. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(cm): sexual contact with a person who is under the influence of an intoxicant. Wis JI–Criminal 1212A is drafted for sexual intercourse with a person who is under the influence of an intoxicant.

Section 940.225(2)(cm) was created by 1997 Wisconsin Act 220 (effective date: May 14, 1998). It originally provided that it was second degree sexual assault if one “[h]as sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person’s conduct, and the defendant knows of such condition.” Although the statute referred to “intoxicant,” alcohol, the most common intoxicant, was excluded from the definition. The original statute was apparently intended to address the so-called date rape drugs such as “gamma hydroxybutyrate” or “GHB,” “gamma hydroxybutyrolactone” or “GBL,” ketamine, or flunitrazepam, the possession of which was also criminalized by the same legislation creating this sexual assault offense. See § 961.41(3g)(f) as created by 1997 Wisconsin Act 220.

Section 940.225(2)(cm) was amended by 2005 Wisconsin Act 436 (effective date: June 6, 2006). Act 436 made the following changes:

- it included “alcohol beverage” in the definition of “intoxicant” in sub. (5)(ai);
- it changed “incapable of appraising the person’s conduct” to “incapable of giving consent”;
- it restated the knowledge requirement as “has actual knowledge that the person is incapable of giving consent”; and,
- it added: “and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.”

Section 940.225(2)(cm) was further amended by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] to add “hazardous inhalant” to the definition of “intoxicant.” Act 83 also created a definition of “hazardous inhalant” in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a “hazardous inhalant,” see Wis JI–Criminal 2667.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. If the charging document specifies one of the substances that qualifies as an “intoxicant” under § 940.225(5)(ai), the Committee suggests simply telling the jury that, for example: “A controlled substance is an intoxicant.” If one of the alternatives is not specified or if reading the full statutory definition is believed to be preferable, that definition is provided in the second set of brackets.

4. This is the definition of “intoxicant” in § 940.225(5)(ai). The definition was revised by 2005 Wisconsin Act 436 to include “alcohol beverage” as an “intoxicant.” It was further revised by 2013 Wisconsin Act 83 to include “hazardous inhalant.”

5. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant “has actual knowledge that the person is incapable of giving consent.” “Actual knowledge” replaced “knows” used in the prior version of the statute. The Committee interprets this change as emphasizing the subjective nature of the mental element required for this offense.

6. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant “has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.” The 2006 revision of the instruction added the fifth element to reflect this addition to the statutory definition.

7. This is the definition provided in § 940.225(4).

2005 Wisconsin Act 436 amended s. 940.225(2)(cm) to refer to the victim being under the influence to a degree which renders that person “incapable of giving consent” in place of “rendered the person incapable of appraising the person’s conduct.”

Act 436 did not amend the second sentence of s. 940.225(4), which provides that “consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), (i) . . .” While “without consent” is not an element of this offense, evidence relating to consent may be relevant to the elements that refer to the victim being incapable of giving consent. Thus, the revised instruction does not include the statement found in the prior version that informs the jury “consent is not a defense.” See, for example, Wis JI–Criminal 1211.

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**1212A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE  
WITH A PERSON WHO IS UNDER THE INFLUENCE OF AN  
INTOXICANT — § 940.225(2)(cm)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(cm) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual intercourse with the person while the person is incapable of giving consent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200B).<sup>1</sup>

2. (Name of victim) was under the influence of an intoxicant at the time of the sexual intercourse.

[ \_\_\_\_\_ is an intoxicant. ]<sup>2</sup>

[“Intoxicant” means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.]<sup>3</sup>

3. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.
4. The defendant had actual knowledge<sup>4</sup> that (name of victim) was incapable of giving consent.
5. The defendant had the purpose to have sexual intercourse while (name of victim) was incapable of giving consent.<sup>5</sup>

### **Meaning of Consent**

“Consent” means words or actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.<sup>6</sup>

### **Deciding About Purpose and Actual Knowledge**

You cannot look into a person’s mind to find purpose and actual knowledge. Purpose and actual knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and actual knowledge.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.



**COMMENT**

Wis JI–Criminal 1212A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1212, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1212 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(cm): sexual intercourse with a person who is under the influence of an intoxicant. Wis JI–Criminal 1212 is drafted for sexual contact with a person who is under the influence of an intoxicant.

Section 940.225(2)(cm) was created by 1997 Wisconsin Act 220 (effective date: May 14, 1998). It originally provided that it was second degree sexual assault if one “[h]as sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person’s conduct, and the defendant knows of such condition.” Although the statute referred to “intoxicant,” alcohol, the most common intoxicant, was excluded from the definition. The original statute was apparently intended to address the so-called date rape drugs such as “gamma hydroxybutyrate” or “GHB,” “gamma hydroxybutyrolactone” or “GBL,” ketamine, or flunitrazepam, the possession of which was also criminalized by the same legislation creating this sexual assault offense. See § 961.41(3g)(f) as created by 1997 Wisconsin Act 220.

Section 940.225(2)(cm) was amended by 2005 Wisconsin Act 436 (effective date: June 6, 2006). Act 436 made the following changes:

- it included “alcohol beverage” in the definition of “intoxicant” in sub. (5)(ai);
- it changed “incapable of appraising the person’s conduct” to “incapable of giving consent”;
- it restated the knowledge requirement as “has actual knowledge that the person is incapable of giving consent”; and,
- it added: “and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.”

Section 940.225(2)(cm) was further amended by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] to add “hazardous inhalant” to the definition of “intoxicant.” Act 83 also created a definition of “hazardous inhalant” in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a “hazardous inhalant,” see Wis JI–Criminal 2667.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. If the charging document specifies one of the substances that qualifies as an “intoxicant” under § 940.225(5)(ai), the Committee suggests simply telling the jury that, for example: “A controlled substance

is an intoxicant.” If one of the alternatives is not specified or if reading the full statutory definition is believed to be preferable, that definition is provided in the second set of brackets.

3. This is the definition of “intoxicant” in § 940.225(5)(ai). The definition was revised by 2005 Wisconsin Act 436 to include “alcohol beverage” as an “intoxicant.” It was further revised by 2013 Wisconsin Act 83 to include “hazardous inhalant.”

4. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant “has actual knowledge that the person is incapable of giving consent.” “Actual knowledge” replaced “knows” used in the prior version of the statute. The Committee interprets this change as emphasizing the subjective nature of the mental element required for this offense.

5. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant “has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.” The 2006 revision of the instruction added the fifth element to reflect this addition to the statutory definition.

6. This is the definition provided in § 940.225(4).

2005 Wisconsin Act 436 amended s. 940.225(2)(cm) to refer to the victim being under the influence to a degree which renders that person “incapable of giving consent” in place of “rendered the person incapable of appraising the person’s conduct.”

Act 436 did not amend the second sentence of s. 940.225(4), which provides that “consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), (i) . . .” While “without consent” is not an element of this offense, evidence relating to consent may be relevant to the elements that refer to the victim being incapable of giving consent. Thus, the revised instruction does not include the statement found in the prior version that informs the jury “consent is not a defense.” See, for example, Wis JI–Criminal 1211.

**1213 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITH A PERSON THE DEFENDANT KNOWS IS UNCONSCIOUS — § 940.225(2)(d)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—and the other person is a person who the defendant knows is unconscious.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>2</sup>

3. (Name of victim) was unconscious<sup>3</sup> at the time of the sexual contact.

4. The defendant knew that (name of victim) was unconscious at the time of the sexual contact.<sup>4</sup>

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.<sup>5</sup>

**[Use of Consent Evidence]**

[Consent to sexual contact is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was unconscious) (or) (whether the defendant knew that (name of victim) was unconscious).]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

This instruction was originally published in 1980 as Wis JI–Criminal 1214 [for sexual intercourse offenses] and Wis JI–Criminal 1215 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI–Criminal 1213 was published in 1996 and revised in 1998, 7/2022, and 7/2024. The 2022 revision amended footnote 1 by revising the term “heavy sleep” to “sleep.” It also added to the comment. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(d): sexual contact with a person the defendant knows is unconscious. Wis JI–Criminal 1213A is drafted for sexual intercourse with a person the defendant knows is unconscious.

Third-degree and fourth-degree sexual assault are not lesser included offenses of this subsection because they require proof of an element that second-degree sexual assault of an unconscious victim does not. Specifically, proof that the victim did not consent to the sexual contact.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. The statute does not define “unconscious.” The Committee decided not to include a definition in the text of the instruction because a definition would be most helpful if tied to the facts of the case. When a case involves a substantial question about the meaning of “unconscious,” the following material may be helpful.

Webster’s New Collegiate Dictionary defines “unconscious” as “not knowing or perceiving, or being unaware.” The Committee believes the common meaning of unconscious includes the loss of awareness caused by intoxication, the taking of drugs, or sleep. In State v. Curtis, 144 Wis. 2d 691, 695 96, 424 N.W.2d 719 (Ct. App. 1988), the court held that “unconscious” under § 940.225(2)(a) includes “a loss of awareness which may be caused by sleep” and that it was proper for the trial court to instruct the jury in those terms.

The constitutionality of § 940.225(2)(d) was upheld in State v. Pittman, 174 Wis. 2d 255, 496 N.W.2d 74 (1993). The court held that the statutory standard “provides clear notice that sexual intercourse with a person who is asleep is illegal.” 174 Wis. 2d 255, 277. Further, the statute “provides an objective standard for those applying the law,” *id.*, since sleep is within the common knowledge of the jury. (The jury in Pittman was instructed, in accord with Curtis, *supra*, that “unconsciousness is a loss of awareness which may be caused by sleep.”) Pittman also affirmed the exclusion of expert testimony on the effects of alcohol on sleep and consciousness, holding that it was irrelevant and tended to convey to the jury the expert’s belief that the complaining witness was lying.

4. Knowledge that the victim is unconscious is expressly required by § 940.225(2)(d).

5. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).” Thus, “without consent” is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was incapable of appraising his or her conduct and whether the defendant knew that the victim was under the influence to a degree that rendered him or her incapable of appraising his or her conduct.

**1213A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE  
WITH A PERSON THE DEFENDANT KNOWS IS UNCONSCIOUS —  
§ 940.225(2)(d)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who the defendant knows is unconscious.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>1</sup>

2. (Name of victim) was unconscious<sup>2</sup> at the time of the sexual intercourse.
3. The defendant knew that (name of victim) was unconscious at the time of the sexual intercourse.<sup>3</sup>

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE SECOND OR THIRD ELEMENTS.<sup>4</sup>

**[Use of Consent Evidence]**

[Consent to sexual intercourse is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was unconscious) (or) (whether the defendant knew that (name of victim) was unconscious).]

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 1213A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI-Criminal 1213, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI-Criminal 1213 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(d): sexual intercourse with a person the defendant knows is unconscious. Wis JI-Criminal 1213 is drafted for sexual contact with a person the defendant knows is unconscious.

Third-degree and fourth-degree sexual assault are not lesser included offenses of this subsection because they require proof of an element that second-degree sexual assault of an unconscious victim does not. Specifically, proof that the victim did not consent to the sexual intercourse.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI-Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives



provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. The statute does not define “unconscious.” The Committee decided not to include a definition in the text of the instruction because a definition would be most helpful if tied to the facts of the case. When a case involves a substantial question about the meaning of “unconscious,” the following material may be helpful.

Webster’s New Collegiate Dictionary defines “unconscious” as “not knowing or perceiving, or being unaware.” The Committee believes the common meaning of unconscious includes the loss of awareness caused by intoxication, the taking of drugs, or sleep. In State v. Curtis, 144 Wis.2d 691, 695-96, 424 N.W.2d 719 (Ct. App. 1988), the court held that “unconscious” under § 940.225(2)(a) includes “a loss of awareness which may be caused by sleep” and that it was proper for the trial court to instruct the jury in those terms.

The constitutionality of § 940.225(2)(d) was upheld in State v. Pittman, 174 Wis.2d 255, 496 N.W.2d 74 (1993). The court held that the statutory standard “provides clear notice that sexual intercourse with a person who is asleep is illegal.” 174 Wis.2d 255, 277. Further, the statute “provides an objective standard for those applying the law,” id., since sleep is within the common knowledge of the jury. (The jury in Pittman was instructed, in accord with Curtis, supra, that “unconsciousness is a loss of awareness which may be caused by sleep.”) Pittman also affirmed the exclusion of expert testimony on the effects of alcohol on sleep and consciousness, holding that it was irrelevant and tended to convey to the jury the expert’s belief that the complaining witness was lying.

3. Knowledge that the victim is unconscious is expressly required by § 940.225(2)(d).

4. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).” Thus, “without consent” is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was incapable of appraising his or her conduct and whether the defendant knew that the victim was under the influence to a degree that rendered him or her incapable of appraising his or her conduct.

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**1214 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT WHILE AIDED AND ABETTED — § 940.225(2)(f)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(f) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person)—without consent and is aided and abetted<sup>1</sup> by one or more other persons.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>2</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>3</sup>
3. (Name of victim) did not consent to the sexual contact.

4. The defendant was aided and abetted by one or more other persons.

**Meaning of “Did Not Consent”<sup>4</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>5</sup>

**Meaning of “Aiding and Abetting”**

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual contact without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.<sup>6</sup>

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.<sup>7</sup>

[However, a person does not aid and abet if the person is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

#### COMMENT

This instruction was originally published in 1988 as Wis JI–Criminal 1217.1 [for sexual intercourse offenses] and Wis JI–Criminal 1217.2 [for sexual contact offenses]. Those instructions were revised in 1990. A revision combining the instructions as Wis JI–Criminal 1214 was published in 1996 and revised in 2002 and 2022. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(f): sexual contact without consent while aided and abetted. Wis JI–Criminal 1214A is drafted for sexual intercourse without consent while aided and abetted.

This offense was created by 1987 Wisconsin Act 245, effective date: April 21, 1988. A related offense is defined as first degree sexual assault by § 940.225(1)(c); it has the additional element of the “use or threat of force or violence.” See Wis JI–Criminal 1205.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(f) uses the phrase “aided or abetted” (emphasis added). Since traditional criminal statutes have referred to “aiding and abetting,” the Committee has used that construction in the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that “aided or abetted” in § 940.225(1)(c) has the same meaning as the phrase “aids and abets” in § 939.05 and therefore is not unconstitutionally vague.

2. The bracketed language should be included when the offense charged involves sexual contact. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

3. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before

accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

4. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis. Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

5. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 87 Wis.2d 804, 275 N.W.2d 715 (1979).

6. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of “aiding and abetting,”

see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of second- or third-degree sexual assault? If aiding is established, the principal is guilty of the second degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a third-degree offense, Sexual Intercourse Without Consent under § 940.225(3). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), with respect to the same situation under § 940.225(1)(c).

7. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

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**1214A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITHOUT CONSENT WHILE AIDED AND ABETTED — § 940.225(2)(f)****Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(f) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent and is aided and abetted<sup>1</sup> by one or more other persons.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200B).<sup>2</sup>

2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant was aided and abetted by one or more other persons.

**Meaning of “Did Not Consent”<sup>3</sup>**

“Did not consent” means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and

circumstances. This element does not require that (name of victim) offered physical resistance.<sup>4</sup>

### **Meaning of “Aiding and Abetting”**

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual intercourse without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.<sup>5</sup>

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.<sup>6</sup>

[However, a person does not aid and abet if the person is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1214A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1214, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1214 to separate those topics and provide greater clarity regarding the essential elements, consistent with the

Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(f): sexual intercourse without consent while aided and abetted. Wis JI–Criminal 1214 is drafted for sexual contact without consent while aided and abetted.

This offense was created by 1987 Wisconsin Act 245, effective date: April 21, 1988. A related offense is defined as first degree sexual assault by § 940.225(1)(c); it has the additional element of the “use or threat of force or violence.” See Wis JI–Criminal 1205.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(f) uses the phrase “aided or abetted” (emphasis added). Since traditional criminal statutes have referred to “aiding and abetting,” the Committee has used that construction in the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that “aided or abetted” in § 940.225(1)(c) has the same meaning as the phrase “aids and abets” in § 939.05 and therefore is not unconstitutionally vague.

2. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

3. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

- (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
- (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it

for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

4. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 87 Wis.2d 804, 275 N.W.2d 715 (1979).

5. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of “aiding and abetting,” see Wis JI–Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider’s culpability in § 939.05. Section 939.05 refers to “intentionally aid and abets,” which has been interpreted as “acting with knowledge or belief that another person is committing or intends to commit a crime.” The Committee also concluded that the defendant must know of the aider’s presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of second- or third-degree sexual assault? If aiding is established, the principal is guilty of the second-degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a third-degree offense, Sexual Intercourse Without Consent under § 940.225(3). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello-Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), with respect to the same situation under § 940.225(1)(c).

6. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.

**1215 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITH A PATIENT OR RESIDENT — § 940.225(2)(g)****Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(g) of the Criminal Code of Wisconsin, is committed by one who is an employee of a (type of facility or program)<sup>1</sup> and has sexual contact—meaning contact undertaken with intent to (cause bodily harm to) (become sexually aroused or gratified) (sexually degrade or humiliate)—with a (patient) (resident) of that (facility) (program).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was an employee of (name of facility or program)<sup>2</sup>.
2. (Name of victim) was a (patient)<sup>3</sup> (resident)<sup>4</sup> of (name of facility or program)<sup>5</sup>.
3. (Name of facility or program) was (an adult family home) (a community based residential facility) (an inpatient health care facility) (a state treatment facility)<sup>6</sup>.  
(Name alternative selected) is (specify the part of the statutory definition that applies).<sup>7</sup>
4. The defendant had sexual contact with (name of victim).

Consent to sexual contact is not a defense.<sup>8</sup>

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>9</sup>

5. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>10</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

This instruction was originally published in 1988 as Wis JI-Criminal 1217.3 [for sexual intercourse offenses] and Wis JI-Criminal 1217.4 [for sexual contact offenses]. Those instructions were revised in 1990 and 1994. A revision combining the instructions as Wis JI-Criminal 1215 was published in 1996 and revised in 2002, 2007, and 2022. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(g): sexual contact with a patient or resident. Wis JI-Criminal 1215A is drafted for sexual intercourse with a patient or resident.

This instruction is for violations of § 940.225(2)(g), as amended by 1993 Wisconsin Act 445, effective date: May 12, 1994.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI-Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to

an employee of “an inpatient facility or a state treatment facility.” The revised statutes apply to an employee of “a facility or program under s. 940.295(2)(b), (c), (h) or (k).” Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: “. . . an employee of a state treatment facility.”

2. Here insert the name of the facility or program. For example: “St. Mary’s Hospital.”

3. “Patient” is defined as follows in § 940.225(5)(am):

“Patient” means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program or from a person providing services under contract with a facility or program.

2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under a contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).

4. “Resident” is defined as follows in § 940.225(5)(ar): “. . . any person who resides in a facility under s. 940.295(2)(b), (c), (h), or (k).”

5. Here insert the name of the facility or program. For example: “St. Mary’s Hospital.”

6. Here insert the name of the facility or program and select the applicable type of facility or program. For example: “St. Mary’s Hospital was an inpatient health care facility.”

7. Here name the applicable type of facility or program and select the relevant part of the statutory definition for that type of facility or program. For example: “An inpatient health care facility is any hospital licensed or approved by the Department of Health and Family Services under (specify licensing statute).”

Section 940.225(2)(g) applies to offenses involving employees and patients or residents in facilities or programs “under s. 940.295(2)(b), (c), (h), or (k).” Those subsections of § 940.295 refer to definitions in other statutes, resulting in extensive and complex references. The Committee recommends that care be taken to assure that essential parts of the applicable definitions are included.

The facilities or programs under s. 940.295(2)(b), (c), (h), or (k) and the cross-referenced definitions are as follows:

- (2)(b) adult family home. § 940.295(1)(am) provides that “‘adult family home’ has the meaning

given in s. 50.01(1).”

- (2)(c) community-based residential facility. § 940.295(1)(c) provides that “‘community-based residential facility’ has the meaning given in s. 50.01(1g).”
- (2)(h) inpatient health care facility. § 940.295(1)(i) provides that “‘inpatient health care facility’ has the meaning given in s. 50.135(1).”
- (2)(k) state treatment facility. § 940.295(1)(r) provides that “‘state treatment facility’ has the meaning given in s. 50.01(15).”

Many of the cross-referenced definitions include their own references to other statutes, sometimes to indicate exceptions. The potential for complexity is illustrated by State v. Powers, 2004 WI App 156, ¶6, 276 Wis.2d 107, 687 N.W.2d 50, where the court of appeals held that an employee of a health care facility operated by the United States Department of Veterans Affairs [the VA Medical Center at Tomah] is not subject to prosecution for an alleged violation of § 940.225(2)(g). As applicable to this situation, sub. (2)(g) requires that the victim of the offense be a patient or resident of a facility or program under § 940.295(2)(h) – an inpatient health care facility. Section 940.295(1)(i) provides that “‘inpatient health care facility’ has the meaning given in s. 50.135(1).” Section 50.135(1) requires that this type of facility be licensed by the state. The state conceded that as a VA facility, the Tomah Medical Center is not licensed by the state, so the court held that § 940.225(2)(g) does not apply.

While Powers was an appeal of the denial of a pretrial motion, the Committee concluded that the state must prove that the facility or program involved in the case is covered by one of the referenced definitions. If not agreed to by the parties, this will present a factual issue for the jury.

8. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g).”

9. appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

10. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”



**1215A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE WITH A PATIENT OR RESIDENT — § 940.225(2)(g)****Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(g) of the Criminal Code of Wisconsin, is committed by one who is an employee of a (type of facility or program)<sup>1</sup> and has sexual intercourse with a (patient) (resident) of that (facility) (program).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was an employee of (name of facility or program)<sup>2</sup>.
2. (Name of victim) was a (patient)<sup>3</sup> (resident)<sup>4</sup> of (name of facility or program)<sup>5</sup>.
3. (Name of facility or program) was (an adult family home) (a community based residential facility) (an inpatient health care facility) (a state treatment facility)<sup>6</sup>.

(Name alternative selected) is (specify the part of the statutory definition that applies).<sup>7</sup>

4. The defendant had sexual intercourse with (name of victim).

Consent to sexual intercourse is not a defense.<sup>8</sup>

“Sexual intercourse” is defined as (insert the applicable definition set forth in

Wis JI–Criminal 1200B).<sup>9</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1215A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1215, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1215 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(g): sexual intercourse with a patient or resident. Wis JI Criminal 1215 is drafted for sexual contact with a patient or resident.

This instruction is for violations of § 940.225(2)(g), as amended by 1993 Wisconsin Act 445, effective date: May 12, 1994.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI-Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(2)(g) was amended by 1993 Wisconsin Act 445. The former statute applied to an employee of “an inpatient facility or a state treatment facility.” The revised statute applies to an employee of “a facility or program under s. 940.295(2)(b), (c), (h) or (k).” Those facilities or programs are:

- (2)(b) an adult family home
- (2)(c) a community-based residential facility
- (2)(h) an inpatient health care facility
- (2)(k) a state treatment facility

The Committee recommends naming the type of facility in this paragraph, for example: “. . . an employee of a state treatment facility.”

2. Here insert the name of the facility or program. For example: “St. Mary’s Hospital.”
3. “Patient” is defined as follows in § 940.225(5)(am):

“Patient” means any person who does any of the following:

1. Receives care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program or from a person providing services under contract with a facility or program.
2. Arrives at a facility or program under s. 940.295(2)(b), (c), (h) or (k) for the purpose of receiving care or treatment from a facility or program under s. 940.295(2)(b), (c), (h) or (k), from an employee of a facility or program under s. 940.295(2)(b), (c), (h) or (k), or from a person providing services under a contract with a facility or program under s. 940.295(2)(b), (c), (h) or (k).
4. “Resident” is defined as follows in § 940.225(5)(ar): “. . . any person who resides in a facility under s. 940.295(2)(b), (c), (h), or (k).”
5. Here insert the name of the facility or program. For example: “St. Mary’s Hospital.”
6. Here insert the name of the facility or program and select the applicable type of facility or program. For example: “St. Mary’s Hospital was an inpatient health care facility.”
7. Here name the applicable type of facility or program and select the relevant part of the statutory definition for that type of facility or program. For example: “An inpatient health care facility is any hospital licensed or approved by the Department of Health and Family Services under (specify licensing statute).”

Section 940.225(2)(g) applies to offenses involving employees and patients or residents in facilities or programs “under s. 940.295(2)(b), (c), (h), or (k).” Those subsections of § 940.295 refer to definitions in other statutes, resulting in extensive and complex references. The Committee recommends that care be taken to assure that essential parts of the applicable definitions are included.

The facilities or programs under s. 940.295(2)(b), (c), (h), or (k) and the cross-referenced definitions are as follows:

- (2)(b) adult family home. § 940.295(1)(am) provides that “‘adult family home’ has the meaning given in s. 50.01(1).”
- (2)(c) community-based residential facility. § 940.295(1)(c) provides that “‘community-based residential facility’ has the meaning given in s. 50.01(1g).”
- (2)(h) inpatient health care facility. § 940.295(1)(i) provides that “‘inpatient health care facility’ has the meaning given in s. 50.135(1).”
- (2)(k) state treatment facility. § 940.295(1)(r) provides that “‘state treatment facility’ has the meaning given in s. 50.01(15).”

Many of the cross-referenced definitions include their own references to other statutes, sometimes to indicate exceptions. The potential for complexity is illustrated by State v. Powers, 2004 WI App 156, ¶6, 276 Wis.2d 107, 687 N.W.2d 50, where the court of appeals held that an employee of a health care facility operated by the United States Department of Veterans Affairs [the VA Medical Center at Tomah] is not subject to prosecution for an alleged violation of § 940.225(2)(g). As applicable to this situation, sub. (2)(g) requires that the victim of the offense be a patient or resident of a facility or program under § 940.295(2)(h) – an inpatient health care facility. Section 940.295(1)(i) provides that “‘inpatient health care facility’ has the meaning given in s. 50.135(1).” Section 50.135(1) requires that this type of facility be licensed by the state. The state conceded that as a VA facility, the Tomah Medical Center is not licensed by the state, so the court held that § 940.225(2)(g) does not apply.

While Powers was an appeal of the denial of a pretrial motion, the Committee concluded that the state must prove that the facility or program involved in the case is covered by one of the referenced definitions. If not agreed to by the parties, this will present a factual issue for the jury.

8. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g).”

9. The bracketed language should be included when the offense charged involves sexual intercourse. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

**1216 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT BY A  
CORRECTIONAL STAFF MEMBER — § 940.225(2)(h)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(h) of the Criminal Code of Wisconsin, is committed by a correctional staff member who has sexual contact—meaning contact undertaken with intent to (cause bodily harm) (become sexually aroused or gratified) (sexually degrade or humiliate)—with an individual who is confined in a correctional institution.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a correctional staff member.

“Correctional staff member” means an individual who works at a correctional institution [and includes a volunteer].<sup>1</sup>

2. The defendant had sexual contact with (name of victim).<sup>2</sup>

Consent to sexual contact is not a defense.<sup>3</sup>

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI–Criminal 1200A).<sup>4</sup>

3. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim))).<sup>5</sup>

4. (Name of victim) was confined in a correctional institution.

(Name institution) is a correctional institution.<sup>6</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1216 was originally published in 2004 and revised in 2007, 2012, 2018, and 2022. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(h): sexual contact by a correctional staff member. Wis JI–Criminal 1216A is drafted for sexual intercourse by a correctional staff member.

This instruction is drafted for violations of § 940.225(2)(h), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. This is the definition provided in § 940.225(5)(ad). The Committee recommends including the

bracketed reference to a volunteer only when there is evidence that the defendant was a volunteer.

A Milwaukee County sheriff's deputy, assigned to work as a bailiff in the courthouse, is not a "correctional staff member" for purposes of § 940.225(2)(h), even though the deputy's duties included escorting inmates from the criminal justice facility to the courthouse holding cell. State v. Terrell, 2006 WI App 166, 295 Wis.2d 619, 721 N.W.2d 527.

2. The definition of the offense in § 940.225(2)(h) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).]

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. The appropriate definition of "sexual contact" should be selected from the alternatives provided in Wis JI-Criminal 1200A, based on the specific facts of the case.

5. Prior to the 2026 revision, the "Elements of the Crime That the State Must Prove" section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a "Meaning of 'Sexual Contact'" section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of "sexual contact," including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted "with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim."

6. Section 940.225(5)(acm) provides:

“Correctional institution” means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

By following these cross references, one may find a statute that provides that a particular institution or facility is a correctional institution. See, for example, the list of “state prisons” in § 302.01. When a statute so provides, the Committee recommends advising the jury that, for example, “The Waupun Correctional Institution is a correctional institution.” It will be for the jury to determine whether, in fact, the victim was confined to that institution.

A “person detained at his or her residence by virtue of participation in the home detention program is ‘confined in a correctional institution’ for purposes of § 940.225(2)(h).” State v. Hilgers, 2017 WI App 12, ¶17, 373 Wis.2d 756, 893 N.W.2d 261.



**1216A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE BY A  
CORRECTIONAL STAFF MEMBER — § 940.225(2)(h)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(h) of the Criminal Code of Wisconsin, is committed by a correctional staff member who has sexual intercourse with an individual who is confined in a correctional institution.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a correctional staff member.

“Correctional staff member” means an individual who works at a correctional institution [and includes a volunteer].<sup>1</sup>

2. The defendant had sexual intercourse with (name of victim).<sup>2</sup>

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200B).<sup>3</sup>

Consent to sexual intercourse is not a defense.<sup>4</sup>

3. (Name of victim) was confined in a correctional institution.

(Name institution) is a correctional institution.<sup>5</sup>

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

Wis JI–Criminal 1216A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1216, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1216 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(h): sexual intercourse by a correctional staff member. Wis JI–Criminal 1216 is drafted for sexual contact by a correctional staff member.

This instruction is drafted for violations of § 940.225(2)(h), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. This is the definition provided in § 940.225(5)(ad). The Committee recommends including the bracketed reference to a volunteer only when there is evidence that the defendant was a volunteer.

A Milwaukee County sheriff’s deputy, assigned to work as a bailiff in the courthouse, is not a “correctional staff member” for purposes of § 940.225(2)(h), even though the deputy’s duties included escorting inmates from the criminal justice facility to the courthouse holding cell. State v. Terrell, 2006 WI App 166, 295 Wis.2d 619, 721 N.W.2d 527.

2. The definition of the offense in § 940.225(2)(h) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what “subject to prosecution” means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that “the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault.” Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the “subject to prosecution” issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).]

3. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

4. “Without consent” is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).” The Committee concluded that it may be helpful to advise the jury of this fact.

5. Section 940.225(5)(cm) provides:

“Correctional institution” means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

By following these cross references, one may find a statute that provides that a particular institution or facility is a correctional institution. See, for example, the list of “state prisons” in § 302.01. When a statute so provides, the Committee recommends advising the jury that, for example, “The Waupun Correctional Institution is a correctional institution.” It will be for the jury to determine whether, in fact, the victim was confined to that institution.

A “person detained at his or her residence by virtue of participation in the home detention program is ‘confined in a correctional institution’ for purposes of § 940.225(2)(h).” State v. Hilgers, 2017 WI App 12, ¶17, 373 Wis.2d 756, 893 N.W.2d 261.

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**1217 SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT BY A PROBATION, PAROLE, OR EXTENDED SUPERVISION AGENT — § 940.225(2)(i)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(i) of the Criminal Code of Wisconsin, is committed by a (probation) (parole) (extended supervision) agent who has sexual contact—meaning contact undertaken with intent to (cause bodily harm) (become sexually aroused or gratified) (sexually degrade or humiliate)—with an individual on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a (probation) (parole) (extended supervision) agent.<sup>1</sup>
2. The defendant had sexual contact with (name of victim).<sup>2</sup>

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200A).<sup>3</sup>

Consent to sexual contact is not a defense.<sup>4</sup>

3. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>5</sup>
4. (Name of victim) was on (probation) (parole) (extended supervision).
5. The defendant supervised (name of victim) in (his) (her) capacity as a (probation) (parole) (extended supervision) agent.<sup>6</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 1217 was originally published in 2004 and revised in 2007, 2013, and 2022. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 940.225(2)(i), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(i): sexual contact by a probation, parole, or extended supervision agent. Wis JI-Criminal 1217C is drafted for sexual intercourse by a probation, parole, or extended supervision agent.

The instruction uses a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

. . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent's supervision of the individual.

If a case involves supervising “through a subordinate” or “influencing or attempting to influence” another agent’s supervision, the introductory definition of the offense and the fifth element must be modified.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI-Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not provide a definition of “probation, parole or extended supervision agent.” However, another Criminal Code statute, § 940.20(2m)(a)2. provides the following:

“Probation, extended supervision and parole agent” means any person authorized by the department of corrections to exercise control over a probationer, parolee or person on extended supervision.

2. The definition of the offense in § 940.225(2)(i) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what “subject to prosecution” means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that “the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault.” Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the “subject to prosecution” issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).] Blum involved a prosecution under § 940.225(2)(h), which has the same statement relating to “subject to prosecution.”

3. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

4. “Without consent” is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).” The Committee concluded that it may be helpful to advise the jury of this fact.

5. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to cause bodily harm to the victim, become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

6. This is a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

. . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent’s supervision of the individual.

The fifth element must be modified if the case involves supervision “through a subordinate” or “influencing or attempting to influence” another agent’s supervision.



**1217A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT BY AN EMPLOYEE OF AN ENTITY — § 940.225(2)(j)****Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(j) of the Criminal Code of Wisconsin, is committed by a licensee, employee, or nonclient resident of an entity who has sexual contact with a client of the entity—meaning contact undertaken with intent to (cause bodily harm to the client) (become sexually aroused or gratified) (sexually degrade or humiliate the client).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a (licensee) (employee) (nonclient resident)<sup>1</sup> of an entity.
2. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>2</sup>

Consent to sexual contact is not a defense.<sup>3</sup>

3. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of

victim)).<sup>4</sup>

4. (Name of victim) was a client of the entity.

“Client” means an individual who receives direct care or treatment services from an entity.<sup>5</sup>

### Meaning of “Entity”

“Entity” means \_\_\_\_\_.<sup>6</sup>

### Jury’s Decision

If you are satisfied beyond a reasonable doubt that all four elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

Wis JI–Criminal 1217A was approved by the Committee in August 2006, and revised in 2022. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

Section 940.225(2)(j) was created by 2005 Wisconsin Act 388 (effective date: Dec. 1, 2006).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(j): sexual contact by an employee of an entity. Wis JI–Criminal 1217D is drafted for sexual intercourse by an employee of an entity.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(5)(ak), created by 2005 Wisconsin Act 388, defines “nonclient resident” as follows: “. . . an individual who resides, or is expected to reside, at an entity, who is not a client of the

entity, and who has, or is expected to have, regular, direct contact with the clients of the entity.”

2. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

3. “Without consent” is not an element of this offense because it is not included in the offense definition. The Committee concluded that it may be helpful to advise the jury of this fact.

4. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to cause bodily harm to the victim, become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

5. This is the definition provided in § 940.225(5)(abm), which was created by 2005 Wisconsin Act 388.

6. Section 940.225(2)(j) refers to “an entity,” as defined in § 48.685(1)(b) or 50.065(1)(c). The Committee recommends choosing the applicable part of applicable definition and inserting it in the blank.

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**1217B SECOND-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT BY A  
LAW ENFORCEMENT OFFICER WITH A PERSON DETAINED OR IN  
CUSTODY — § 940.225(2)(k)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(k) of the Criminal Code of Wisconsin, is committed by a law enforcement officer who has sexual contact with any person who (is detained by any law enforcement officer, as provided under s. 968.24) (is in the custody of any law enforcement officer)—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a law enforcement officer.

“Law enforcement officer” means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed and sworn to enforce. [“Law enforcement officer” includes a university police officer, as

defined in s. 175.42 (1) (b)].<sup>1</sup>

2. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 1200A).<sup>2</sup>

Consent to sexual contact is not a defense.<sup>3</sup>

3. The defendant acted with intent to (become sexually aroused or gratified)  
(sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of  
victim)).<sup>4</sup>
4. (Name of victim) was (detained by any law enforcement officer, as provided under  
s. 968.24) (in the custody of any law enforcement officer).

This applies (whether the custody is lawful or unlawful) (whether the  
detainment or custody is actual or constructive).<sup>5</sup>

[Section 968.24 provides that after having identified himself or herself as a law  
enforcement officer, a law enforcement officer may stop a person in a public place  
for a reasonable period of time when the officer reasonably suspects that such  
person is committing, is about to commit or has committed a crime, and may  
demand the name and address of the person and an explanation of the person's  
conduct. Such detention and temporary questioning shall be conducted in the  
vicinity where the person was stopped.]<sup>6</sup>

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

Wis JI–Criminal 1217B was approved by the Committee in June 2022. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 940.225(2)(k), created by 2021 Wisconsin Act 188 [effective date: March 19, 2022].

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(k): sexual contact by a law enforcement officer with a person detained or in custody. Wis JI–Criminal 1217E is drafted for sexual intercourse by a law enforcement officer with a person detained or in custody.

1. This is the definition provided in Wis. Stat. § 165.85 (2) (c). The Committee recommends including the bracketed reference to a university police officer only when there is evidence that the defendant was a university police officer.
2. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.
3. Section 940.225(2)(k) provides in part “Consent is not an issue in an action under this paragraph.” Thus, “without consent” is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.
4. Prior to the 2024 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

5. The definition of the offense in § 940.225(2)(k) provides this language. § 940.225 does not define “actual” or “constructive” custody.

6. Section 968.24 concerns the temporary questioning of a person in a public place without arrest. More specifically, the section is the statutory codification of “Terry stop” authority. Because the connection between the statutory offense and an on-the-street detention may be confusing to a jury, the Committee concluded it may be helpful to include the bracketed statement if the facts of the case so require.



**1217C SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE BY A PROBATION, PAROLE, OR EXTENDED SUPERVISION AGENT — § 940.225(2)(i)**

**Statutory Definition of the Crime**

Second degree sexual assault, as defined in § 940.225(2)(i) of the Criminal Code of Wisconsin, is committed by a (probation) (parole) (extended supervision) agent who has sexual intercourse with an individual on (probation) (parole) (extended supervision), and who supervises that individual in his or her capacity as an agent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a (probation) (parole) (extended supervision) agent.<sup>1</sup>
2. The defendant had sexual intercourse with (name of victim).<sup>2</sup>

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>3</sup>

Consent to sexual intercourse is not a defense.<sup>4</sup>

3. (Name of victim) was on (probation) (parole) (extended supervision).
4. The defendant supervised (name of victim) in (his) (her) capacity as a (probation) (parole) (extended supervision) agent.<sup>5</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of second degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1217C was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1217, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1217 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 940.225(2)(i) involving “sexual intercourse,” created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

For an instruction addressing violations of Wis. Stat. § 940.225(2)(i) involving “sexual contact,” see Wis JI–Criminal 1217.

The instruction uses a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

. . . agent who supervises the individual, either directly or through a subordinate, . . . or who has influenced or has attempted to influence another probation, parole, or extended supervision agent’s supervision of the individual.

If a case involves supervising “through a subordinate” or “influencing or attempting to influence” another agent’s supervision, the introductory definition of the offense and the fourth element must be modified.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. The statute does not provide a definition of “probation, parole or extended supervision agent.” However, another Criminal Code statute, § 940.20(2m)(a)2. provides the following:

“Probation, extended supervision and parole agent” means any person authorized by the

department of corrections to exercise control over a probationer, parolee or person on extended supervision.

2. The definition of the offense in § 940.225(2)(i) includes the following statement:

This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what “subject to prosecution” means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that “the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault.” Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the “subject to prosecution” issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).] Blum involved a prosecution under § 940.225(2)(h), which has the same statement relating to “subject to prosecution.”

3. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

4. “Without consent” is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).” The Committee concluded that it may be helpful to advise the jury of this fact.

5. This is a simplified statement of the statutory description of the supervision requirement in sub. (2)(i), which reads in part as follows:

... agent who supervises the individual, either directly or through a subordinate, ... or who has influenced or has attempted to influence another probation, parole, or extended supervision agent’s supervision of the individual.

The fourth element must be modified if the case involves supervision “through a subordinate” or “influencing or attempting to influence” another agent’s supervision.

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**1217D SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE BY  
AN EMPLOYEE OF AN ENTITY — § 940.225(2)(j)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(j) of the Criminal Code of Wisconsin, is committed by a licensee, employee, or nonclient resident of an entity who has sexual intercourse with a client of the entity.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a (licensee) (employee) (nonclient resident)<sup>1</sup> of an entity.
2. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>2</sup>

Consent to sexual intercourse is not a defense.<sup>3</sup>

3. (Name of victim) was a client of the entity.

“Client” means an individual who receives direct care or treatment services from an entity.<sup>4</sup>

**Meaning of “Entity”**

“Entity” means \_\_\_\_\_.<sup>5</sup>

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI–Criminal 1217D was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1217A, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1217A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

Section 940.225(2)(j) was created by 2005 Wisconsin Act 388 (effective date: Dec. 1, 2006).

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(j): sexual intercourse by an employee of an entity. Wis JI–Criminal 1217A is drafted for sexual contact by an employee of an entity.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. § 940.225(1)(d), which makes it a first-degree sexual assault to commit what would otherwise be a second-degree sexual assault “against an individual who is 60 years of age or older.” Wis JI–Criminal 1204 provides a model for integrating the instruction for the second-degree offense into instruction for a violation of § 940.225(1)(d).

1. Section 940.225(5)(ak), created by 2005 Wisconsin Act 388, defines “nonclient resident” as follows: “. . . an individual who resides, or is expected to reside, at an entity, who is not a client of the entity, and who has, or is expected to have, regular, direct contact with the clients of the entity.”

2. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

3. “Without consent” is not an element of this offense because it is not included in the offense definition. The Committee concluded that it may be helpful to advise the jury of this fact.

4. This is the definition provided in § 940.225(5)(abm), which was created by 2005 Wisconsin Act 388.

5. Section 940.225(2)(j) refers to “an entity,” as defined in § 48.685(1)(b) or 50.065(1)(c). The Committee recommends choosing the applicable part of applicable definition and inserting it in the blank.

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**1217E SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE BY A  
LAW ENFORCEMENT OFFICER WITH A PERSON DETAINED OR IN  
CUSTODY — § 940.225(2)(k)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(k) of the Criminal Code of Wisconsin, is committed by a law enforcement officer who has sexual intercourse with any person who (is detained by any law enforcement officer, as provided under s. 968.24) (is in the custody of any law enforcement officer).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a law enforcement officer.

“Law enforcement officer” means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed and sworn to enforce. [“Law enforcement officer” includes a university police officer, as defined in s. 175.42 (1) (b)].<sup>1</sup>

2. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).<sup>2</sup>

Consent to sexual intercourse is not a defense.<sup>3</sup>

3. (Name of victim) was (detained by any law enforcement officer, as provided under s. 968.24) (in the custody of any law enforcement officer).

This applies (whether the custody is lawful or unlawful) (whether the detainment or custody is actual or constructive).<sup>4</sup>

[Section 968.24 provides that after having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.]<sup>5</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of second-degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI–Criminal 1217E was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1217B, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1217B to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 940.225(2)(k), created by 2021 Wisconsin Act 188 [effective date: March 19, 2022].

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(k): sexual intercourse by a law enforcement officer with a person detained or in custody. Wis JI–Criminal 1217B is drafted for sexual contact by a law enforcement officer with a person detained or in custody.

1. This is the definition provided in Wis. Stat. § 165.85(2)(c). The Committee recommends including the bracketed reference to a university police officer only when there is evidence that the defendant was a university police officer.

2. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

3. Section 940.225(2)(k) provides in part “Consent is not an issue in an action under this paragraph.” Thus, “without consent” is not an element of this offense and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

4. The definition of the offense in § 940.225(2)(k) provides this language. § 940.225 does not define “actual” or “constructive” custody.

5. Section 968.24 concerns the temporary questioning of a person in a public place without arrest. More specifically, the section is the statutory codification of “Terry stop” authority. Because the connection between the statutory offense and an on-the-street detention may be confusing to a jury, the Committee concluded it may be helpful to include the bracketed statement if the facts of the case so require.

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**1219 FOURTH-DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT — § 940.225(3m)****Statutory Definition of the Crime**

Fourth degree sexual assault, as defined in § 940.225(3m) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with another person without consent—meaning contact undertaken with intent to (cause bodily harm to that person) (become sexually aroused or gratified) (sexually degrade or humiliate that person).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)) (cause bodily harm to (name of victim)).<sup>2</sup>
3. (Name of victim) did not consent to the sexual contact.

FOR SEXUAL CONTACT INVOLVING THE VICTIM BEING  
CAUSED OR ALLOWED TO TOUCH THE DEFENDANT:

[Sexual contact is an intentional touching by (name of victim) of the (name intimate part)<sup>3</sup> of the defendant, if the defendant intentionally caused<sup>4</sup> (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

**Deciding About Intent**

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

**Meaning of "Did Not Consent"<sup>5</sup>**

"Did not consent" means that (name of victim) did not freely agree to have sexual contact with the defendant. In deciding whether (name of victim) did not consent, you should consider what (he) (she) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.<sup>6</sup>

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of fourth degree sexual assault have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 1219 was originally published in 1980 and revised in 1983, 1990, 1992, 1996, 2002, 2004, and 7/2025. The 7/2025 revision amended the “Meaning of ‘Did Not Consent’” section to use gender-neutral language. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for fourth degree sexual assault as defined in § 940.225(3m). It applies to cases involving “sexual contact” as defined in § 940.225(5)(b)1. A new type of third-degree sexual assault was created by 1995 Wisconsin Act 69, effective date: December 2, 1995. It applies only to sexual contact as defined in § 940.225(5)(b)2., which provides that sexual contact includes:

Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

See Wis JI–Criminal 1218B for an instruction for third-degree sexual assault based on the new definition of “sexual contact.”

Unlike the other instructions for sexual contact offenses, this instruction builds in the alternatives for defining “sexual contact” that are found in Wis JI–Criminal 1200A. This was done for the convenience of users and to emphasize that the definition of a new type of sexual contact created by 1995 Wisconsin Act 69 [see above] does not apply to fourth degree sexual assault as defined in § 940.225(3m).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 1200A, based on the specific facts of the case.

2. Prior to the 2024 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 940.225(5)(b).

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to cause bodily harm, become sexually aroused or gratified, or to sexually degrade or humiliate the victim.”

3. Section 939.22(19) defines “intimate parts”: “‘Intimate parts’ means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.” The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct. App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining “intimate part” to include “the vaginal area.”

4. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant “causes” the complainant to do. The statute does not expressly provide for the “causing” alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the “or allowed” alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b) requires an “intentional touching by the complainant . . . of the . . . defendant’s intimate parts. . .” The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant’s, rather than the victim’s, intent. Thus, the instruction refers simply to “a touching” by the victim that the defendant “intentionally caused.” This is consistent with the Traylor decision’s interpretation of almost identical language in the definition of “sexual contact” in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language “if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification.” Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

5. The definition of “consent,” found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of “without consent,” found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

“Consent,” as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate



unwillingness to an act.

The definition of “without consent” used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim’s being “competent to give informed consent,” being unconscious, or being mentally ill, see Wis JI Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on “without consent” rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as “words or overt actions indicating a freely given agreement.” No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant’s belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the “intent words” which indicate that the defendant’s knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

6. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

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**1232A BATTERY TO A JUROR OR A JUROR'S FAMILY MEMBER — § 940.62(2)(a)****Statutory Definition of the Crime**

Section 940.62(2)(a) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to (the person) (the family member) of a current or former juror<sup>1</sup> where at the time of the act the defendant knows or had reason to know that the victim is a (current or former juror) (family member of a current or former juror), the act is in response to any action taken (in the juror's official capacity) (by the juror in a legal proceeding), and there is no consent by the person harmed.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant caused bodily harm to (name of victim).

“Cause” means that the defendant's conduct was a substantial factor in producing bodily harm.<sup>2</sup>

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.<sup>3</sup>

2. (Name of victim) was a (current or former juror) (family member of a current or former juror).

[For the purpose of this offense, a (e.g., child) is a family member.]<sup>4</sup>

3. At the time of the act, the defendant (knew)<sup>5</sup> (had reason to know) that (name of victim) was a (current or former juror) (family member of a current or former juror).
4. The defendant caused bodily harm to (name of victim) in response to an action taken in (an official capacity) (a legal proceeding) by (name of juror) as a juror.<sup>6</sup>
5. The defendant caused bodily harm without the consent of (name of victim).
6. The defendant acted intentionally.

“Intentionally” means that the defendant had the mental purpose to cause bodily harm to another human being or was aware that his or her conduct was practically certain to cause bodily harm.<sup>7</sup>

### **Deciding About Intent and Knowledge**

You cannot look into a person’s mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.<sup>8</sup>

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI–Criminal 1232A was approved by the Committee in February 2026.

This instruction is for violations of § 940.62(2)(a) limited to allegations involving a juror or the juror's family member. For violations based on threats to a juror, see Wis JI–Criminal 1232B.

2025 Wisconsin Act 24 recodified special-circumstance batteries based on the status of the victim and placed “battery to certain individuals involved with a court or legal system” in § 940.62(2)(a). Before 2025 Wisconsin Act 24 took effect on August 10, 2025, battery against a juror was addressed by Wis JI–Criminal 1232 Battery to Juror [Juror Has Assented to Verdict] — § 940.20(3). Act 24 repealed that provision and relocated the offense to § 940.62(2)(a), “Battery to certain individuals involved with a court or legal system,” which now encompasses battery against prosecutors, law enforcement officers, grand and petit jurors (and their family members), among others.

1. The Committee believes it is clearer for jurors to be instructed simply that, for example, the victim “was a juror.” If the facts of a particular case require reference to a “grand” or “petit” juror, the Committee recommends including those terms in the instruction as needed. For additional context on grand juries, see Wis. Stat. § 968.40; for petit juries, see Wis. Stat. § 756.001.

2. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also, see Wis JI–Criminal 901 Cause.

3. This is the definition provided in § 939.22(4).

4. Section 940.51(10) provides a definition of “family member” for the purpose of this offense:

“Family member” means a spouse, child, stepchild, foster child, parent, legal guardian, sibling, grandparent, or grandchild.”

The applicable term should be inserted in the blank.

5. The knowledge element is expressly required by § 940.62(2)(a)1, which requires proof that, at the time of the act, the defendant knew or had reason to know that the victim was a current or former juror or a family member of a current or former juror.”

6. Section 940.62(2)(a)2. provides that the battery must be “in response to any action taken in an official capacity or in a legal proceeding.” Although both phrases appear in the statute (because the subsection applies to a broad list of protected persons), in juror cases the “legal proceeding” alternative will ordinarily describe the relevant conduct.

7. See § 939.23(4) and Wis JI–Criminal 923A and 923B.

8. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee has concluded that this shorter version is appropriate for most cases. The complete traditional statement is found at Wis JI–Criminal 923A.

**1238 BATTERY OR THREAT TO A WITNESS [WITNESS HAS ATTENDED OR TESTIFIED] — § 940.201****[INSTRUCTION WITHDRAWN]****COMMENT**

Wis JI-Criminal 1238 was originally published 1998 and revised in 2004, 2022, and 1/2024. The 2004 revision involved the adoption of a new format, adding a definition of “true threat,” and nonsubstantive changes in the text. The 2023 revision amended the definition of a “true threat” according to Counterman v. Colorado, 600 US 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), to clarify that the assessment of the threat requires consideration of both the speaker’s perspective (recklessness standard) and the victim’s perspective (reasonable person standard). The instruction was withdrawn in February 2026 because 2025 Wisconsin Act 24 repealed former § 940.201 and recodified the witness-related battery and threat offenses in separate statutes, leaving Wis JI-Criminal 1238 inconsistent with the current statutory scheme.

In 1998, this instruction replaced Wis JI-Criminal 1232 for offenses against witnesses. Wis JI-Criminal 1232 has been revised to apply only to battery against a juror.

This instruction is for violations of § 940.201(2)(a), where the alleged battery has taken place after the victim has testified or attended as a witness. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called. For that type of case, the second and fourth elements must be modified. See footnotes 4 and 6 below. Wis JI-Criminal 1239, which formerly provided a separate instruction for that type of case, has been withdrawn. [The withdrawal note for Wis JI-Criminal 1239 contains a summary of McLeod.]

Section 940.201 was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3). Act 143 expanded the scope of the statute by including threats to cause bodily harm and, in sub. (2)(b) threats to cause and causing of bodily harm against family members of a witness. If a threat or harm to a family member of a witness is involved, the instruction must be modified.

1. This is the definition of “bodily harm” provided in § 939.22(4).
2. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI-Criminal 901, Cause.

3. This definition is based on one of the descriptions of “true threat” in State v. Perkins, 2001 WI 46, ¶28, 243 Wis.2d 141, 626 N.W.2d 762. In Perkins, the court held that “Only a ‘true threat’ is constitutionally punishable under statutes criminalizing threats.” Id. at ¶ 17. Perkins additionally held that a jury instruction for a threat to a judge in violation of § 940.203 was an incomplete statement of the law because it did not define “threat” as “true threat.” This created an unacceptable risk that “the jury may have used the common definition of ‘threat,’ thereby violating the defendant’s constitutional right to freedom of speech.” 2001 WI 46, ¶43. The court stated: “The common definition of threat is an expression of an intention to inflict injury on another. The definition of threat for the purposes of a statute criminalizing threatening language is much narrower.” 2001 WI 46, ¶43.

The following is the most complete definition of “true threat” offered by the court in Perkins:

A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered. 2001 WI 46, ¶29.

The Committee concluded that the definition in the instruction is equivalent in content and will be more understandable to the jury. In a case decided at the same time as Perkins, the court used a definition much like the one used in the instruction. See State v. A.S., 2001 WI 48, ¶23, 243 Wis.2d 173, 626 N.W.2d 712.

Perkins involved an orally communicated threat. The instruction is drafted more broadly to be applicable whether the threat is communicated orally, in writing, or by conduct.

In Elonis v. United States, 575 U.S. 723, 135 S.Ct. 2001 (2015), the United States Supreme Court interpreted a federal statute making it a crime to transmit in interstate commerce “any communication containing any threat ... to injure the person of another.” 18 USC § 875(c). Because the statute was not clear as to what mental state was required, there was a split in the federal circuits on that issue. Elonis was convicted under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The Supreme Court concluded that this was not sufficient: “Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.” The decision did not specify what mental state is required. The decision was based on constitutional requirements – it was a matter of interpreting a federal statute – so it has no direct impact on Wisconsin law. The Committee concluded that the definition of “true threat” used in this instruction is sufficient to meet any requirements that may be implied from the decision in Elonis, especially in light of element 6, which requires that “the defendant acted with the mental purpose to threaten bodily harm” to another...

4. The definition of “witness” in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.201. If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

- (3) “Witness” means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness,



whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the predecessor to § 943.201 B § 940.26, 1975 Wis. Stats. B also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of “witness” in the second element should be modified to refer to “a person who is expected to be summoned to testify.”

5. The statute includes the requirement that the defendant “knew or had reason to know” that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim because the victim had testified, the defendant must have known that the victim was a witness. However, because the “knew or had reason to know” requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person “by reason of” that person having testified would have known that person was a witness. Thus, the “had reason to know” alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

6. This element is drafted for a case where the person has attended or testified. If that statement does not fit the status of the victim, the statement must be modified. See note 4, supra.

The instruction uses “because” in place of the statutory language “by reason of . . .” The Committee intended no substantive change and believed the instruction will be easier for a jury to understand if “because” is used.

7. If the definition of “without consent” is believed to be necessary, see Wis JI-Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that “without consent” means “no consent in fact” or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

8. “Intentionally” requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI-Criminal 923A and 923B.

“Intentionally” also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word “intentionally” in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.20(2m)(b), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of “intentionally” does not carry over to the three facts set forth in (2m)(b)1., through 2. and 3. Sub. (2m)(b)1. has its own mental state – “knows or should know” – and thereby breaks the connection between “intentionally” used in sub. (2m)(b) proper and the other facts that follow.

9. The requirement that the defendant know there is no consent is based on the definition of “intentionally” in § 939.23(3): “. . . the actor must have knowledge of those facts which are necessary to

make his conduct criminal and which are set forth after the word intentionally.”

**1238A BATTERY TO A WITNESS, THEIR FAMILY MEMBER, OR A PERSON SHARING A COMMON DOMICILE WITH A WITNESS — § 940.62(2)(a)****Statutory Definition of the Crime**

Section 940.62(2)(a) of the Criminal Code of Wisconsin is violated by one who intentionally causes bodily harm to ((the person) (the family member) of a current or former (witness)) (a person sharing a common domicile with a witness) where at the time of the act the defendant knew or had reason to know that the victim was a (current or former witness) (a family member of a current or former witness) (a person sharing a common domicile with a witness), the act is in response to any action taken in (an official capacity) (a legal proceeding), and there is no consent by the victim.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following six elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant caused bodily harm to (name of victim).

“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.<sup>1</sup>

“Cause” means that the defendant’s conduct was a substantial factor in producing bodily harm.<sup>2</sup>

2. (Name of victim) was a (current or former witness) (family member of a current or former witness) (person sharing a common domicile with a witness).

[“Witness” means any person who (has attended a proceeding to testify or who has testified.) (is subject to be called or likely to be called as a witness.))]<sup>3</sup>

[A [insert proper term from the definition in § 940.41(3)] is a witness.]

3. The defendant (knew) (had reason to know) that (name of victim) was a (current or former witness) (family member of a current or former witness) (person sharing a common domicile with a witness).<sup>4</sup>
4. The defendant caused bodily harm to (name of victim) in response to an action taken in (an official capacity) (a legal proceeding) by (name of witness) as a witness.<sup>5</sup>
5. The defendant caused bodily harm without the consent<sup>6</sup> of (name of victim).
6. The defendant acted intentionally.<sup>7</sup> This requires that the defendant acted with the mental purpose to cause bodily harm to (name of victim)<sup>8</sup>, or was aware that his or her conduct was practically certain to cause that result, and knew that (name of victim) did not consent.<sup>9</sup>

### **Deciding About Intent and Knowledge**

You cannot look into a person’s mind to find intent or knowledge. Intent and knowledge must be found, if found at all, from the defendant’s acts, words, and statements,

if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1238A was approved by the Committee in February 2026.

The offense of Battery to a Witness [Witness Has Attended or Testified] — § 940.201 was previously covered by Wis JI–Criminal 1238. That instruction was withdrawn in February 2026 following the enactment of 2025 Wisconsin Act 24, which repealed § 940.201 in its entirety as part of a broader reorganization of Wisconsin’s battery statutes.

§ 940.62(2)(a), created by 2025 Wisconsin Act 24 [effective August 10, 2025], establishes a Class H felony for committing battery against certain individuals involved in the court or legal system. While the statute applies broadly—including judges, prosecutors, law enforcement officers, guardians ad litem, corporation counsel, advocates, attorneys, and grand or petit jurors, this instruction is limited in scope and addresses only witnesses and individuals who share a common domicile with a witness.

For an instruction on Threat to a Witness or Person Sharing a Common Domicile with a Witness, see Wis JI–Criminal 1238B.

This instruction is for violations of § 940.62(2)(a), where the alleged battery has taken place in response to any action taken in a legal proceeding. In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the battery to witness statute also applies where the victim has not yet testified but is expected to be called.

Section 940.201[now 940.62(2)(a)], was created by 1997 Wisconsin Act 143, effective date: May 5, 1998. Similar offenses against witnesses were formerly addressed by § 943.20(3).

1. This is the definition of “bodily harm” provided in § 939.22(4).

2. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of bodily harm. The act of one person alone might produce it, or the acts of two more persons might jointly produce it.

Also see Wis JI–Criminal 901, Cause.

3. The definition of “witness” in the first set of brackets is a simplified version of the definition provided in § 940.41(3), which applies to violations of § 940.62(2)(a). If that statement does not fit the status of the victim, the definition in the second set of brackets should be used, selecting the proper alternative from the full definition, which reads as follows:

(3) “Witness” means any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; whose declaration under oath is received as evidence for any purpose; who has provided information concerning any crime to any peace officer or prosecutor; who provided information concerning a crime to any employee or agent of a law enforcement agency using a crime reporting telephone hotline or other telephone number provided by the law enforcement agency; or who has been served with a subpoena issued under § 885.01 or under the authority of any court of this state or of the United States.

In State v. McLeod, 85 Wis.2d 787, 271 N.W.2d 157 (Ct. App. 1978), the Wisconsin Court of Appeals held that the predecessor to § 943.201 B § 940.26, 1975 Wis. Stats. B also applied where the victim has not yet attended or testified but is expected to be summoned to testify. For that type of case, the definition of “witness” in the second element should be modified to refer to “a person who is expected to be summoned to testify.”

4. The statute includes the requirement that the defendant “knew or had reason to know” that the victim is or was a witness. A strong argument can be made that making an element of this statement is unnecessary because of the element that follows. That is, if the defendant committed the battery against the victim in response to an action taken in a legal proceeding, the defendant must have known that the victim was a witness. However, because the “knew or had reason to know” requirement is part of the statute, the Committee concluded that it should be retained as an element. In all cases that the Committee could envision, the defendant who caused harm to another person “by reason of” that person having testified would have known that person was a witness. Thus, the “had reason to know” alternative is placed in brackets because it is not expected to be applicable to the typical case under the statute.

5. § 940.62(2)(a)2. provides that the battery must be “in response to any action taken in an official capacity or in a legal proceeding.” Although the statute uses both phrases because § 940.62(2)(a) applies to a broad list of persons involved in the court or legal system, the Committee concluded that, as a practical matter, the “official capacity” alternative is not ordinarily applicable when the protected person is a witness. Witnesses do not act in an “official capacity” in the sense contemplated by the statute; their relevant conduct is participation in a “legal proceeding” (e.g., testifying, appearing under subpoena, etc.). The Committee views Act 24’s use of both phrases as a drafting choice intended to consolidate the prior, role-specific formulations—former § 940.201 (witness-focused, proceeding-based)—into a single subsection. Accordingly, in prosecutions involving witnesses (and persons associated with witnesses), this instruction

is drafted for use with the “legal proceeding” alternative, and “official capacity” should be selected only if the evidence and the theory of prosecution genuinely implicate that concept.

6. If the definition of “without consent” is believed to be necessary, see Wis JI–Criminal 948, which provides an instruction based on the definition provided in § 939.22(48). That definition provides that “without consent” means “no consent in fact” or that consent was given because of fear, a claim of legal authority by the defendant, or misunderstanding.

7. “Intentionally” requires either a mental purpose to cause the result or awareness that the conduct is practically certain to cause it. § 939.23(3). The Committee concluded that the mental purpose alternative is most likely to apply to this offense. See Wis JI–Criminal 923A and 923B.

“Intentionally” also generally requires knowledge of all facts necessary to make the conduct criminal which follow the word “intentionally” in the statute. § 939.23(3). This general rule appears to be countered by the drafting style of § 940.62(2)(a), which divides the facts necessary to constitute the crime among several subsections of the statute. The Committee concluded that the knowledge requirement that usually accompanies the use of “intentionally” does not carry over to the facts set forth in (2)(a)1. And 2. Sub. (2)(a)1. has its own mental state – “knows or should know” – and thereby breaks the connection between “intentionally” used in sub. (2)(a)2. proper and the other facts that follow.

8. This instruction is drafted for cases involving intent directed at the actual victim because the Committee concluded that this is the scenario most likely to arise in practice. However, the statute provides “intent to cause bodily harm to that person or another.” If it is necessary to instruct on the issue of transferred intent, the instruction should be modified accordingly.

9. The requirement that the defendant know there is no consent is based on the definition of “intentionally” in § 939.23(3): “. . . the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word intentionally.”

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**1266 INJURY (GREAT BODILY HARM) BY OPERATION OF A VEHICLE  
WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED  
SUBSTANCE — § 940.25(1)(am)**

**Statutory Definition of the Crime**

Section 940.25(1)(am) of the Criminal Code of Wisconsin is violated by one who causes great bodily harm to another by the operation of a vehicle while the person has a detectable amount of a restricted controlled substance in his or her blood.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant operated a vehicle.<sup>1</sup>

“Operate” means the physical manipulation or activation of any of the controls of a vehicle necessary to put it in motion.<sup>2</sup>

2. The defendant's operation of a vehicle caused great bodily harm to (name of victim).

“Cause” means that the defendant's operation of a vehicle was a substantial factor<sup>3</sup> in producing great bodily harm.

“Great bodily harm” means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or

protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.<sup>4</sup>

3. The defendant had a detectable amount of a restricted controlled substance<sup>5</sup> in his or her blood at the time the defendant operated a vehicle.

(Name restricted controlled substance) is a restricted controlled substance.<sup>6</sup>

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta-9-tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

### **How to Use the Test Result Evidence**

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the operating.<sup>7</sup>

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied beyond a reasonable doubt that there was a detectable amount of (name restricted controlled substance) in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of (name restricted controlled substance) in (his) (her) blood at the time of the operating but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable

amount of (name restricted controlled substance) in (his) (her) blood at the time of the alleged operating unless you are satisfied of that fact beyond a reasonable doubt.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2), USE THE FOLLOWING CLOSING:<sup>8</sup>

**[Jury's Decision]**

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.25(2),<sup>9</sup> USE THE FOLLOWING:

**[Consider Whether the Defense is Proved]**

[Wisconsin law provides that it is a defense to this crime if the great bodily harm would have occurred even if the defendant had been exercising due care and had not had a detectable amount of (name restricted controlled substance) in his or her blood.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence<sup>10</sup> that this defense is established.

“By the greater weight of the evidence” is meant evidence which, when weighed against that opposed to it, has more convincing power. “Credible evidence” is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.<sup>11</sup>

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care<sup>12</sup> does not by itself provide a defense to the crime charged against the defendant.<sup>13</sup> Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the great bodily harm would have occurred even if the defendant had not had a detectable amount of (name restricted controlled substance) in his or her blood.]

### **Jury's Decision**

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.<sup>14</sup>]

### **COMMENT**

Wis JI–Criminal 1266 was approved by the Committee in June 2010 and revised in 2021. The 2021 revision added an alternative element to the instruction and to footnotes 6 and 7 based on 2019 Wisconsin Act 68. This revision was approved by the Committee in February 2026. It added to the comment, clarifying that methamphetamine is a “restricted controlled substance” regardless of isomer as provided in State v. Johnson, 2025 WI App 20, ¶54, 415 Wis. 2d 682, 19 N.W.3d 645.

This instruction is drafted for violations of § 940.25(1)(am), causing great bodily harm while operating a vehicle with a detectable amount of a restricted controlled substance. The statute was created by 2003 Wisconsin Act 97 and applies to offenses committed on or after the Act’s effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI–Criminal 2600 Introductory Comment, Sec. IX.

Section 940.25(2) provides that the defendant “has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and . . . he or she did not have a detectable amount of a restricted controlled substance in his or her blood . . .” The defense is addressed in the instruction by using an alternative ending, see text at footnote 8 and following. The constitutionality of the defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985). See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

Footnotes common to several instructions are collected in the Introductory Comment that precedes Wis JI–Criminal 2600. They are cross-referenced in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 939.22(44) defines “vehicle” as follows:

“Vehicle” means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

2. Regarding the definition of “operate,” see Wis JI–Criminal 2600 Introductory Comment, Sec. III.

3. The Committee concluded that the simple “substantial factor” definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with “before”:

There may be more than one cause of great bodily harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 8, below. The defense is closely related to the cause element but, in the Committee’s judgment, deals with a different issue and may apply even if the defendant’s operation was the cause as required by the second element. If the defendant’s operation caused the great bodily harm, the defense allows the defendant to avoid liability if it is established that the great bodily harm would have occurred even if the defendant had not been operating “with a detectable amount” and had been exercising due care. The constitutionality of eliminating causal negligence as an element and providing the affirmative defense was upheld by the Wisconsin Supreme Court in State v. Caibaiosai, 122 Wis.2d 587, 363 N.W.2d 574 (1985).

See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

4. See § 939.22(14) and Wis JI–Criminal 914.

5. The Committee suggests that the name of the restricted controlled substance be used throughout the instruction. See note 1, supra.

6. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a detectable amount of the substance in his or her blood remains a jury question.

Section 340.01(50m) defines “restricted controlled substance” as follows:

(50m) ‘Restricted controlled substance’ means any of the following:

- (a) A controlled substance included in schedule I other than tetrahydrocannabinol.
- (b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
- (c) Cocaine or any of its metabolites.
- (d) Methamphetamine.
- (e) Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person’s blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person’s blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

Methamphetamine is a restricted controlled substance as defined by statute, and the statutes do not distinguish between its isomers. Accordingly, the State is not required to prove whether the methamphetamine detected was dextromethamphetamine or levomethamphetamine; proof of a detectable amount of methamphetamine is sufficient. State v. Johnson, 2025 WI App 20, ¶¶24–26, 54, 415 Wis. 2d 682, 19 N.W.3d 645.

7. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI–Criminal 2663. [The Committee’s general approach to instructing on test results is discussed in Wis JI–Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper to use it for tests in “restricted controlled substance” cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for “detectable amount of a restricted controlled substance” cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person's blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9-tetrahydrocannabinol in a person’s blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

[t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person's blood is a chemical analysis of a sample of the person’s blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence” strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence on the issue of the person having . . .” may express a legislative intent that the analysis be admissible to prove the material issue “that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . .” as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses the “prima facie” effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.

8. Section 940.25(2)(a) provides that the defendant “has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant . . .” When there is not “some evidence” of the defense in the case, this set of closing paragraphs should be used.

See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

9. See note 8, *supra*. When there is “some evidence” of the defense in the case, the second set of closing paragraphs should be used.

10. Section 940.09(2)(a) expressly places the burden on the defendant to prove the defense “by a preponderance of the evidence.” The instruction describes the standard as “to a reasonable certainty, by the greater weight of the credible evidence,” because the Committee concluded that “the greater weight” will be more easily understood by the jury than “preponderance.”

11. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in *State v. Lohmeier*, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, Criminal conduct or contributory negligence of victim no defense. See Wis JI–Criminal 2600 Introductory Comment, Sec. X.

12. The phrase “failure to exercise due care” is intended to refer to what might be characterized as “negligence” on the part of the victim. The Committee concluded that the term “negligence” should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for “negligence” would be a reference to the failure to exercise “ordinary care.” The instruction uses “due care” instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to “ordinary care” when referring to the victim’s conduct and to “due care” when referring to the defendant’s conduct. Because “due care” is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.

13. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. “Defense” is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant

is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 11, *supra*, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.

14. This statement is included to assure that both options for a not guilty verdict are clearly presented:

- 1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
- 2) not guilty even though the elements have been proved, because the defense has been established.



**1276 HUMAN TRAFFICKING — § 940.302(2)(a)****Statutory Definition of the Crime**

Human trafficking, as defined in § 940.302 of the Criminal Code of Wisconsin, is committed by one who knowingly engages in trafficking for the purpose of [labor or services] [a commercial sex act] and does so by [CHOOSE ANY OF THE FOLLOWING THAT APPLY]<sup>1</sup>

[causing or threatening to cause bodily harm to any individual.]

[causing or threatening to cause financial harm to any individual.]

[restraining or threatening to restrain any individual.]

[violating or threatening to violate a law.]

[destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.]

[extortion.]

[fraud or deception.]

[debt bondage.]<sup>2</sup>

[controlling or threatening to control any individual's access to an addictive controlled substance.]

[using any scheme or pattern or other means to directly or indirectly coerce, threaten, or intimidate any individual.]

[using or threatening to use force or violence on any individual.]

[causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.]

### **State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

### **Elements of the Crime That the State Must Prove**

1. The defendant knowingly engaged in trafficking.

“Trafficking” means that the defendant [(recruited) (enticed) (harbored) (transported) (provided) (obtained)] [attempted to (recruit) (entice) (harbor) (transport) (provide) (obtain)] (name of victim).<sup>3</sup>

2. The defendant (use the term selected in element 1.) (name of victim) for the purpose of [labor or services] [a commercial sex act].<sup>4</sup>

[“Services” means activities performed by one individual at the request, under the supervision, or for the benefit of another person.]<sup>5</sup>

[“Commercial sex act” means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.]<sup>6</sup>

3. The defendant engaged in trafficking by (use the term or terms selected in the introductory paragraph).<sup>7</sup>

### **Deciding About Knowledge and Purpose**

You cannot look into a person's mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 1276 was originally published in 2011 and revised in 2013. This revision was approved by the Committee in February 2026; it reflects changes made by 2025 Wisconsin Act 56.

This instruction is drafted for violations of § 940.302, Human trafficking, which was created by 2007 Wisconsin Act 116 [effective date: April 3, 2008]. The statute was amended by 2013 Wisconsin Act 362 [effective date April 25, 2014]. For an example showing how the instruction would read when typical alternatives are selected, see Wis JI-Criminal 1276 EXAMPLE.

Subsection (2)(b) of § 940.302 provides: "Whoever benefits in any manner from a violation of par. (a) is guilty of a Class C felony if the person knows or reasonably should have known that the benefits come from or are derived from an act or scheme described in par. (a)." This instruction does not address this means of violating the statute.

Subsection (2)(c) of § 940.302 was created by 2013 Wisconsin Act 362, by renumbering and revising what formerly was sub. (2) of § 944.33. Sub. (2)(c) provides "Whoever knowingly receives compensation

from the earnings of debt bondage, a prostitute, or a commercial sex act, as described in sub. (1) (a) 1. and 2., is guilty of a Class E felony.” For an instruction addressing sub. (2)(c), see Wis JI–Criminal 1277.

2007 Wisconsin Act 116 also created § 939.46(1m) which provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

2007 Wisconsin Act 116 also created § 948.051, Trafficking of a child – see Wis JI–Criminal 2124.

1. The applicable term should be selected. The alternatives are those provided in sub. (2)(a)2.a. - L. of § 940.302.

2. Section 940.302(1)(b) defines “debt bondage” as follows: “the condition of a debtor arising from the debtor’s pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined.”

3. The Committee recommends selecting the applicable alternative from the choices in the brackets and parentheses. The choices are those provided in the definition of “trafficking” provided in § 940.302(1)(d).

4. For example, if element 1. involved selecting the “entice” alternative, the second element should read as follows: “The defendant enticed (name of victim) for the purpose of labor or services.”

5. This is the definition of “services” provided in § 940.302(1)(c).

6. This is the definition provided in § 940.302(1)(a), as amended by 2013 Wisconsin Act 362. For a definition of “sexual contact” see Wis JI–Criminal 934 and § 939.22(34). The definition in § 939.22(34) applies to this offense; the other “sexual contact” definitions in § 940.225(5)(c) and § 948.01(5) apply to violations of § 940.225 and Chapter 948, respectively.

7. The applicable term should be selected. The alternatives are those provided in sub. (2)(a)2.a. - L. of § 940.302.

**1277 HUMAN TRAFFICKING: RECEIVING COMPENSATION — § 940.302(2)(c)****Statutory Definition of the Crime**

Human trafficking, as defined in § 940.302(2)(c) of the Criminal Code of Wisconsin, is committed by one who knowingly receives compensation from the earnings of debt bondage, a prostitute, or a commercial sex act.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant received compensation from the earnings of [debt bondage] [a prostitute] [a commercial sex act].

[“Debt bondage” means the condition of a debtor arising from the debtor’s pledge of services as a security for debt if the reasonable value of those services is not applied toward repaying the debt or if the length and nature of the services are not defined.]<sup>1</sup>

[“Prostitute” means a person who intentionally engages in sexual intercourse or other sexual acts for anything of value.]<sup>2</sup>

[“Commercial sex act” means (sexual contact) (sexual intercourse) for which anything of value is given to, promised, or received, directly or indirectly, by any person.]<sup>3</sup>

2. The defendant received that compensation knowingly. This requires that the defendant knew that the compensation was from the earnings of [debt bondage] [a prostitute] [a commercial sex act].

### **Deciding About Knowledge**

You cannot look into a person’s mind to find out knowledge. Knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 1277 was approved by the Committee in June 2015. This revision was approved by the Committee in February 2026; it reflects changes made by 2025 Wisconsin Act 56.

This instruction is drafted for violations of sub. (2)(c) of § 940.302, Human trafficking, which are Class E felonies. The substance of subsection (2)(c) formerly appeared at § 944.30(2); it was amended and moved to § 940.302 by 2013 Wisconsin Act 362 [effective date: April 25, 2014].

For violations of sub. (2)(a) of § 940.302 see Wis JI Criminal 1276 and Wis JI Criminal 1276 EXAMPLE.

Subsection (2)(b) of § 940.302 provides: “Whoever benefits in any manner from a violation of par. (a) is guilty of a Class C felony if the person knows or reasonably should have known that the benefits come from or are derived from an act or scheme described in par. (a).” An instruction has not been drafted to address this means of violating the statute.

Section 939.46(1m) provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

For violations of § 948.051, Trafficking of a child, see Wis JI Criminal 2124.

1. This is the definition provided in § 940.302(1)(b).
2. This is based on part of the definition of “practice prostitution” in Wis JI Criminal 1562.
3. This is based on the definition provided in § 940.302(1)(a), as amended by 2013 Wisconsin Act 362. The portions of that definition relating to “sexually explicit performance” and “any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification” are excluded – see § 940.302(1)(a)3. For a definition of “sexual contact” see Wis JI Criminal 934 and § 939.22(34). The definition in § 939.22(34) applies to this offense; the other “sexual contact” definitions in § 940.225(5)(c) and § 948.01(5) apply to violations of § 940.225 and Chapter 948, respectively.

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**1296 INTIMIDATION OF A VICTIM — §§ 940.44(1) and 940.45****Statutory Definition of the Crime**

Intimidation of a victim, as defined in § 940.44(1) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)<sup>1</sup> another person who has been the victim of any crime from making any report of the victimization to any peace officer or law enforcement agency.<sup>2</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. (Name of victim) was a victim of a crime.

“Victim” means a person against whom a crime has been committed or attempted in this state.<sup>3</sup>

In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in § \_\_\_\_\_ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).<sup>4</sup> Before you may find the defendant guilty of intimidation

of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)<sup>5</sup> (attempted to prevent) (attempted to dissuade) (name of victim) from reporting the crime to any law enforcement agency.<sup>6</sup>
3. The defendant acted knowingly and maliciously.<sup>7</sup>

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

### **Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. Knowledge and intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.<sup>8</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].<sup>9</sup>

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:<sup>10</sup>

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

[“Was the defendant’s act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)<sup>11</sup> of (name of victim)]?”]

[FOR CHARGES UNDER SUB. (2)]

[“Was the defendant’s act accompanied by damage to the property of [(name of victim)] [(identify relative)<sup>12</sup> of (name of victim)]?”]

[FOR CHARGES UNDER SUB. (3)]

[“Was the defendant’s act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?”]<sup>13</sup>

[FOR CHARGES UNDER SUB. (4)]

[“Was the defendant’s act in furtherance of any conspiracy?”]<sup>14</sup>

[FOR CHARGES UNDER SUB. (5)]

[“Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?”]

[FOR CHARGES UNDER SUB. (6)]

[“Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?”]

[FOR CHARGES UNDER SUB. (7)]<sup>15</sup>

[“Was the underlying crime an act of domestic abuse<sup>16</sup> or one subject to a domestic abuse surcharge?”<sup>17</sup>]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question “yes.”

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI–Criminal 1296 was originally published in 1987 and revised in 1991, 1994, 1998, 2001, 2010, and 2020. The 2001 revision involved adoption of a new format, nonsubstantive changes to the text, and updating of the comment. The revised instruction applies to both misdemeanor and felony offenses; it also replaces Wis JI–Criminal 1294. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 15. The October 2022 revision removed a “Reporter’s Note” concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4). This revision was approved by the Committee in December 2025. The revision updated the comment.

This instruction is drafted for use in both misdemeanor and felony charges under §§ 940.44(1) and 940.45. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI–Criminal 1296A.

The definition of the three basic elements is based on § 940.44(1) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in § 940.45 subs. (1)-(7) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to “prevent or dissuade” as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define “attempt” for the jury. The following is suggested:

Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of “attempt” found in Wis JI–Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The concluding phrase of this paragraph, “. . . from making any report of the victimization to any peace officer or law enforcement agency,” is a simplified paraphrasing of subsec. (1) of 940.44. There are two other subsections that are not addressed by the instruction. The three subsections read as follows:

- (1) Making any report of the victimization to any peace officer or state, local or federal law enforcement or prosecuting agency, or to any judge.
- (2) Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof. [See Wis JI–Criminal 1297.]
- (3) Arresting or causing or seeking the arrest of any person in connection with the victimization.

3. The definition of “victim” in the instruction is a simplified version of the definition provided in § 940.41(2):

- (2) “Victim” means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

4. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI–Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI–Criminal 1294. If the jury has not been instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, *supra*.

5. “Dissuade” means “to advise against” or “to turn from by persuasion,” Webster’s New Collegiate Dictionary.

6. This statement substitutes “reporting the crime” for the statute’s “report of the victimization” on the grounds that it means the same thing and will be more understandable. The second element reflects one alternative of several that are possible under the statute. See note 2, *supra*.

7. Section 940.44 does not use any of the regular criminal code “intent” words, such as “intentionally” but rather contains the phrase “knowingly and maliciously.” The terms “malice” and “maliciously” are not used anywhere else in the Wisconsin Criminal Code. “Maliciously” is defined in § 940.41(1r) as follows:

(1r) “Malice” or “maliciously” means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

8. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI–Criminal 923A [formerly JI 923.1].

9. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with “guilty” and read the next sentence, beginning with “If you are not so satisfied . . .”

10. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class G felony. A bracketed question is provided for each statutory option.

11. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: “. . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness.” Reference to “treatment foster child” was deleted by 2009 Wisconsin Act 28.

12. The same relatives are covered as under sub. (1) of the statute. See note 11, *supra*.

13. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: “Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2).” The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to “any express or implied threat of force. . .” (Emphasis supplied.) The suggested instruction does not include “express or implied” because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

14. See Wis JI–Criminal 570 for a definition of the inchoate crime of conspiracy.

15. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: “(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055.”

16. Subsection 968.075(1)(a) defines “domestic abuse” as follows:

“Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3..

For an instruction on committing a domestic abuse crime, see Wis JI–Criminal 984.

17. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(1)(a)1 and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.

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**1297 INTIMIDATION OF A VICTIM — §§ 940.44(2) and 940.45****Statutory Definition of the Crime**

Intimidation of a victim, as defined in § 940.44(2) of the Criminal Code of Wisconsin, is committed by one who knowingly and maliciously prevents or dissuades (or who attempts to so prevent or dissuade)<sup>1</sup> another person who has been the victim of any crime from causing a complaint, indictment, or information to be sought and prosecuted or assisting in the prosecution thereof.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. (Name of victim) was a victim of a crime.

“Victim” means a person against whom a crime has been committed or attempted in this state.<sup>2</sup>

In this case, it is alleged that (name of victim) was a victim of (name of crime). (Name of crime), as defined in §\_\_\_\_\_ of the Criminal Code of Wisconsin, is committed by one who (refer to the uniform criminal jury instruction for a definition of the crime).<sup>3</sup> Before you may find the defendant guilty of intimidation

of a victim, you must be satisfied beyond a reasonable doubt that (name of victim) was the victim of (name of crime).

2. The defendant (prevented) (dissuaded)<sup>4</sup> (attempted to prevent) (attempted to dissuade) (name of victim) from [causing a (complaint) (indictment) (information) to be sought] (or) [causing a (complaint) (indictment) (information) to be prosecuted] (or) [assisting in the prosecution of a (complaint) (indictment) (information)].<sup>5</sup>

3. The defendant acted knowingly and maliciously.<sup>6</sup>

This requires that the defendant knew (name of victim) was a victim of a crime and that the defendant (acted with the intent to injure or annoy another) (or) (acted with an intent to interfere with the orderly administration of justice).

### **Deciding About Knowledge and Intent**

You cannot look into a person's mind to find knowledge and intent. They must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.<sup>7</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty [and answer the following question "yes" or "no"].<sup>8</sup>

If you are not so satisfied, you must find the defendant not guilty.

ADD ONE OF THE FOLLOWING QUESTIONS IF A FELONY OFFENSE IS CHARGED AND THE EVIDENCE WOULD SUPPORT A FINDING THAT A PENALTY FACTOR SET FORTH IN § 940.45 IS ESTABLISHED:<sup>9</sup>

If you find the defendant guilty, you must answer the following question:

[FOR CHARGES UNDER SUB. (1)]

[“Was the defendant’s act accompanied by (attempted) force or violence upon [(name of victim)] [(identify relative)<sup>10</sup> of (name of victim)]?”]

[FOR CHARGES UNDER SUB. (2)]

[“Was the defendant’s act accompanied by damage to the property of [(name of victim)] [(identify relative)<sup>11</sup> of (name of victim)]?”]

[FOR CHARGES UNDER SUB. (3)]

[“Was the defendant’s act accompanied by any express or implied threat of (name harm described in sub. (1) or (2) of § 940.45)?”]<sup>12</sup>

[FOR CHARGES UNDER SUB. (4)]

[“Was the defendant’s act in furtherance of any conspiracy?”]<sup>13</sup>

[FOR CHARGES UNDER SUB. (5)]

[“Does the defendant have a prior conviction for (a violation under §§ 940.42 to 940.45) (an act which, if committed in this state, would be a violation under §§ 940.42 to 940.45)?”]

[FOR CHARGES UNDER SUB. (6)]

[“Did the defendant commit the act for monetary gain or for any other consideration acting on the request of any other person?”]

[FOR CHARGES UNDER SUB. (7)]<sup>14</sup>

[“Was the underlying crime an act of domestic abuse<sup>15</sup> or one subject to a domestic abuse surcharge?”<sup>16</sup>]

[CONTINUE WITH THE FOLLOWING IN ALL FELONY CASES:]

If you are satisfied beyond a reasonable doubt that (repeat the question), you should answer the question “yes.”

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI–Criminal 1297 was originally published in 2010 and revised in 2016 and 2020. The Committee approved revisions in February 2022 and October 2022. The February 2022 revision corrected an inadvertent error in sub. (7) of § 940.45, which was created by 2019 Wisconsin Act 112. See footnote 14. The October 2022 revision removed a “Reporter’s Note” concerning issues relating to instructing the jury on a domestic abuse surcharge pursuant to s. 973.055(4). This revision was approved by the Committee in December 2025; it updated the comment.

This instruction is drafted for use for both misdemeanor and felony charges under §§ 940.44(2) and 940.45. For violations of § 940.44(1) see Wis JI–Criminal 1296. A separate instruction is drafted for cases involving intimidation of a person acting on behalf of a victim. See Wis JI–Criminal 1296A.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14. See footnote 5, below.

The definition of the three basic elements is based on § 940.44(2) and is to be used in both felony and misdemeanor prosecutions; for felony offenses, a question is to be added so that the jury makes a finding whether the fact presented in the question is proved. Each of the facts specified in subs. (1)-(6) increases the penalty to that for a Class G felony.

Sections 940.41 through 940.49, relating to intimidation of victims and witnesses, were created by Chapter 118, Laws of 1981. They were based on a model statute proposed in 1979 by the Committee on Victims, American Bar Association Section of Criminal Justice.

1. Section 940.44 prohibits attempts to “prevent or dissuade” as well as the completed act. The material relating to attempts is drafted in parentheses throughout the instruction and should be included when the facts of the case support the attempt basis of liability.

Section 940.46, also created by Chapter 118, Laws of 1981, further provides that attempts to violate §§ 940.42 to 940.45 may be prosecuted as a completed act. This section is redundant in light of the fact that the definition of each substantive offense already prohibits both the completed act and an attempt.

If an attempt case is charged, it may be advisable to define “attempt” for the jury. The following is suggested:

Attempt requires that the defendant intended to (prevent) (dissuade) (name of victim) from making a report of the victimization to any peace officer or law enforcement agency and did acts which indicated unequivocally that the defendant had that intent and would have (prevented) (dissuaded) (name of victim) from making a report except for the intervention of another person or some other extraneous factor.

This definition is briefer than the full explanation of “attempt” found in Wis JI–Criminal 580 but is believed sufficient for most cases. See that instruction for a complete discussion of attempt.

2. The definition of “victim” in the instruction is a simplified version of the definition provided in § 940.41(2):

(2) “Victim” means any natural person against whom any crime as defined in s. 939.12 or under the laws of the United States is being or has been perpetrated or attempted in this state.

3. The statement in the first paragraph of the uniform instruction should usually be sufficient. It will virtually always be sufficient where the crime is also charged in the instant case. In other situations, it may be good practice to include a more complete definition of the crime, depending on the crime and the nature of the evidence.

In State v. Thomas, 161 Wis.2d 616, 468 N.W.2d 729 (Ct. App. 1991), the court found that it was error to fail to instruct sufficiently on the crime committed against the victim:

The jury instruction should have specified and defined the crime or crimes underlying the alleged victimization. Additionally, the jury should have been told that it could not find the defendant guilty of intimidation of a victim unless the state proved the elements of the underlying crime or crimes beyond a reasonable doubt. The reason is clear: a jury that is not told which crime is the predicate for the intimidation-of-a-victim charge and is not instructed on the elements of that crime may very well conclude that certain conduct constitutes a crime when it does not.

161 Wis.2d 616, 624.

In many cases, it is likely that the defendant will also be charged with committing the underlying crime against the victim as well as with trying to intimidate that victim. In those situations, Wis JI–Criminal 1294 would be given after the jury had been instructed on the essential facts of the underlying crime and detailed recapitulation of those facts ought not to be necessary in Wis JI–Criminal 1294. If the jury has not been

instructed on the underlying crime, a more detailed explanation may be required in order to satisfy the requirements of the Thomas case.

Acquittal on the underlying crime does not prevent conviction on the charge of intimidating the victim of that crime. State v. Thomas, *supra*.

4. “Dissuade” means “to advise against” or “to turn from by persuasion,” Webster’s New Collegiate Dictionary.

5. Subsection (2) of § 940.44 reads as follows: “Causing a complaint, indictment or information to be sought and prosecuted and assisting in the prosecution thereof.” The instruction provides for three alternatives as set forth in State v. Freer, 2010 WI App 9, 323 Wis.2d 29, 779 N.W.2d 12, which concluded that the statute was ambiguous because “‘and’ in the statutes is not always interpreted as a conjunctive term.” The court relied on an LRB analysis of the bill to interpret the statute as though it read “or” instead of “and”:

In light of the LRB analysis, we conclude that the legislature intended the victim intimidation statute to prohibit any act of intimidation that seeks to prevent or dissuade a crime victim from assisting in the prosecution. Accordingly, we read “and” in the phrase “causing a complaint . . . to be sought and prosecuted and assisting in the prosecution thereof” in the disjunctive, and thereby conclude that Wis. Stat. § 940.44(2) prohibits knowingly or maliciously preventing or dissuading a crime victim from providing any one or more of the following forms of assistance to prosecutors: (1) causing a complaint, indictment or information to be sought; (2) causing a complaint to be prosecuted; or (3) assisting in the prosecution.

2010 WI App 9, ¶24.

Section 940.44(2) was amended by 2013 Wisconsin Act 14 [effective date: April 10, 2015] to codify the interpretation of the statute in Freer. The text of the instruction already reflected the Freer interpretation so it was not affected by Act 14.

6. Section 940.44 does not use any of the regular criminal code “intent” words, such as “intentionally” but rather contains the phrase “knowingly and maliciously.” The terms “malice” and “maliciously” are not used anywhere else in the Wisconsin Criminal Code. “Maliciously” is defined in § 940.41(1r) as follows:

(1r) “Malice” or “maliciously” means an intent to vex, annoy or injure in any way another person or to thwart or interfere in any manner with the orderly administration of justice.

This instruction reduces the mental purpose to that of preventing the witness from testifying because that purpose fits in best with the basic definition of the offense: attempting to prevent the witness from testifying. This kind of purpose is one that shows intent to interfere with the administration of justice.

7. This is the shorter version used to describe the process of finding knowledge and intent. The Committee concluded that it is suitable for use in most cases. For the longer description of the intent-finding process, see Wis JI–Criminal 923A [formerly Wis JI–Criminal 923.1].

8. Continue with the bracketed material if the felony offense is charged and add the appropriate question. For misdemeanor offenses, stop with “guilty” and read the next sentence, beginning with “If you are not so satisfied . . .”

9. Section 940.45 specifies seven different facts that increase the penalty for the basic misdemeanor offense to that for a Class D felony. A bracketed question is provided for each statutory option.

10. The penalty increase provided by § 940.45(1) applies to the following specified relatives of the witness: “. . . the spouse, child, stepchild, foster child, parent, sibling or grandchild of the witness or any person sharing a common domicile with the witness.” Reference to “treatment foster child” was deleted by 2009 Wisconsin Act 28.

11. The same relatives are covered as under sub. (1) of the statute. See note 10, supra.

12. This is an abbreviated paraphrasing of the full subsection (3) of § 940.43, which provides: “Where the act is accompanied by any express or implied threat of force, violence, injury or damage described in sub. (1) or sub. (2).” The references to sub. (1) and (2) serve to broaden the coverage of the subsection to all threats to do personal injury or cause property damage to any witness or any relative of the witness. The appropriate description of the harm and the target of the threat should be inserted in the blank.

Subsection 940.43(3) refers to “any express or implied threat of force. . .” (Emphasis supplied.) The suggested instruction does not include “express or implied” because the Committee concluded it was unnecessary. There must in fact be a threat, regardless of whether that threat is communicated by an express statement or implied from conduct. If a case clearly involves a threat implied from conduct, it may be appropriate to advise the jury that the statute covers those threats. Care should be taken, however, to assure that it remains clear that the threat, however communicated, must be established by proof which satisfies the jury beyond a reasonable doubt.

13. See Wis JI–Criminal 570 for a definition of the inchoate crime of conspiracy.

14. This option was added to reflect the alternative created by 2019 Wisconsin Act 112. [Effective date: March 1, 2020.] The question is a paraphrase of the statute, which reads as follows: “(7) Where the underlying crime is an act of domestic abuse, as defined in s. 968.075(1)(a), that constitutes the commission of a crime or a crime that, following a conviction, is subject to the surcharge in s. 973.055.”

15. Subsection 968.075(1)(a) defines “domestic abuse” as follows:

“Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225 (1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

For an instruction on committing a domestic abuse crime, see Wis JI–Criminal 984.

16. A person is subject to a domestic abuse surcharge if that person is convicted of knowingly violating a domestic abuse temporary restraining order or injunction, or is otherwise convicted of violating certain criminal offenses or municipal ordinances specified under § 973.055(1)(a)1 and the court finds the conduct constituting the violation involved an act by an adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided, or against an adult with whom the adult person has created a child. See § 973.055.





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# WISCONSIN JURY INSTRUCTIONS

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## CRIMINAL

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## VOLUME IIA

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**Wisconsin Criminal Jury  
Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 3/2026 Supplement (Release No. 70)

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**1396A REPRESENTATIONS DEPICTING NUDITY — SYNTHETIC INTIMATE REPRESENTATION — 942.09(2)(am)4.**

**Statutory Definition of the Crime**

Section 942.09(2)(am)4. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, distributes, or exhibits a synthetic intimate representation of an identifiable person with intent to coerce, harass, or intimidate that person.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant posted, published, distributed, or exhibited a synthetic intimate representation.

“Synthetic intimate representation” means a representation generated using technological means that uses an identifiable person’s face, likeness, or other distinguishing characteristic to depict an intimate representation of that person, regardless of whether the representation includes artificial, legally generated, or generally accessible components, and that is so realistic that a reasonable person would believe it depicts conduct of the identifiable person.<sup>1</sup>

“Intimate representation” means (a representation of a nude or partially nude person) (a representation of clothed, covered, or partially clothed or covered genitalia or buttock that is not otherwise visible to the public.

the public) (a representation of a person urinating, defecating, or using a feminine hygiene product) (a representation of a person engaged in sexual intercourse or sexual contact).<sup>2</sup>

IF THE MEANING OF “NUDE OR PARTIALLY NUDE PERSON” IS REQUIRED, ADD THE FOLLOWING DEFINITION

[“Nude or partially nude person” means (any human being with less than fully and opaquely covered genitals, pubic area, or buttocks) (any female human being with less than a fully opaque covering over any portion of a breast below the top of the nipple) (any male human being with covered genitals in a discernibly turgid state).<sup>3</sup>]

2. The person depicted in the synthetic intimate representation was identifiable as (name of the person depicted).
3. The defendant acted with intent to coerce, harass, or intimidate (name of the person depicted).

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question “yes,” you must be satisfied beyond a reasonable doubt that the answer is “yes.”

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI–Criminal 1396A was approved in February 2026.

This instruction is for a violation of sub. (2)(am)4. of § 942.09. Section 942.09 was formerly § 944.025, the original version of which was found to be unconstitutional in State v. Stevenson, 2000 WI 71, 236 Wis.2d 86, 613 N.W.2d 90. Section 944.025 was amended by 2001 Wisconsin Act 16, but those changes were superseded by 2001 Wisconsin Act 33, which renumbered the statute § 942.09 [effective date: December 18, 2001].

For violations of § 942.09(2)(am)1. capturing an intimate representation without the consent of the person depicted, see Wis JI–Criminal 1396.

Two other offenses are defined in § 942.09(2)(am): making a reproduction of a representation captured in violation of sub. (2)(a) [see sub. (2)(am)2.]; and possessing, distributing, or exhibiting a representation captured in violation of sub. (2)(a) [see sub. (2)(am)3.]. Uniform instructions have not been drafted for those offenses.

For violations of §§ 942.09(3m)(a)1., 2., and 3, see Wis JI–Criminal 1398A, 1398B, and 1398C.

Subsection (2)(bm) of § 942.09 creates an exception for representations of nude children, captured or possessed by parents, that do not constitute violations of § 948.05, Sexual Exploitation of a Child, or § 948.12, Possession of Child Pornography. Subsection (2)(cm) extends the exception to those who receive a representation covered by sub. (2)(am) in a non-commercial context. Both provisions were amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016]. Act 370 also created an exception to providers of an interactive computer service or an information service or telecommunications service if the

representation is provided by a third party or the representation is provided to a person who posts or publishes a private representation that is newsworthy or of public importance. See § 942.09(2)(dm).

1. This is the definition provided in § 942.09(1)(e).
2. This is the definition provided in § 942.09(1)(ag).
3. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

**1398A PUBLISHING A PRIVATE REPRESENTATION DEPICTING NUDITY  
WITHOUT CONSENT — § 942.09(3m)(a)1.**

**Statutory Definition of the Crime**

Section 942.09(3m)(a)1. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted does not consent to the posting or publication of the private representation.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant (posted or published)<sup>1</sup> (caused to be posted or published) a private representation.

“Post or publish” includes posting or publishing on a website on the Internet, if the website may be viewed by the general public.<sup>2</sup>

2. The defendant knew that the person who is depicted did not consent to the posting or publication of the private representation.

**Meaning of “Representation”**

“Representation” means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.<sup>3</sup>

**Meaning of “Did Not Consent”**

“Did not consent” means that (name) did not freely agree to the posting or publishing of the private representation.<sup>4</sup>

**Meaning of “Private Representation”**

“Private representation” means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.<sup>5</sup>

**Meaning of “Nude or Partially Nude Person”**

“Nude or partially nude person” means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].<sup>6</sup>

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.



If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.<sup>7</sup>

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question “yes,” you must be satisfied beyond a reasonable doubt that the answer is “yes.”

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI–Criminal 1398A was originally published in 2015 and revised in 2017, 2018, and 2019. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of “representation.” The 2019 revision added to the comment to reflect changes made by 2019 Wisconsin Act 16. This revision was approved by the Committee in February 2026. It amended the comment to reflect statutory changes made to § 942.09 by 2025 Wisconsin Act 34 [effective date: October 4, 2025].

This instruction is for a violation of sub. (3m)(a)1. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

Two other offenses are defined in § 942.09(3m)(a). § 942.09(3m)(a)2. applies to one who: “posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted.” See Wis JI–Criminal 1398B. § 942.09(3m)(a)3. applies to one who: “makes a reproduction of a private representation” and the actor “knows that the person depicted in the reproduction did not consent to the making of the reproduction.” See Wis JI–Criminal 1398C.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016]. The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: “‘Post or publish’ includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public.”

2. This is the definition provided in § 942.09(1)(bg).

3. This is the definition provided in § 942.09(1)(c).

4. § 942.09(1)(ae) defines “consent”:

. . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines “did not consent” in essentially the same manner as the instructions for sexual assault under § 940.225 define “without consent.” A complete explanation of that definition is provided in, for example, footnote 2, Wis JI–Criminal 1201. Also see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim’s not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

5. This is the definition provided in § 942.09(1)(bn).

If a definition of “sexually explicit conduct” is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

“Sexually explicit conduct” means actual or simulated:

- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal opening either by a person or upon the person’s instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

6. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

7. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at

the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

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**1398B PUBLISHING A DEPICTION THAT IS KNOWN TO BE A PRIVATE REPRESENTATION OF NUDITY WITHOUT CONSENT—§ 942.09(3m)(a)2.**

**Statutory Definition of the Crime**

Section 942.09(3m)(a)2. of the Criminal Code of Wisconsin is violated by a person who posts, publishes, or causes to be posted or published a depiction of a person that he or she knows is a private representation without the consent of the person depicted.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant (posted or published)<sup>1</sup> (caused to be posted or published) a depiction of a person.

“Post or publish” includes posting or publishing on a website on the Internet, if the website may be viewed by the general public.<sup>2</sup>

2. The defendant knew that the depiction was a private representation.
3. The person who is depicted did not consent to the posting or publication of the private representation.

**Meaning of “Representation”**

“Representation” means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.<sup>3</sup>

**Meaning of “Did Not Consent”**

“Did not consent” means that (name) did not freely agree to the posting or publishing of the private representation.<sup>4</sup>

**Meaning of “Private Representation”**

“Private representation” means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.<sup>5</sup>

**Meaning of “Nude or Partially Nude Person”**

“Nude or partially nude person” means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].<sup>6</sup>

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.<sup>7</sup>

If you find the defendant guilty, you must answer the following question:

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question “yes,” you must be satisfied beyond a reasonable doubt that the answer is “yes.”

If you are not so satisfied, you must answer the question “no.”

#### COMMENT

Wis JI–Criminal 1398B was originally published in 2015 and revised in 2017, 2018, 2019, 2020, and 9/2024. The 2017 revision reflected changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370. The 2018 revision made an editorial correction in the definition of “representation.” The 2019 revision added to the Comment to reflect changes made by 2019 Wisconsin Act 16. This revision was approved by the Committee in February 2026. It amended the comment to reflect statutory changes made to § 942.09 by 2025 Wisconsin Act 34 [effective date: October 4, 2025].

This instruction is for a violation of sub. (3m)(a)2. of § 942.09 as created by 2013 Wisconsin Act 243 [effective date: April 10, 2014].

Two other offenses are defined in § 942.09(3m)(a). § 942.09(3m)(a)1. applies to one who: “posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted did not consent to the posting or publication . . .” See Wis JI–Criminal 1398A. § 942.09(3m)(a)3. applies to one who: “makes a reproduction of a private representation” and the actor “knows that the person depicted in the reproduction did not consent to the making of the reproduction.” See Wis JI–Criminal 1398C.

In State v. Culver, 2018 WI App 55, 384 Wis.2d 222, 918 N.W.2d 103, the Wisconsin Court of Appeals held that § 942.09(3m)(a)2. was not overbroad in violation of the First Amendment and was not unconstitutionally vague.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016]. The instruction does not address the exceptions.

1. Section 942.09(1)(bg) states: “‘Post or publish’ includes posting or publishing on a Web site on the Internet, if the Web site may be viewed by the general public.”

2. This is the definition provided in § 942.09(1)(bg).

3. This is the definition provided in § 942.09(1)(c).

4. § 942.09(1)(ae) defines “consent”:

... words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines “did not consent” in essentially the same manner as the instructions for sexual assault under § 940.225 define “without consent.” A complete explanation of that definition is provided in, for example, footnote 2, Wis JI–Criminal 1201. Also see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim’s not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

5. This is the definition provided in § 942.09(1)(bn).

If a definition of “sexually explicit conduct” is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

“Sexually explicit conduct” means actual or simulated:

- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal opening either by a person or upon the person’s instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts. See Wis. Stat. § 948.01(1t) for definition of this term.



6. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

7. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

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**1398C MAKING A REPRODUCTION OF A PRIVATE REPRESENTATION  
WITHOUT CONSENT—§ 942.09(3m)(a)3.**

**Statutory Definition of the Crime**

Section 942.09(3m)(a)3. of the Criminal Code of Wisconsin is violated by a person who makes a reproduction of a private representation, if the actor knows that the person depicted in the reproduction did not consent to the making of the reproduction.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence that satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant made a reproduction of a private representation.
2. The defendant knew that the person depicted in the reproduction did not consent to the making of the reproduction.

**Meaning of “Representation”**

“Representation” means a photograph, exposed film, motion picture, videotape, recording, other visual or audio representation, or data that represents a visual image or audio recording.<sup>1</sup>

**Meaning of “Private Representation”**

“Private representation” means a representation depicting a nude or partially nude person or depicting a person engaging in sexually explicit conduct that is intended by the

person depicted in the representation to be captured, viewed, or possessed only by the person who, with the consent of the person depicted, captured the representation or to whom the person depicted directly and intentionally gave possession of the representation.<sup>2</sup>

### **Meaning of “Nude or Partially Nude Person”**

“Nude or partially nude person” means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].<sup>3</sup>

### **Meaning of “Did Not Consent”**

“Did not consent” means that (name) did not freely agree to the making of the reproduction of the private representation.<sup>4</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.<sup>5</sup>

Was (name of victim) under the age of 18 years at the time of the offense?

Before you may answer the question “yes,” you must be satisfied beyond a reasonable doubt that the answer is “yes.”

If you are not so satisfied, you must answer the question “no.”

**COMMENT**

Wis JI–Criminal 1398C was approved by the Committee in February 2026.

This instruction is for a violation of sub. (3m)(a)3. of § 942.09 as created by 2025 Wisconsin Act 34 [effective date: October 4, 2025].

Two other offenses are defined in § 942.09(3m)(a). § 942.09(3m)(a)1. applies to one who: “posts, publishes, or causes to be posted or published, a private representation if the actor knows that the person depicted did not consent to the posting or publication . . .” See Wis JI–Criminal 1398A. § 942.09(3m)(a)2. applies to one who: “posts, publishes, or causes to be posted or published, a depiction of a person that he or she knows is a private representation, without the consent of the person depicted.” See Wis JI–Criminal 1398B.

Exceptions to the applicability of sub. (3m) are set forth in sub. (3m)(b)1. through 4. Subdivision 1 was amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016]. The instruction does not address the exceptions.

1. This is the definition provided in § 942.09(1)(c).
2. This is the definition provided in § 942.09(1)(bn).

If a definition of “sexually explicit conduct” is believed to be necessary, § 942.09(1)(d) provides that the definition of the term in § 948.01(7) applies:

“Sexually explicit conduct” means actual or simulated:

- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal opening either by a person or upon the person’s instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts. See Wis. Stat. 948.01(1t) for definition of this term.

3. This is the definition provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

4. § 942.09(1)(ae) defines “consent”:

. . . words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11(2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines “did not consent” in essentially the same manner as the instructions for sexual assault under § 940.225 define “without consent.” A complete explanation of that definition is provided in, for example, footnote 2, Wis JI–Criminal 1201. Also see Wis JI–Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim’s not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

5. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of § 942.09: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(3m)(am). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.

**1421 BURGLARY WITH INTENT TO STEAL<sup>1</sup> — § 943.10(1m)****Statutory Definition of the Crime**

Burglary, as defined in § 943.10(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building<sup>2</sup> without the consent of the person in lawful possession and with intent to steal.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intentionally entered a building.<sup>3</sup>
2. The defendant entered the building without the consent<sup>4</sup> of the person in lawful possession.<sup>5</sup>
3. The defendant knew that the entry was without consent.<sup>6</sup>
4. The defendant entered the building with intent to steal.<sup>7</sup>

“Intent to steal” requires that the defendant had the mental purpose to take and carry away<sup>8</sup> movable property of another without consent and that the defendant intended to deprive the owner permanently of possession of the property.<sup>9</sup> [It requires that the defendant knew the property belonged to another and knew the person did not consent to the taking of the property.]<sup>10</sup>

### **When Must Intent Exist?**

The intent to steal must be formed before entry is made. The intent to steal, which is an essential element of burglary, is no more or less than the mental purpose to steal formed at any time before the entry, which continued to exist at the time of the entry.

### **Deciding About Intent and Knowledge**

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.<sup>11</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.<sup>12</sup>

### **COMMENT**

Wis JI-Criminal 1421 was originally published in 1966 and revised in 1984, 1991, 1993, 1996, 2001, 2020,1/2024, and 2/2025. This revision was approved by the Committee in December 2025. It amended the instruction to conform with 2025 Wisconsin Act 44.

Criminal trespass to dwelling under § 943.14 is not a lesser included offense of burglary with intent to steal. Raymond v. State, 55 Wis.2d 482, 198 N.W.2d 351 (1972).



1. This instruction is drafted for burglary with the “intent to steal.” If “intent to commit a felony” is charged, see Wis JI–Criminal 1424. If “intent to commit a burglary” is charged, see Wis JI–Criminal 1423. For burglary offenses committed “while armed” or under other aggravating circumstances as prohibited by § 943.10(2), see Wis JI–Criminal 1425A, 1425B, and 1425C.

2. The model instruction is drafted for a case involving entry into a “building.” It must be modified if entry involved any of the other places listed in § 943.10(1m)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of “building.” The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that “a mobile home is a building.” The court said this created a “mandatory conclusive presumption . . . regarding an element of the arson offense.” However, the court further held that the error was harmless because it played no role in the jury’s verdict:

We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the ‘functional equivalent’ of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.10(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis. JI–Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

“[w]hile the circuit court could have used the phrase ‘a room within a building’ instead of the words ‘office’ or ‘building,’ the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used.” Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.10 “identifies alternative means of committing one element of the crime of burglary under § 943.10(1m)(a)-(f).” Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.10(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of “building” is necessary, resort to a standard dictionary may be helpful. For example, Webster’s Ninth New Collegiate Dictionary provides that a “building” refers to “a usually roofed and walled structure built for permanent use (as for a dwelling).”

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break “and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony.” The court held that the unfinished house was a “building” for purposes of burglary and defined the term as follows:

. . . an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . “The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property.”

69 Wis. 203, 206-07

A more recent case discusses “building” in connection with zoning rules prohibiting “mobile homes” but allowing “modular homes” and other buildings. The person’s home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county’s own definition of “building” and found that the home in question qualified:

. . . the county relies on the terms “building” and “mobile home” to classify structures. A building is “any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property.” It is clear that Hansman’s structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1m)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once “the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary.” Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant’s entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). “Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry ‘without consent.’ The same ordinarily is true of consent

obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . .” 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not “without consent,” see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain “at a time or place beyond his authority. ‘Entry’ in § 943.10(1m)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure.” Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men’s room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m., and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

The task in most cases will be to determine the limits of such consent and the defendant’s knowledge or lack of it.

. . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer’s consent and Schantek’s knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek’s claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was “without consent” because of an “implied limitation on the scope of the invitation to enter”:

We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word “intentionally” is used, “the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word ‘intentionally.’” The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant’s postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant’s entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not “purport to be acting under legal authority,” one of the alternatives to “no consent in fact” provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, *supra*, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The problem of circumstantially proving intent to steal has received considerable attention from the Wisconsin Supreme Court. The present rule provides that while “intent to steal will not be inferred from the fact of entry alone,” “additional circumstances such as time, nature of the place entered, method of entry, identity of the accused and other circumstances, without proof of actual larceny, can be sufficient to permit a reasonable person to conclude the defendant entered with an intent to steal.” State v. Barclay, 54 Wis.2d 651, 654, 196 N.W.2d 745 (1972), citing Strait v. State, 41 Wis.2d 552, 562, 164 N.W.2d 505 (1969). Also see State v. Holmstrom, 43 Wis.2d 465, 168 N.W.2d 574 (1969), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970), overruling State v. Kennedy, 15 Wis.2d 600, 113 N.W.2d 372 (1962). For a complete review of prior cases, see State v. Bowden, 93 Wis.2d 574, 288 N.W.2d 139 (1980).

8. The instruction uses “take and carry away” since it is the most common type of theft and the one that would most often be involved in a burglary case. In a proper case, the other alternatives in the theft statute (“use, transfer, conceal, or retain possession of . . .”) should be substituted.

9. “Intent to deprive the owner permanently of possession” is used as the most common type of “intent to steal.” It is possible that a burglary offense could involve mental states for other types of stealing. See, for example, theft under § 943.20(1)(b), which involves “intent to convert to his own use” and theft under § 943.20(1)(c), which requires intent to deprive a pledgee or other person having a superior right of possession.

10. The bracketed material should be added if there is evidence that, for example, the defendant believed he was reclaiming his own property. Referred to as “right to recapture,” “claim of right,” or “self-help,” this defensive matter tends to negate either the “property of another” or the “knew it was property of another” elements. The rule applies to burglary, see State v. Pettit, 171 Wis.2d 627, 492 N.W.2d 633 (Ct. App. 1992), and is discussed at Wis JI–Criminal 710, Law Note: Right to Recapture.

11. Evidence of the defendant’s possession of recently stolen property may often be offered to support a finding of intent to steal. If an instruction on the effect of such evidence is requested, see Wis JI–Criminal 170, Circumstantial Evidence, and 173, Possession of Recently Stolen Property.

12. Burglary, as defined in § 943.10(1m), is punished as a Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI–Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI–Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI–Criminal 1425C).

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**1423 BURGLARY WITH INTENT TO COMMIT A BATTERY<sup>1</sup> — § 943.10(1m)****Statutory Definition of the Crime**

Burglary, as defined in § 943.10(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building<sup>2</sup> without the consent of the person in lawful possession and with intent to commit a battery therein.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intentionally entered a building.<sup>3</sup>
2. The defendant entered the building without the consent<sup>4</sup> of the person in lawful possession.<sup>5</sup>
3. The defendant knew that the entry was without consent.<sup>6</sup>
4. The defendant entered the building with intent to commit a (battery) (battery to an unborn child), [that is, that the defendant intended to commit a (battery) (battery to an unborn child) at the time the defendant entered the building].<sup>7</sup>

[IF THE JURY IS ALSO INSTRUCTED ON THE INTENDED BATTERY, IT IS SUFFICIENT TO REFER TO THAT INSTRUCTION AND NOT REPEAT IT HERE.]

[IF THE INTENDED BATTERY IS NOT CHARGED, DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN UNIFORM INSTRUCTION WIS JI-CRIMINAL 1220 or WIS JI-CRIMINAL 1227.]

### **When Must Intent Exist?**

The intent to commit a (battery) (battery to an unborn child) must be formed before entry is made. The intent to commit a (battery) (battery to an unborn child) which is an essential element of burglary is no more or less than the mental purpose<sup>8</sup> to commit a (battery) (battery to an unborn child) formed at any time before the entry, which continued to exist at the time of the entry.

### **Deciding About Intent and Knowledge**

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.<sup>9</sup>



**COMMENT**

Wis JI–Criminal 1423 was approved by the Committee in December 2025.

1. This instruction is drafted for burglary with the “intent to commit a battery.” If “intent to steal” is charged, see Wis JI–Criminal 1421. If “intent to commit a felony” is charged, see Wis JI–Criminal 1424. For burglary offenses committed “while armed” or under aggravating circumstances as prohibited by § 943.10(2), see Wis JI–Criminal 1425A, 1425B, and 1425C.

2. The model instruction is drafted for a case involving entry into a “building.” It must be modified if entry involved any of the other places listed in § 943.10(1m)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction does not include a definition of “building.” The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis.2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that “a mobile home is a building.” The court said this created a “mandatory conclusive presumption . . . regarding an element of the arson offense.” However, the court further held that the error was harmless because it played no role in the jury’s verdict:

We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the ‘functional equivalent’ of finding that the structure was a building.

160 Wis.2d 722, 740.

In United States of America v. Franklin, 2019 WI 64, 387 Wis.2d 259, 272, 928 N.W.2d 545, the Wisconsin Supreme Court concluded that the locational alternatives provided in Wis. Stat. § 943.10(1m)(a)-(f) are alternative factual means of committing one element of burglary. Providing context to this holding, the court referenced an example previously incorporated in State v. Pinder, 2018 WI 106, ¶60, 384 Wis. 2d 416, 919 N.W.2d 568. Although the issue in Pinder concerned the validity of a search warrant issued for the placement and use of a GPS tracking device on a motor vehicle, the court did make a ruling in which it denied an ineffective assistance of counsel claim for failure to object to the burglary jury instruction Wis JI-Criminal 1421. Addressing this claim, the court emphasized the latitude afforded in the crafting of a burglary jury instruction so as to comport with the evidence of the case, noting that:

“[w]hile the circuit court could have used the phrase ‘a room within a building’ instead of the words ‘office’ or ‘building,’ the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used.” *Id.* at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.01 “identifies alternative means of committing one element of the crime of burglary under § 943.01 (1m)(a)-(f).” Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a

reasonable doubt as to locational alternatives provided in § 943.01(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of “building” is necessary, resort to a standard dictionary may be helpful. For example, Webster’s Ninth New Collegiate Dictionary provides that a “building” refers to “a usually roofed and walled structure built for permanent use (as for a dwelling).”

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break “and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony.” The court held that the unfinished house was a “building” for purposes of burglary and defined the term as follows:

... an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . “The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property.”

69 Wis. 203, 206-07

A more recent case discusses “building” in connection with zoning rules prohibiting “mobile homes” but allowing “modular homes” and other buildings. The person’s home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed. The court of appeals used the county’s own definition of “building” and found that the home in question qualified:

... the county relies on the terms “building” and “mobile home” to classify structures. A building is “any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property.” It is clear that Hansman’s structure is intended for the protection, shelter and enclosure of persons.

Hansman v. Oneida Co., 123 Wis.2d 511, 513, 366 N.W.2d 901 (Ct. App. 1985).

3. The offense of burglary is complete upon the slightest entry by the defendant into any one of the places described in § 943.10(1m)(a)-(f) without the consent of the person in lawful possession, when such entry is made with the required intent. The least entry with any part of the body is sufficient. State v. Barclay, 54 Wis.2d 651, 655n.10, 196 N.W.2d 745 (1972).

The crime of burglary is completed once “the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary.” Morones v. State, 61 Wis.2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant’s entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis.

Criminal Code § 939.22(48)(a) (c). “Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry ‘without consent.’ The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . .” 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not “without consent,” see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis.2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain “at a time or place beyond his authority. ‘Entry’ in § 943.10(1m)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure.” Levesque v. State, 63 Wis.2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men’s room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis.2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m. and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

The task in most cases will be to determine the limits of such consent and the defendant’s knowledge or lack of it.

. . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer’s consent and Schantek’s knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek’s claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis.2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis.2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was “without consent” because of an “implied limitation on the scope of the invitation to enter”:

We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis.2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word “intentionally” is used, “the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word ‘intentionally.’” The decision in Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant’s postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant’s entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not “purport to be acting under legal authority,” one of the alternatives to “no consent in fact” provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, *supra*, note 4, and State v. Wilson, 160 Wis.2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. The intent to commit the battery must exist at the time the defendant entered the place. It is not sufficient that the defendant formed an intent to commit the battery after entry. Such intent, however, is usually proved circumstantially by what defendant did after he or she entered the place.

8. Under the Criminal Code, the phrase “with intent to” means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. Subsection 939.23(4) and Wis JI–Criminal 923A and 923B.

9. Burglary, as defined in § 943.10(1m), is punished as Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI–Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI–Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI–Criminal 1425C).

**1424 BURGLARY WITH INTENT TO COMMIT A FELONY<sup>1</sup> – § 943.10(1m)****Statutory Definition of the Crime**

Burglary, as defined in § 943.10(1m) of the Criminal Code of Wisconsin, is committed by one who intentionally enters a building<sup>2</sup> without the consent of the person in lawful possession and with intent to commit a felony therein.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intentionally entered a building.<sup>3</sup>
2. The defendant entered the building without the consent<sup>4</sup> of the person in lawful possession.<sup>5</sup>
3. The defendant knew that the entry was without consent.<sup>6</sup>
4. The defendant entered the building with intent to commit (state felony)<sup>7</sup>, [that is, that the defendant intended to commit (state felony) at the time the defendant entered the building].<sup>8</sup>

[IF THE JURY IS ALSO INSTRUCTED ON THE INTENDED FELONY, IT IS SUFFICIENT TO REFER TO THAT INSTRUCTION AND NOT REPEAT IT HERE.]

[IF THE INTENDED FELONY IS NOT CHARGED, DEFINE THE CRIME, REFERRING TO THE ELEMENTS AND DEFINITIONS IN THE UNIFORM INSTRUCTION FOR THAT OFFENSE.]

### **When Must Intent Exist?**

The intent to commit a felony must be formed before entry is made. The intent to commit (state felony) which is an essential element of burglary is no more or less than the mental purpose<sup>9</sup> to commit (state felony) formed at any time before the entry, which continued to exist at the time of the entry.

### **Deciding About Intent and Knowledge**

You cannot look into a person's mind to find intent and knowledge. Intent and knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent and knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

IF ONE OF THE AGGRAVATING FACTORS SET FORTH IN § 943.10(2) IS CHARGED AND SUPPORTED BY THE EVIDENCE, ADD WIS JI-CRIMINAL 1425A, 1425B, OR 1425C.<sup>10</sup>

**COMMENT**

Wis JI-Criminal 1424 was originally published in 1966 and revised in 1985, 1991, 1994, 1995, 1998, 2001, 2020, 2021, 1/2024, and 2/2025. This revision was approved by the Committee in December 2025. It amended the instruction to conform with 2025 Wisconsin Act 44.

1. This instruction is drafted for burglary with the “intent to commit a felony.” If “intent to steal” is charged, see Wis JI Criminal 1421. If “intent to commit a burglary” is charged, see Wis JI Criminal 1423. For burglary offenses committed “while armed” or under aggravating circumstances as prohibited by § 943.10(2), see Wis JI Criminal 1425A, 1425B, and 1425C.

In State v. O’Neill, 121 Wis. 2d 300, 359 N.W.2d 906 (1984), the Wisconsin Supreme Court held that “. . . the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge” under subsec. 943.10(1)(a). O’Neill involved a burglary charge against a campus police supervisor who allegedly conducted an illegal entry and search of an apartment. The theory of prosecution was that the illegal entry and search constituted misconduct in public office which could serve as the underlying felony for the burglary charge. The supreme court reversed the burglary conviction, holding that “misconduct in public office is not the type of felony contemplated by sec. 943.10(1).”

The text of the instruction has not been changed to accommodate the O’Neill decision because the Committee concluded that the question of whether a particular felony could form the basis for a burglary charge would be one of law for the trial court rather than one of fact for the jury.

In State v. Semrau, 2000 WI APP 54, 233 Wis. 2d 508, 608 N.W.2d 376, the court applied O’Neill and concluded that bail jumping could be the intended felony upon which a burglary charge can be based.

“Felon in possession of a firearm” in violation of § 941.29 is a crime against persons or property and can be the basis for the intent to commit a felony element of burglary. State v. Steele, 2001 WI APP 34, ¶ 21, 241 Wis. 2d 269, 625 N.W.2d 595.

2. The model instruction is drafted for a case involving entry into a “building.” It must be modified if entry involved any of the other places listed in § 943.10(1m)(a) through (f): any building or dwelling; an enclosed railroad car; an enclosed portion of any ship or vessel; a locked enclosed cargo portion of a truck or trailer; a motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or a room in any of the above.

The instruction has never included a definition of “building.” The meaning of the term has been considered to be the same for burglary and arson cases. In an arson case, State v. Kuntz, 160 Wis. 2d 722, 467 N.W.2d 531 (1991), the Wisconsin Supreme Court held it was error for the trial court to state that “a mobile home is a building.” The court said this created a “mandatory conclusive presumption . . . regarding an element of the arson offense.” However, the court further held that the error was harmless because it played no role in the jury’s verdict:

We conclude that no rational juror could plausibly find that the structure in question was a mobile home without also finding that the structure was a building. . . . If the jury found this structure to be a mobile home, as that term is commonly understood, this finding would be the ‘functional equivalent’ of finding that the structure was a building.

160 Wis. 2d 722, 740.

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“[w]hile the circuit court could have used the phrase ‘a room within a building’ instead of the words ‘office’ or ‘building,’ the facts adduced would not confuse the jury as to what it was called upon to decide regardless of which of these words might be used.” Id. at 456.

The court in Franklin cited the analysis of the statutory text, the legislative history and context of the statute, along with the nature of the conduct, and the appropriateness of multiple punishments in its conclusion that Wis. Stat. § 943.10 “identifies alternative means of committing one element of the crime of burglary under § 943.10(1m)(a)-(f).” Franklin at 273. Furthermore, the court found that the crime of burglary does not include a separate locational element, and jury unanimity on finding guilt beyond a reasonable doubt as to locational alternatives provided in § 943.10(1m)(a)-(f) is not necessary to convict. Id. 273.

If a definition of “building” is necessary, resort to a standard dictionary may be helpful. For example, Webster’s Ninth New Collegiate Dictionary provides that a “building” refers to “a usually roofed and walled structure built for permanent use (as for a dwelling).”

In Clark v. State, 69 Wis. 203, 33 N.W. 436 (1887), the issue was whether an unfinished house from which tools were taken was covered by § 4409 R.S. which made it a burglary to break “and enter in the night-time any office, shop, or any other building not adjoining or occupied with any dwelling house, or any ship, steamboat, vessel, railroad freight car or passenger car, with intent to commit the crime of larceny or other felony.” The court held that the unfinished house was a “building” for purposes of burglary and defined the term as follows:

... an edifice or structure erected upon land, and so far completed that it may be used temporarily or permanently for the occupation or shelter of man or beast, or for the storage of tools or other personal property for safe-keeping. . . . “The well-understood meaning of the word is a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property.”

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A more recent case discusses “building” in connection with zoning rules prohibiting “mobile homes” but allowing “modular homes” and other buildings. The person’s home had been mobile once, but at the site was affixed to a foundation and attached to utilities with steel undercarriage and trailer hitch removed.



The court of appeals used the county's own definition of "building" and found that the home in question qualified:

. . . the county relies on the terms "building" and "mobile home" to classify structures. A building is "any structure used, designed or intended to be used for the protection, shelter or enclosure of persons, animals or property." It is clear that Hansman's structure is intended for the protection, shelter and enclosure of persons.

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The crime of burglary is completed once "the defendant jimmied the lock and pushed against the door, pushing it inward, [and making] entry onto the premises. . . . Whether he stepped in or, as he testified, later reached in to close the door, would not matter. It is not how or why the door was closed that matters. It is the fact that it was opened by a person with intent to steal that furnishes both entry and intent, the prerequisite for the crime of burglary." Morones v. State, 61 Wis. 2d 544, 548-49, 213 N.W.2d 31 (1973).

4. The defendant's entry into the place involved was without consent if the person in lawful possession did not consent in fact or if consent was given under the circumstances provided by Wis. Criminal Code § 939.22(48)(a)-(c). "Consent to enter which is obtained by the use or threat of force or by pretense of legal authority is in legal effect entry 'without consent.' The same ordinarily is true of consent obtained because the person giving the consent is mistaken as to the nature of the thing to which he consents. . . ." 1953 Legislative Council Committee Report on the Criminal Code, page 102.

Entry into a place when it is open to the public is not "without consent," see § 943.10(3). Thus, entry into a hotel lobby open to the public, although done with the intent to steal, is not burglary. Champlin v. State, 84 Wis. 2d 621, 267 N.W.2d 295 (1978).

However, one who enters with consent may remain "at a time or place beyond his authority. 'Entry' in § 943.10(1m)(a), Stats., must be construed to mean not only the simple act of passing through the outer wall of a structure but also the result of such action, namely, presence within the structure." Levesque v. State, 63 Wis. 2d 412, 217 N.W.2d 317 (1974). Thus, an otherwise lawful entry became unlawful when Levesque hid himself in the false ceiling of the men's room and remained there until after the restaurant was closed.

State v. Schantek, 120 Wis. 2d 79, 353 N.W.2d 832 (Ct. App. 1984), involved an entry of a gas station by an employee after regular business hours. The station closed at 9:00 p.m. and Schantek entered at around 11:30 p.m., using his own key. He took money from a cash box. The court upheld the conviction for burglary, stating that the extent of consent under these circumstances must be determined on the facts of each case:

The task in most cases will be to determine the limits of such consent and the defendant's knowledge or lack of it.

. . . . We do conclude, however, that the arrangement between Schantek and his employer clearly rendered certain presence inappropriate and thus beyond the limits of the employer's consent and Schantek's knowledge. A fair reading of the evidence does not allow for the strained conclusion that Benco gave Schantek all-encompassing consent to enter the premises at all times for all purposes – including criminal adventure. Nor does the evidence remotely allow for Schantek's claim of knowledge of such all-encompassing consent. We therefore conclude under the facts of this case that the employer did not give Schantek consent to enter the premises, and Schantek had knowledge of such nonconsent.

120 Wis. 2d 79, 85.

The Schantek approach was applied in State v. Karow, 154 Wis. 2d 375, 453 N.W.2d 181 (Ct. App. 1990). In Karow, the defendant claimed the entry was with consent because the victim allowed him to come into the house and use the telephone. After entering, Karow and accomplices killed the victim. The court of appeals affirmed the burglary conviction, finding that the entry was “without consent” because of an “implied limitation on the scope of the invitation to enter”:

We hold that an implied limitation on the scope of the consent to enter may be recognized, and we recognize it here. The record supports an inference, not patently incredible, that the consent Brown granted to Karow, a stranger, was limited to a specific area and a single purpose. That consent can in no way be reasonably construed to extend beyond the purpose for which it was granted.

154 Wis. 2d 375, 384.

5. Under § 943.10, the question is one of lawful possession and not legal title. Ordinarily, the question of who is in lawful possession, while presenting a mixed question of law and fact, can be decided by the court as a matter of law on admitted or undisputed facts.

6. Knowledge that the entry is without consent is an element of the offense of burglary because of the standard interpretation of criminal statutes required by § 939.23(3): Where the word “intentionally” is used, “the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word ‘intentionally.’” The decision in Hanson v. State, 52 Wis. 2d 396, 190 N.W.2d 129 (1971), is sometimes cited for the contrary position. However, Hanson involved a defendant's postconviction challenge to the validity of his guilty plea and simply held that there was an adequate factual basis for a finding that there was no consent in fact to the defendant's entry. Under such circumstances, said the court, there was no additional burden on the state to show that the defendant did not “purport to be acting under legal authority,” one of the alternatives to “no consent in fact” provided in the statutory definition of without consent, § 939.22(48). Recent decisions have reaffirmed that knowledge that entry is without consent is an essential element of burglary. See State v. Schantek, *supra*, note 4, and State v. Wilson, 160 Wis. 2d 774, 467 N.W.2d 130 (Ct. App. 1991).

7. If multiple felonies are alleged, identify and define each felony. A defendant is not entitled to a unanimity instruction regarding the felonies that form the basis of their intent to enter a dwelling. In State v. Hammer, 216 Wis. 2d 214, 576 N.W.2d 285 (Ct. App. 1997), the court of appeals considered whether, in order to support a conviction for burglary, the jury had to be unanimous as to the predicate felony that the defendant intended to commit when entering a dwelling. The circuit court had instructed the jury that three different acts (first-degree sexual assault, armed robbery, and battery causing substantial bodily harm) were felonies but declined to instruct the jury that the verdict had to be unanimous as to the predicate felony

that the defendant intended to commit. *Id.* at 217-18. Affirming Hammer's conviction, the court concluded that the language of Wis. Stat. § 943.10(1m) "indicates that the crime is one single offense with multiple modes of commission." *Id.* at 220. Although there are different ways to satisfy the intent element of the crime of burglary, "the different ways do not create separate and distinct offenses." *Id.* at 220. Furthermore, the statute focuses on the intent to commit a felony, not any particular felony. Therefore, all the felonies are conceptually similar for the purposes of unanimity. *Id.* at 222.

8. The intent to commit the felony must exist at the time the defendant entered the place. It is not sufficient that the defendant formed an intent to commit the felony after entry. Such intent, however, is usually proved circumstantially by what defendant did after he entered the place.

Care must be taken to assure that the crime intended was a felony. In *State v. Gilbertson*, 69 Wis. 2d 587, 230 N.W.2d 874 (1975), a burglary conviction was reversed because there was insufficient proof of intent to commit a felony. The underlying crime was alleged to be criminal damage to property which becomes a felony only if there is intent to reduce the property's value by the requisite felony level. The insufficiency of the evidence on this point required reversal.

A defendant's intention to endanger the safety of others through criminally reckless conduct is enough to satisfy element four's requirement that a defendant enter a building with the intent to commit a felony. See *State v. Mays*, 2022 WI App 24, 402 Wis. 2d 162, 975 N.W.2d 649. In *Mays*, the Wisconsin Court of Appeals held the defendant's conviction for the crime of felony murder, with the underlying crime of armed burglary, predicated on his intent to commit second-degree recklessly endangering safety, was valid under Wisconsin law.

9. Under the Criminal Code, the phrase "with intent to" means that the defendant either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result. Subsection 939.23(4) and Wis JI Criminal 923A and 923B.

10. Burglary, as defined in § 943.10(1m), is punished as Class F felony. The penalty increases to a Class E felony if a burglary is committed under any of the circumstances defined in subsec. (2). The Committee recommends handling these penalty-increasing factors by submitting an additional question after the basic burglary instruction is given. Instructions are provided for three of the four factors identified in subsec. (2): while armed (see Wis JI Criminal 1425A); while unarmed, but the person arms himself or herself while in the enclosure (see Wis JI Criminal 1425B); while in the enclosure, the person uses explosives to open a depository (there is no instruction for this alternative); and, while in the enclosure, the person commits a battery upon a person lawfully therein (see Wis JI Criminal 1425C).

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# WISCONSIN JURY INSTRUCTIONS

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## CRIMINAL

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## VOLUME III

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**Wisconsin Criminal Jury  
Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 3/2026 Supplement (Release No. 70)

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**2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 [EFFECTIVE DATE: MARCH 27, 2008] AND 2013 WISCONSIN ACT 167 [EFFECTIVE DATE: MARCH 29, 2014]**

**Background**

Section 948.02 was amended by both 2005 Wisconsin Act 430 and 2005 Wisconsin Act 437. The changes were inconsistent with one another, so the Revisor of Statutes published the statute as amended by Act 437. The statute as amended by Act 430 was printed immediately following that version in the 2005-06 Wisconsin Statutes – in boldface type. A study committee of the Wisconsin Legislative Council was convened to review the matter, and issued a report with recommendations for additional legislation. The Legislative Council draft was introduced in both houses: 2007 Assembly Bill 209 and 2007 Senate Bill 103. Senate Bill 103 was enacted as 2007 Wisconsin Act 80 [effective date: March 27, 2008.] Section 948.02(1)(e) was later amended by 2013 Wisconsin Act 167.

**Summary: Offenses Defined in § 948.02**

As amended by 2007 Wisconsin Act 80 and 2013 Wisconsin Act 167, § 948.02(1) defines 5 types of first-degree sexual assault of a child. See Wis JI–Criminal 2102A-E. Section 948.02(2), which defines second degree sexual assault of a child, was not affected by Act 80. See Wis JI–Criminal 2104.

Because some of the offense definitions differ only slightly, the Committee concluded that a summary of the elements, penalties, and related issues might be helpful.

**§ 948.02(1) 1st degree sexual assault of a child**

- (am) • sexual contact or sexual intercourse  
• with a person who has not attained the age of 13  
• causes great bodily harm  
[Wis JI–Criminal 2102A]

Class A felony. Minimum of 25 years confinement before extended supervision eligibility – § 939.616(1g).

- (b) • sexual intercourse  
• with a person who has not attained the age of 12  
[Wis JI–Criminal 2102B]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

- (c)
    - sexual intercourse
    - with a person who has not attained the age of 16
    - by use or threat of force or violence
- [Wis JI–Criminal 2102C]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

- (d)
    - sexual contact
    - with a person who has not attained the age of 16
    - by use or threat of force or violence
    - by a person who is at least 18 years of age
- [Wis JI–Criminal 2102D]

Class B felony. Mandatory minimum term of confinement of 5 years – § 939.616(2).

- (e)
    - sexual contact or sexual intercourse
    - with a person who has not attained the age of 13
- [Wis JI–Criminal 2102E]

Class B felony.

NOTE: 2013 Wisconsin Act 167 amended § 948.02(1)(e) by adding “sexual intercourse.” [Effective date: March 29, 2014.]

**§ 948.02(2) 2nd degree sexual assault of a child**

[Not affected by 2007 Wisconsin Act 80]

- sexual contact or sexual intercourse
  - with a person who has not attained the age of 16
- [Wis JI–Criminal 2104]

Class C felony.

NOTE: Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: “This section does not apply if s. 948.093 applies.” Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19.



**Mandatory Minimum Sentences – § 939.616**

As noted above, § 939.616 provides for mandatory minimum sentences for violations of § 948.02(1)(am) through (d). In State v. Lalicata, 2012 WI App 138, 345 Wis.2d 342, 824 N.W.2d 921, the court of appeals held that the mandatory minimum sentence under § 939.616(1r) for convictions under § 948.02(1)(b) is “truly mandatory, with no probation option.” ¶1.

§ 939.616(1s) provides for a mandatory minimum sentence for a violation of § 948.051, Trafficking of a Child. It requires that the confinement portion of any bifurcated sentence be no less than 15 years.

Section 939.616(3) provides: “. . . The mandatory minimum sentences in this section do not apply to an offender who was under 18 years of age when the violation occurred.”

**Penalty Increase for Sexual Assault or Physical Abuse of a Child by a Child Care Provider – § 939.635**

Section 939.635 was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011]. It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. Wis JI–Criminal 2115 provides a special question to be added to the applicable offense instruction when the enhanced penalty authorized by § 939.635 is alleged in the charging document and the evidence would support a finding that the penalty-increasing facts are established.

**Lesser Included Offenses**

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged” is a lesser included crime.

**COMMENT**

Wis JI–Criminal 2102 Introductory Comment was originally published in 2008 and revised in 2013, 2015, and 2019. The 2013 revision added reference to State v. Lalicata. The 2015 revision reflected a

change made in § 948.02(1)(e) by 2013 Wisconsin Act 167. The 2019 revision added a section describing the penalty increase under § 939.635. This revision was approved by the Committee in February 2026; it reflects changes made by 2025 Wisconsin Act 56.

**2102A FIRST-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: CAUSING GREAT BODILY HARM — § 948.02(1)(am)**

**Statutory Definition of the Crime**

First-degree sexual assault of a child, as defined in § 948.02(1)(am) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a person who has not attained the age of 13 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person)—and causes great bodily harm to that person.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. (Name of victim) was under the age of 13 years at the time of the alleged sexual contact.

Knowledge of (name of victim)'s age is not required<sup>3</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>4</sup>

Consent to sexual contact is not a defense.<sup>5</sup>

4. The defendant caused great bodily harm to (name of victim).

“Great bodily harm” means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.<sup>6</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 2102A was approved by the Committee in April 2008. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 948.02(1)(am) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. A violation of this subsection is a Class A felony.

This instruction is for the type of first-degree sexual assault of a child defined by § 948.02(1)(am): sexual contact with a person who has not attained the age of 13 years: causing great bodily harm. Wis JI-Criminal 2102F is drafted for sexual intercourse with a person who has not attained the age of 13 years: causing great bodily harm.

As revised by Act 80, the statute defines the crime in the same manner as § 940.225(1)(a): “Has sexual contact or sexual intercourse . . . and causes . . . great bodily harm.” Under § 940.225(1)(a), the act itself need not cause the great bodily harm. See Wis JI–Criminal 1201, footnote 1, and State v. Schambow, 176 Wis. 2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). The Wisconsin Legislative Council Act Memo for 2007 Wisconsin Act 80 states that the revision “clarifies that harm to the victim caused by the offender at the time of a first-degree sexual assault of a child, and not necessarily caused by the sexual intercourse or contact, would satisfy the great bodily harm element . . .”

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under § 948.02 than the one charged” is a lesser included crime.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. See § 939.23(6).

4. See § 939.43(2).

5. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

6. See § 939.22(14) and Wis JI–Criminal 914. The reference to “other serious bodily injury” at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an “ejusdem generis” rationale. LaBarge v. State, 74 Wis. 2d 327, 246 N.W.2d 794 (1976).

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**2102D FIRST-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS BY USE OR THREAT OF FORCE OR VIOLENCE BY A PERSON WHO HAS ATTAINED THE AGE OF 18 YEARS — § 948.02(1)(d)**

**Statutory Definition of the Crime**

First-degree sexual assault of a child, as defined in § 948.02(1)(d) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 18 years who has sexual contact with a person who has not attained the age of 16 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person)—by the use or threat of force or violence.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. The defendant had attained the age of 18 years.

4. (Name of victim) was under the age of 16 years at the time of the alleged sexual contact.

Knowledge of (name of victim)'s age is not required<sup>3</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>4</sup>

5. The defendant had sexual contact with (name of victim) by the use or threat of force or violence.

The use or threat of force or violence may occur at any time before or as part of the sexual contact.<sup>5</sup>

As a matter of law, a person who has not attained the age of 16 years cannot consent to sexual contact. Any consideration of the conduct of (name of victim) must be limited to determining whether the defendant had sexual contact by the use or threat of force or violence.<sup>6</sup>

[The phrase “use or threat of force or violence” includes forcible sexual contact or force used as the means of making sexual contact.]<sup>7</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.



**COMMENT**

Wis JI–Criminal 2102D was approved by the Committee in April 2008. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

Section 948.02(1)(d) was created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. The offense is a Class B felony.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under § 948.02 than the one charged” is a lesser included crime.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. See § 939.23(6).

4. See § 939.43(2).

5. This is based on State v. Hayes, 2003 WI App 99, 264 Wis.2d 377, 633 N.W.2d 351, discussed in footnote 2, Wis JI–Criminal 1208.

6. This material is used in place of the statement in other instructions for child sexual assault offenses that “consent is not a defense” because the latter could be interpreted as inconsistent with the defendant’s right to challenge proof of the “by the use or threat of force or violence” element by reference to conduct of the victim. For a similar situation, see Wis JI–Criminal 926, Contributory Negligence.

7. See State v. Bonds, 165 Wis.2d 27, 477 N.W.2d 265 (1991), discussed in footnote 5, Wis JI–Criminal 1208.

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**2102E FIRST-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT  
WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS  
— § 948.02(1)(e)**

**Statutory Definition of the Crime**

First-degree sexual assault of a child, as defined in § 948.02(1)(e) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a person who has not attained the age of 13 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. (Name of victim) was under the age of 13 years at the time of the alleged sexual contact.

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

Consent to sexual contact is not a defense.<sup>5</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2102E was approved by the Committee in 2008, and revised in 2015. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in *State v. Goth*, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 948.02(1)(e) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008] and as amended by 2013 Wisconsin Act 167 [effective date: March 29, 2013].

For an instruction addressing violations of Wis. Stat. § 948.02(1)(e) involving “sexual intercourse,” see Wis JI–Criminal 2102G.

2013 Wisconsin Act 167 amended § 948.02(1)(e) to add “sexual intercourse.” Before that amendment, sub. (1)(e) applied only to “sexual contact.”

**NOTE:** The age limit for this offense is that the victim “has not attained the age of 13 years.” Section 948.02(1)(b) prohibits “sexual intercourse with a person who has not attained the age of 12 years.”

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. See § 939.23(6).
4. See § 939.43(2).
5. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2102F FIRST-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: CAUSING GREAT BODILY HARM — § 948.02(1)(am)**

**Statutory Definition of the Crime**

First-degree sexual assault of a child, as defined in § 948.02(1)(am) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 13 years and causes great bodily harm to that person.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).<sup>1</sup>

2. (Name of victim) was under the age of 13 years at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required<sup>2</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>3</sup>

Consent to sexual intercourse is not a defense.<sup>4</sup>

3. The defendant caused great bodily harm to (name of victim).

“Great bodily harm” means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.<sup>5</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2102F was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2102A, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2102A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 948.02(1)(am) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. A violation of this subsection is a Class A felony.

For an instruction addressing violations of Wis. Stat. § 948.02(1)(am) involving “sexual contact,” see Wis JI–Criminal 2102A.

As revised by Act 80, the statute defines the crime in the same manner as § 940.225(1)(a): “Has sexual contact or sexual intercourse . . . and causes . . . great bodily harm.” Under § 940.225(1)(a), the act itself need not cause the great bodily harm. See Wis JI–Criminal 1201, footnote 1, and State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). The Wisconsin Legislative Council Act Memo for 2007 Wisconsin Act 80 states that the revision “clarifies that harm to the victim caused by the offender at the time of a first-degree sexual assault of a child, and not necessarily caused by the sexual intercourse or contact, would satisfy the great bodily harm element . . .”

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged” is a lesser included crime.



1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. See § 939.23(6).

3. See § 939.43(2).

4. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

5. See § 939.22(14) and Wis JI–Criminal 914. The reference to “other serious bodily injury” at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an “ejusdem generis” rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

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**2102G FIRST-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS — § 948.02(1)(e)**

**Statutory Definition of the Crime**

First-degree sexual assault of a child, as defined in § 948.02(1)(e) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 13 years.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).<sup>1</sup>

2. (Name of victim) was under the age of 13 years at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required<sup>2</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>3</sup>

Consent to sexual intercourse is not a defense.<sup>4</sup>

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI–Criminal 2102G was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2102E, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2102E to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is drafted for violations of § 948.02(1)(e) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008] and as amended by 2013 Wisconsin Act 167 [effective date: March 29, 2013].

For an instruction addressing violations of Wis. Stat. § 948.02(1)(e) involving “sexual contact,” see Wis JI–Criminal 2102E.

2013 Wisconsin Act 167 amended § 948.02(1)(e) to add “sexual intercourse.” Before that amendment, sub. (1)(e) applied only to “sexual contact.”

**NOTE:** The age limit for this offense is that the victim “has not attained the age of 13 years.” Section 948.02(1)(b) prohibits “sexual intercourse with a person who has not attained the age of 12 years.”

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. See § 939.23(6).

3. See § 939.43(2).

4. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

**2104 SECOND-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS — § 948.02(2)**

**Statutory Definition of the Crime**

Second-degree sexual assault of a child, as defined in § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a person who has not attained the age of 16 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. (Name of victim) was under the age of 16 years at the time of the alleged sexual contact.

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

Consent to sexual contact is not a defense.<sup>5</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2104 was originally published in 1989 as Wis JI Criminal 2104 [for sexual intercourse offenses] and Wis JI Criminal 2105 [for sexual contact offense]. It was revised in 1996 to combine the instructions as Wis JI Criminal 2104. The 2001 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. The 2008 revision added a reference to 2007 Wisconsin Act 80 to the Comment. The 2018 revision reflected a change made by 2017 Wisconsin Act 174. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the type of second-degree sexual assault of a child defined by § 948.02(2): sexual contact with a person who has not attained the age of 16 years.

For an instruction addressing violations of Wis. Stat. § 948.02(2) involving “sexual intercourse,” see Wis JI–Criminal 2104A.

Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: “This section does not apply if s. 948.093 applies.” Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19. The Committee concluded that any factual discrepancies regarding the applicability of § 948.093 would likely be resolved before trial and in any event should be treated in the same manner as statutory exceptions. The Committee’s judgment has been that statutory exceptions are best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise that issue, the burden is on the state to prove beyond a reasonable doubt that the exception

does not apply. See the Comment to Wis JI Criminal 1335B explaining the application of this approach to exceptions to the prohibition on carrying a concealed weapon.

2008 Wisconsin Act 80 made significant changes in subsection (1) of § 948.02(2). Subsection (2) was not affected.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged” is a lesser included crime.

The revised instruction provides for inserting definitions of “sexual contact” and “sexual intercourse” provided in Wis JI Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Second degree sexual assault of a child under § 948.02(2) is a lesser included offense of first-degree sexual assault of a child under § 948.02(1) and is properly submitted when the evidence supports a reasonable doubt about the child’s age. State v. Moua, 215 Wis. 2d 511, 573 N.W.2d 202 (Ct. App. 1997).

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant’s alleged “constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation.” State v. Fisher, 211 Wis. 2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. See § 939.23(6).

4. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810, the court held that “no affirmative defense of the victim’s intentional misrepresentation of his or her age exists in a prosecution

under § 948.02(2) . . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's ages nor evidence regarding the cause for or reasonableness of that is relevant." ¶3.

5. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.



**2104A SECOND-DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS — § 948.02(2)**

**Statutory Definition of the Crime**

Second-degree sexual assault of a child, as defined in § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a person who has not attained the age of 16 years.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).<sup>1</sup>

2. (Name of victim) was under the age of 16 years at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required<sup>2</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>3</sup>

Consent to sexual intercourse is not a defense.<sup>4</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2104A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2104, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2104 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.02(2) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2104.

Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: “This section does not apply if s. 948.093 applies.” Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19. The Committee concluded that any factual discrepancies regarding the applicability of § 948.093 would likely be resolved before trial and in any event should be treated in the same manner as statutory exceptions. The Committee’s judgment has been that statutory exceptions are best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise that issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the Comment to Wis JI–Criminal 1335B explaining the application of this approach to exceptions to the prohibition on carrying a concealed weapon.

2008 Wisconsin Act 80 made significant changes in subsection (1) of § 948.02(2). Subsection (2) was not affected.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged” is a lesser included crime.

The revised instruction provides for inserting definitions of “sexual contact” and “sexual intercourse” provided in Wis JI–Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the

users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

Second-degree sexual assault of a child under § 948.02(2) is a lesser included offense of first-degree sexual assault of a child under § 948.02(1) and is properly submitted when the evidence supports a reasonable doubt about the child's age. State v. Moua, 215 Wis. 2d 511, 573 N.W.2d 202 (Ct. App. 1997).

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis. 2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. The appropriate definition of "sexual intercourse" should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. See § 939.23(6).

3. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2) . . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's ages nor evidence regarding the cause for or reasonableness of that is relevant." ¶3.

4. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2105A ATTEMPTED SECOND-DEGREE SEXUAL ASSAULT OF A CHILD:  
SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS  
NOT ATTAINED THE AGE OF 16 YEARS: ACTUAL CHILD — §§  
948.02(2); 939.32**

**Statutory Definition of the Crime**

Attempted second-degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual contact with a person who has not attained the age of 16 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person)—does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intended<sup>1</sup> to have sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 2101A).<sup>2</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>3</sup>

3. (Name of victim) was under the age of 16 years.

Knowledge of (name of victim)'s age is not required<sup>4</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>5</sup>

4. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual contact with (name of victim) except for the intervention of another person or some other extraneous factor.<sup>6</sup>

#### **Meaning of “Unequivocally”**

“Unequivocally” means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

#### **Meaning of “Another Person”**

“Another person” means anyone but the defendant and may include the intended victim.

#### **Meaning of “Extraneous Factor”**

An “extraneous factor” is something outside the knowledge of the defendant or outside the defendant's control.

### **Deciding About Intent**

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 2105A was approved by the Committee in August 2004. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.02(2) involving "sexual contact" only. For violations involving "sexual intercourse," see Wis JI-Criminal 2105C.

This instruction provides a model for attempted second-degree sexual assault of a child based on an attempt to assault an actual child. It combines Wis JI-Criminal 2104 and 580 but departs from the format recommended by the general instruction on attempt and involves three elements: the first two being the elements of the completed crime and the third being the definition of attempt.

A separate instruction is provided for cases based on attempts to assault what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. See Wis JI-Criminal 2105B.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis. 2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997). See State v. Weeks, 165 Wis. 2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts.

1. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts.

2. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

3. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

4. Section 939.23(6).

5. Section 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that “no affirmative defense of the victim’s intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2) . . . . If an accused’s reasonable belief about the victim’s age, based on the victim’s intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant’s belief about the victim’s age nor evidence regarding the cause for or reasonableness of that belief is relevant.” ¶3.

6. The definition of “attempt” is based on § 939.32 and Wis JI–Criminal 580. For explanation of the definitions of “unequivocally,” “another person,” and “extraneous factor,” see the footnotes to Wis JI–Criminal 580.



**2105B ATTEMPTED SECOND-DEGREE SEXUAL ASSAULT OF A CHILD:  
SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE  
AGE OF 16 YEARS: FICTITIOUS CHILD — §§ 948.02(2); 939.32**

**Statutory Definition of the Crime**

Attempted second-degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual contact with a person who has not attained the age of 16 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate that person)—does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intended to have sexual contact with another person.

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. The defendant believed that the person was under the age of 16 years.<sup>3</sup>
4. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual contact with that person except for the intervention of another person or some other extraneous factor.<sup>4</sup>

### **Meaning of “Unequivocally”**

“Unequivocally” means that no other inference or conclusion can reasonably and fairly be drawn from the defendant’s acts, under the circumstances.

### **Meaning of “Another Person”**

“Another person” means anyone but the defendant and may include the intended victim.

### **Meaning of “Extraneous Factor”**

An “extraneous factor” is something outside the knowledge of the defendant or outside the defendant's control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual (contact) (intercourse) with that person.<sup>5</sup>

### **Deciding About Intent**

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2105B was approved by the Committee in August 2004. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in *State v. Goth*, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.02(2) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2105D.

This instruction provides a model for attempted second degree sexual assault of a child based on an attempt to assault what turns out to be a fictitious child, which result from “sting” operations based on electronic communications. It combines Wis JI–Criminal 2104 and 580. A separate instruction is provided for cases based on attempts to assault an actual child. See Wis JI–Criminal 2105A.

Prosecutions based on activities directed toward fictitious children have been upheld in connection with charges of enticing a child under § 948.07 and sexual assault of a child under § 948.02.

In *State v. Robins*, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

... attempted child enticement ... can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the “child” is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359, where the court of appeals reached the same conclusion: “the fictitiousness of the girls constituted an extraneous factor beyond Koenck’s control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact.” 2001 WI App 93, ¶28.

State v. Grimm, 2002 WI App 242, 258 Wis. 2d 166, 653 N.W.2d 284, and State v. Brienzo, 2003 WI App 203, 267 Wis. 2d 349, 671 N.W.2d 700, held that prosecutions for attempted sexual assault of a child can also be maintained in “internet sting” situations. “. . . [T]he reasoning in Koenck and Robins is equally applicable to the charge of attempted second-degree sexual assault of a child.” Grimm, 258 Wis. 2d 166, ¶10. Brienzo held that “the crime of attempted sexual assault of a child by means of sexual intercourse is a crime known to law. A defendant may have the intent to engage in sexual intercourse and may engage in acts in furtherance of that intent. When he or she does, he or she is liable for that attempt.” 267 Wis.2d 349, ¶21.

Also see § 948.075, which prohibits use of a computerized communication system to facilitate a child sex crime. Wis JI–Criminal 2135 provides a model for violations of that statute.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact or intercourse with a child in violation of § 948.02(2), for which this instruction is drafted, the victim must be under the age of 16, so the defendant’s belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287: “attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the ‘child’ is fictitious.” 253 Wis. 2d 298, ¶34.

The two cases dealing with attempted sexual assault of a child also contain statements supporting this conclusion: “The facts alleged and their reasonable inferences permit the conclusion that [the defendant] intended to have sexual contact with a person he believed to be under the age of sixteen.” State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, ¶20; State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, ¶25.

4. The definition of “attempt” is based on § 939.32 and Wis JI–Criminal 580. For explanation of the definitions of “unequivocally,” “another person,” and “extraneous factor,” see the footnotes to Wis JI–Criminal 580.

5. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that “attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the ‘child’ is fictitious.” 253 Wis. 2d 298, ¶34.

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**2105C ATTEMPTED SECOND-DEGREE SEXUAL ASSAULT OF A CHILD:  
SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT  
ATTAINED THE AGE OF 16 YEARS: ACTUAL CHILD — §§ 948.02(2);  
939.32**

**Statutory Definition of the Crime**

Attempted second-degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual intercourse with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intended<sup>1</sup> to have sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>2</sup>

2. (Name of victim) was under the age of 16 years.

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

3. The defendant did acts which demonstrate unequivocally, under all the circumstances, that the defendant intended to and would have had sexual intercourse with (name of victim) except for the intervention of another person or some other extraneous factor.<sup>5</sup>

### **Meaning of “Unequivocally”**

“Unequivocally” means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

### **Meaning of “Another Person”**

“Another person” means anyone but the defendant and may include the intended victim.

### **Meaning of “Extraneous Factor”**

An “extraneous factor” is something outside the knowledge of the defendant or outside the defendant’s control.

### **Deciding About Intent**

You cannot look into a person’s mind to find intent. Intent must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.



**COMMENT**

Wis JI–Criminal 2105C was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2105A, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2105A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.02(2) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2105A.

This instruction provides a model for attempted second-degree sexual assault of a child based on an attempt to assault an actual child. It combines Wis JI–Criminal 2104 and 580 but departs from the format recommended by the general instruction on attempt and involves three elements: the first two being the elements of the completed crime and the third being the definition of attempt.

A separate instruction is provided for cases based on attempts to assault what turns out to be a fictitious child, which result from “sting” operations based on electronic communications. See Wis JI–Criminal 2105B.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis. 2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See State v. Weeks, 165 Wis. 2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts.

2. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

3. Section 939.23(6).

4. Section 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis. 2d 418, 680 N.W.2d 810, the court held that “no affirmative defense of the victim’s intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused’s reasonable belief about the victim's age, based on the victim’s intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant’s belief about the victim’s age nor evidence regarding the cause for or reasonableness of that belief is relevant.” ¶3.

5. The definition of “attempt” is based on § 939.32 and Wis JI–Criminal 580. For explanation of the definitions of “unequivocally,” “another person,” and “extraneous factor,” see the footnotes to Wis JI–Criminal 580.

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**2105D ATTEMPTED SECOND-DEGREE SEXUAL ASSAULT OF A CHILD:  
SEXUAL INTERCOURSE WITH A PERSON WHO HAS NOT  
ATTAINED THE AGE OF 16 YEARS: FICTITIOUS CHILD — §§  
948.02(2); 939.32**

**Statutory Definition of the Crime**

Attempted second-degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual intercourse with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant intended to have sexual intercourse with another person.

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>1</sup>

2. The defendant believed that the person was under the age of 16 years.<sup>2</sup>
3. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual

intercourse with that person except for the intervention of another person or some other extraneous factor.<sup>3</sup>

### **Meaning of “Unequivocally”**

“Unequivocally” means that no other inference or conclusion can reasonably and fairly be drawn from the defendant’s acts, under the circumstances.

### **Meaning of “Another Person”**

“Another person” means anyone but the defendant and may include the intended victim.

### **Meaning of “Extraneous Factor”**

An “extraneous factor” is something outside the knowledge of the defendant or outside the defendant’s control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual intercourse with that person.<sup>4</sup>

### **Deciding About Intent**

You cannot look into a person’s mind to find intent. Intent must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

Wis JI–Criminal 2105D was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2105B, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2105B to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.02(2) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2105B.

This instruction provides a model for attempted second-degree sexual assault of a child based on an attempt to assault what turns out to be a fictitious child, which result from “sting” operations based on electronic communications. It combines Wis JI–Criminal 2104 and 580. Separate instructions provided for cases based on attempts to assault an actual child. See Wis JI–Criminal 2105A and Wis JI–Criminal 2105C.

Prosecutions based on activities directed toward fictitious children have been upheld in connection with charges of enticing a child under § 948.07 and sexual assault of a child under § 948.02.

In State v. Robins, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

... attempted child enticement ... can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the “child” is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, 242 Wis. 2d 693, 626 N.W.2d 359, where the court of appeals reached the same conclusion: “the fictitiousness of the girls constituted an extraneous factor beyond Koenck’s control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact.” 2001 WI APP 93, ¶28.

State v. Grimm, 2002 WI App 242, 258 Wis. 2d 166, 653 N.W.2d 284, and State v. Brienzo, 2003 WI App 203, 267 Wis. 2d 349, 671 N.W.2d 700, held that prosecutions for attempted sexual assault of a child can also be maintained in “internet sting” situations. “. . . [T]he reasoning in Koenck and Robins is equally applicable to the charge of attempted second-degree sexual assault of a child.” Grimm, 258 Wis. 2d 166, ¶10. Brienzo held that “the crime of attempted sexual assault of a child by means of sexual intercourse is a crime known to law. A defendant may have the intent to engage in sexual intercourse and may engage in acts in furtherance of that intent. When he or she does, he or she is liable for that attempt.” 267 Wis. 2d 349, ¶21.

Also see § 948.075, which prohibits use of a computerized communication system to facilitate a child sex crime. Wis JI—Criminal 2135 provides a model for violations of that statute.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI—Criminal 2101B, based on the specific facts of the case.

2. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact or intercourse with a child in violation of § 948.02(2), for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287: “attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the ‘child’ is fictitious.” 253 Wis. 2d 298, ¶34.

The two cases dealing with attempted sexual assault of a child also contain statements supporting this conclusion: “The facts alleged and their reasonable inferences permit the conclusion that [the defendant] intended to have sexual contact with a person he believed to be under the age of sixteen.” State v. Grimm, 2002 WI App 242, 258 Wis. 2d 166, 653 N.W.2d 284, ¶20; State v. Brienzo, 2003 WI App 203, 267 Wis. 2d 349, 671 N.W.2d 700, ¶25.

3. The definition of “attempt” is based on § 939.32 and Wis JI—Criminal 580. For explanation of the definitions of “unequivocally,” “another person,” and “extraneous factor,” see the footnotes to Wis JI—Criminal 580.

4. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, that “attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the ‘child’ is fictitious.” 253 Wis. 2d 298, ¶34.

**2124 TRAFFICKING OF A CHILD — § 948.051(1)****Statutory Definition of the Crime**

Trafficking of a child, as defined in § 948.051 of the Criminal Code of Wisconsin, is committed by one who knowingly [(recruits) (entices) (provides) (obtains) (harbors) (transports) (patronizes) (solicits)] [attempts to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] any child for the purpose of commercial sex acts.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant knowingly [(recruited) (enticed) (provided) (obtained) (harbored) (transported) (patronized) (solicited)] [attempted to (recruit) (entice) (provide) (obtain) (harbor) (transport) (patronize) (solicit)] (name of child).
2. (Name of child) had not attained the age of 18 years.

[Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.]<sup>1</sup>

3. The defendant (use the term selected in element 1.) (name of child) for the purpose of commercial sex acts.<sup>2</sup>

“Commercial sex act” means (sexual contact) (sexual intercourse) (sexually explicit performance) (any conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification) for which anything of value is given to, promised, or received, directly or indirectly, by any person.<sup>3</sup>

**[Meaning of Sexual Contact]**

[REFER TO WIS JI CRIMINAL 2101A FOR DEFINITION OF “SEXUAL CONTACT”]

**Deciding About Knowledge and Purpose**

You cannot look into a person’s mind to find out knowledge and purpose. Knowledge and purpose must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and purpose.

**Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI Criminal 2124 was originally published in 2011 and was revised in 2015 and 2016. This revision was approved by the Committee in February 2026; it reflects changes made by 2025 Wisconsin Act 56.

This instruction is drafted for violations of § 948.051, Trafficking of a child, which was created by 2007 Wisconsin Act 116 [effective date: April 3, 2008]. The statute was amended by 2013 Wisconsin Act



362 [effective date April 25, 2014]. See footnotes 2 and 3. 2015 Wisconsin Act 367 amended the statute to add “transport” “patronize” and “solicit” to the list of prohibited acts. [Effective date: May 29, 2017.]

2007 Wisconsin Act 116 also created § 940.302, Human trafficking, see Wis JI Criminal 1276.

Subsection (2) of § 948.051 provides: “Whoever benefits in any manner from a violation of sub. (1) is guilty of a Class B felony if the person knows that the benefits come from an act described in sub. (1).” This instruction does not address this means of violating the statute.

2007 Wisconsin Act 116 also created § 939.46(1m) which provides an affirmative defense for any offense committed by a trafficking victim as a direct result of the violation of the trafficking statute.

1. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

2. 2013 Wisconsin Act 362 amended § 948.051(1) to eliminate a reference to “sexually explicit performance.” The same conduct is now covered by the term “commercial sex act” as specified as prohibited conduct in § 940.302(1)(a), which applies to violations of § 948.051.

3. This is the definition provided in § 940.302(1)(a) as amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014]. Section 948.051(1) specifically refers to this definition. For a definition of “sexual contact” see Wis JI Criminal 934 and § 939.22(34). The Committee concluded that the definition in § 939.22(34) applies to the offense because § 948.051(1) specifically refers to trafficking “any child for the purpose of commercial sex acts, as defined in s. 940.302(1)(a) . . .” The definition in § 940.302(1)(a) refers to “sexual contact” and, since that statute is not part of § 940.225 or in Chapter 948, the definition of “sexual contact” in § 939.22(34) applies.

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**2130 INCEST WITH A CHILD: SEXUAL CONTACT — § 948.06(1)****Statutory Definition of the Crime**

Incest with a child, as defined in § 948.06(1) of the Criminal Code of Wisconsin, is committed by one who has sexual contact—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate)—with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. The defendant knew that (name of victim) was related to (him) (her) by blood or adoption.<sup>3</sup>

4. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.<sup>4</sup>

5. (Name of victim) was under the age of 18 years at the time of the alleged offense.<sup>5</sup>

Knowledge of (name of victim)’s age is not required<sup>6</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>7</sup>

Consent to sexual contact is not a defense.<sup>8</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2130 was originally published in 1974 and revised in 1980, 1991, 1994, 1996, and 2008. The 2008 revision involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.06(1) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2130A.

This instruction is for a violation of § 948.06(1), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. Note that § 944.06 also defines a crime of incest which is not limited to child victims. See Wis JI–Criminal 1510.

Section 948.06(1) also applies to one who marries a child. And sub. (2) imposes liability on a person responsible for a child’s welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. Neither of those offenses are addressed by uniform instructions.

Section 948.06 was amended by 2005 Wisconsin Act 277 to create sub. (1m) which prohibits sexual contact or intercourse by a child's stepparent. See Wis JI-Criminal 2131 and Wis JI-Criminal 2131A.

1. The appropriate definition of "sexual contact" should be selected from the alternatives provided in Wis JI-Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the "Elements of the Crime That the State Must Prove" section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a "Meaning of 'Sexual Contact'" section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of "sexual contact," including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted "with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim."

3. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are "related." The statute further requires that they be related "in a degree closer than second cousin," but the knowledge requirement apparently does not extend to the degree of relation.

4. "Second cousin" is defined in Black's Law Dictionary (7th Edition) as follows: "A person related to another by descending from the same great-grandfather or great-grandmother." The table following footnote 8 shows the degree of relationship of second cousins.

5. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

6. Section 939.23(6).

7. Section 939.43(2).

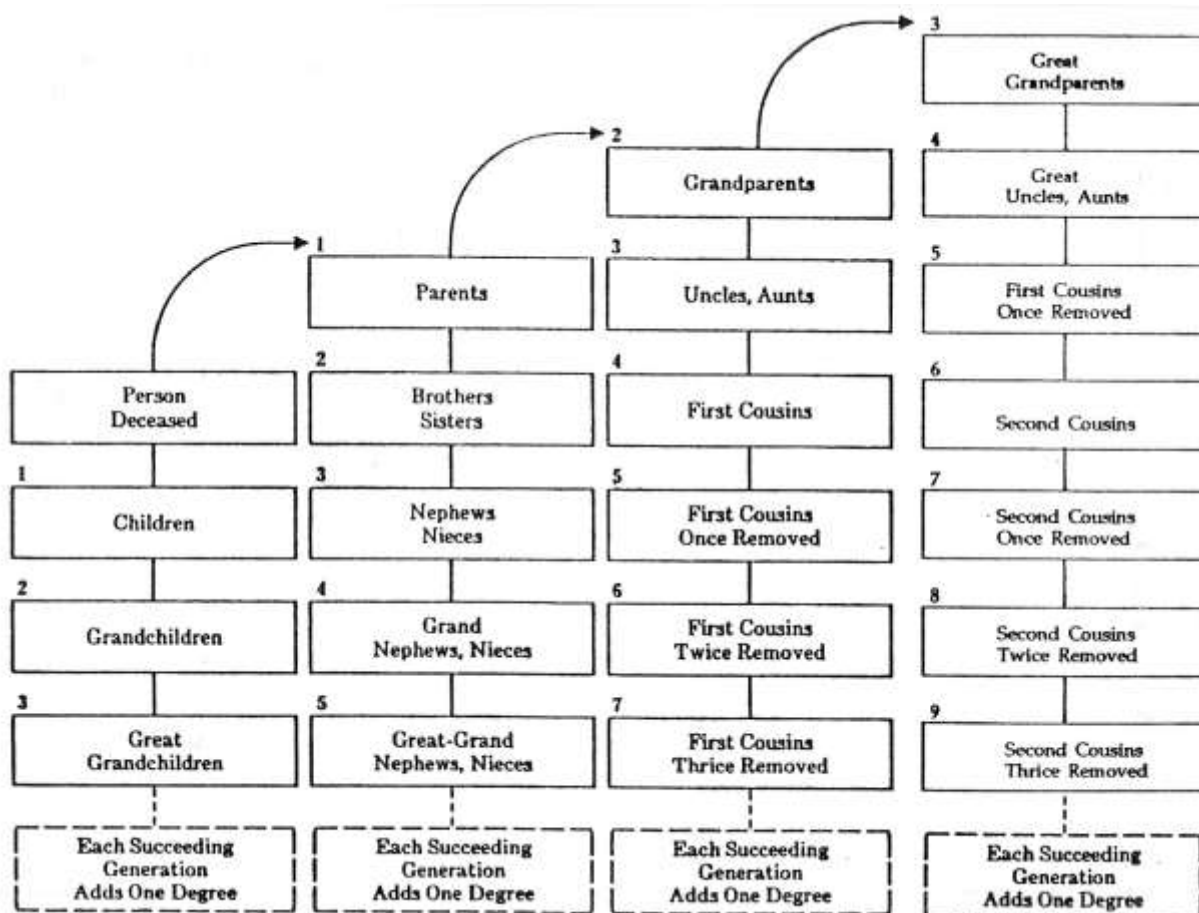
8. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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### **Degree of Kinship**

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents' Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the

degree of kinship of second cousins is indicated by the number “6.” Thus, all those degrees indicated by the number “5” or less are “related in a degree closer than second cousin” and fall within the prohibition of § 948.096(1).



**2130A INCEST WITH A CHILD: SEXUAL INTERCOURSE — § 948.06(1)****Statutory Definition of the Crime**

Incest with a child, as defined in § 948.06(1) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a child he or she knows is related, either by blood or adoption, and the child is related in a degree of kinship closer than second cousin.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).<sup>1</sup>

2. The defendant knew that (name of victim) was related to (him) (her) by blood or adoption.<sup>2</sup>
3. (Name of victim) was related to the defendant in a degree of kinship closer than second cousin.<sup>3</sup>
4. (Name of victim) was under the age of 18 years at the time of the alleged offense.<sup>4</sup>

Knowledge of (name of victim)’s age is not required<sup>5</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>6</sup>

Consent to sexual intercourse is not a defense.<sup>7</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2130A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2130, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2130 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in *State v. Goth*, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.06(1) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2130.

This instruction is for a violation of § 948.06(1), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989. Note that § 944.06 also defines a crime of incest which is not limited to child victims. See Wis JI–Criminal 1510.

Section 948.06(1) also applies to one who marries a child. And sub. (2) imposes liability on a person responsible for a child’s welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. Neither of those offenses are addressed by uniform instructions.

Section 948.06 was amended by 2005 Wisconsin Act 277 to create sub. (1m) which prohibits sexual contact or intercourse by a child’s stepparent. See Wis JI Criminal 2131 and Wis JI Criminal 2131A.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.



2. The knowledge requirement is included in the statutory definition of the offense. Note that the knowledge required is that the defendant and the victim are “related.” The statute further requires that they be related “in a degree closer than second cousin,” but the knowledge requirement apparently does not extend to the degree of relation.

3. “Second cousin” is defined in Black’s Law Dictionary (7th Edition) as follows: “A person related to another by descending from the same great-grandfather or great-grandmother.” The table following footnote 7 shows the degree of relationship of second cousins.

4. Section 948.01(1) defines “child” as “a person who has not attained the age of 18 years.”

5. Section 939.23(6).

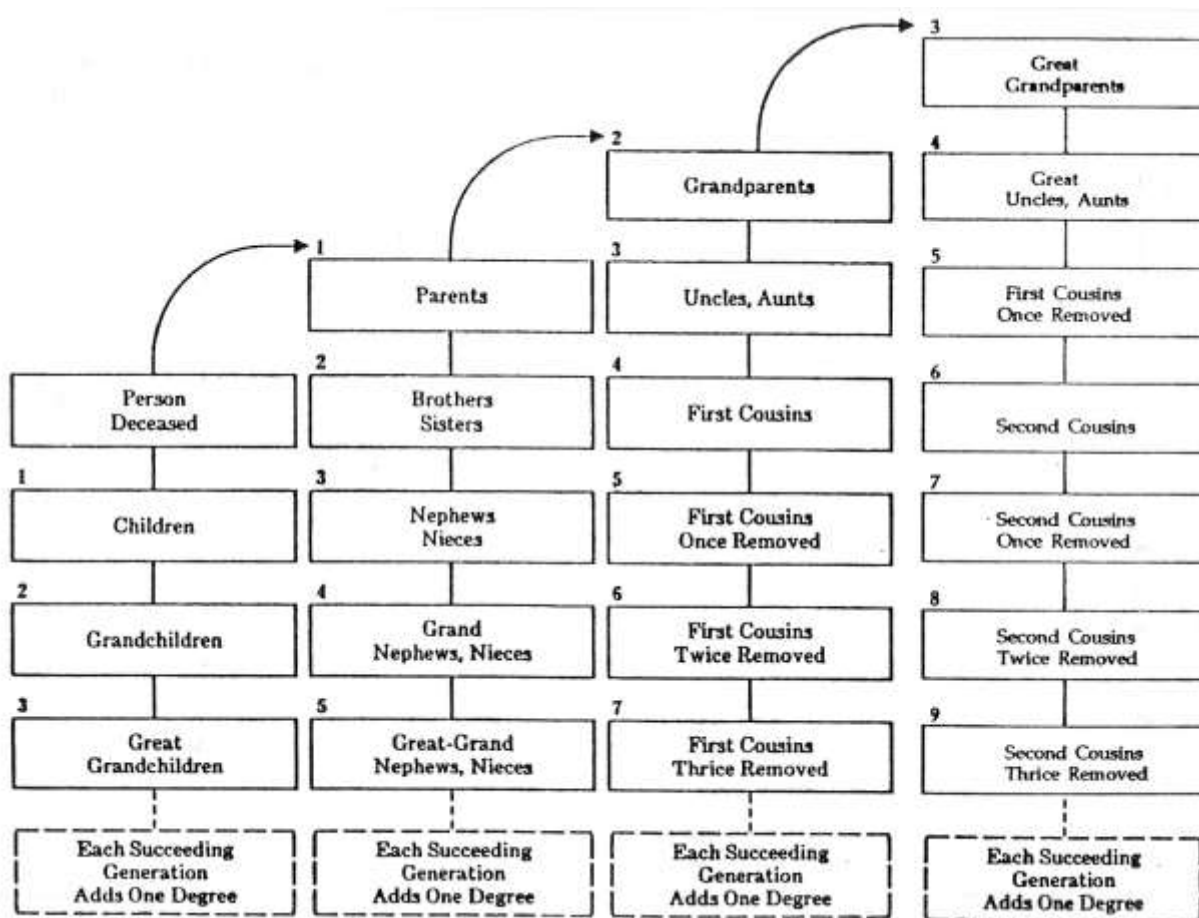
6. Section 939.43(2).

7. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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#### **Degree of Kinship**

The following chart is based on the table showing degrees of kinship found at s. 990.001(16) of the Wisconsin Statutes. The column at the far right has been added to show how the various degrees of kinship compare to second cousins. The added column is based on the chart appearing at page 48, Decedents’ Estates and Trusts, by Ritchie, Alford, and Effland, 4th Edition, © 1971, Foundation Press. Note that the degree of kinship of second cousins is indicated by the number “6.” Thus, all those degrees indicated by the number “5” or less are “related in a degree closer than second cousin” and fall within the prohibition of s. 948.096(1).



**2131 INCEST WITH A CHILD: SEXUAL CONTACT BY STEPPARENT — § 948.06(1m)**

**Statutory Definition of the Crime**

Incest with a child, as defined in § 948.06(1m) of the Criminal Code of Wisconsin, is committed by one who has sexual contact with a child—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate)—and who is the child’s stepparent.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wisconsin Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>

3. The defendant was the stepparent of (name of victim).

USE THE FOLLOWING IF IT IS BELIEVED TO BE NECESSARY TO  
DEFINE “STEPPARENT”

“Stepparent” means a person who was married to the biological or adoptive parent of (name of child) at the time of the alleged offense.<sup>3</sup>

4. (Name of victim) was under the age of 18 years at the time of the alleged offense.<sup>4</sup>

Knowledge of (name of victim)’s age is not required<sup>5</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>6</sup>

Consent to sexual contact is not a defense.<sup>7</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI Criminal 2131 was approved by the Committee in March 2007. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.06(1m) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2131A.

This instruction is for a violation of § 948.06(1m), created by 2005 Wisconsin Act 277 [effective date: April 20, 2006].

See Wis JI–Criminal 2130 for violations of § 948.06(1). Subsection (2) of § 948.06 imposes liability on a person responsible for a child’s welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. That offense is not addressed by uniform instructions.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. There is no statutory definition of “stepparent.” The definition suggested in the text was developed by the Committee.

4. Section 948.01(1) defines “child” as “a person who has not attained the age of 18 years.”

5. Section 939.23(6).

6. Section 939.43(2).

7. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2131A INCEST WITH A CHILD: SEXUAL INTERCOURSE BY STEPPARENT  
— § 948.06(1m)**

**Statutory Definition of the Crime**

Incest with a child, as defined in § 948.06(1m) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with a child and who is the child's stepparent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>1</sup>

2. The defendant was the stepparent of (name of victim).

USE THE FOLLOWING IF IT IS BELIEVED TO BE NECESSARY TO  
DEFINE “STEPPARENT”

“Stepparent” means a person who was married to the biological or adoptive parent of (name of child) at the time of the alleged offense.<sup>2</sup>

3. (Name of victim) was under the age of 18 years at the time of the alleged offense.<sup>3</sup>

Knowledge of (name of victim)'s age is not required<sup>4</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>5</sup>

Consent to sexual intercourse is not a defense.<sup>6</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2131A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2131, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2131 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.06(1m) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2131.

This instruction is for a violation of § 948.06(1m), created by 2005 Wisconsin Act 277 [effective date: April 20, 2006].

See Wis JI Criminal 2130 for violations of § 948.06(1). Subsection (2) of 948.06 imposes liability on a person responsible for a child's welfare whose failure to act exposes the child to a risk that incest may occur or facilitates incest. That offense is not addressed by uniform instructions.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. There is no statutory definition of “stepparent.” The definition suggested in the text was developed by the Committee.

3. Section 948.01(1) defines “child” as “a person who has not attained the age of 18 years.”

4. Section 939.23(6).

5. Section 939.43(2).



6. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2137A SEXUAL ASSAULT OF A FOSTER CHILD: SEXUAL CONTACT — § 948.085(1)****Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.085(1) of the Criminal Code of Wisconsin, is committed by a person who has sexual contact with a child for whom the person is a foster parent—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate the child).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. (Name of victim) was under the age of 18 years<sup>3</sup> at the time of the alleged sexual contact.

Knowledge of (name of victim)’s age is not required<sup>4</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>5</sup>

Consent to sexual contact is not a defense.<sup>6</sup>

4. The defendant was a foster parent to (name of victim).

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2137A was originally published in 2007 and revised in 2010. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.085(1) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2137C.

This instruction is for violations of § 948.085(1), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(2), see Wis JI–Criminal 2137B.

The 2010 revision deleted reference to “treatment foster parent” which was removed from § 948.085 by 2009 Wisconsin Act 28 (Section 3353).

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.”
4. Section 939.23(6).
5. Section 939.43(2).
6. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2137B SEXUAL ASSAULT OF A CHILD PLACED IN A SUBSTITUTE CARE FACILITY<sup>1</sup>: SEXUAL CONTACT — § 948.085(2)****Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.085(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual contact with a child who was placed in a substitute care facility—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate the child)—where the person (works or volunteers at the facility) (is responsible<sup>2</sup> for managing the facility).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis  
JI-Criminal 2101A).<sup>3</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>4</sup>
3. (Name of victim) was under the age of 18 years<sup>5</sup> at the time of the alleged sexual contact.

Knowledge of (name of victim)'s age is not required<sup>6</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>7</sup>

Consent to sexual contact is not a defense.<sup>8</sup>

4. (Name of victim) was placed in a substitute care facility.

“Substitute care facility” means

[a shelter care facility licensed under s. 48.66(1)(a).]<sup>9</sup>

[a group home licensed under s. 48.625 or 48.66(1).]<sup>10</sup>

[a facility described in s. 940.295(2)(m).]<sup>11</sup>

5. The defendant (worked or volunteered at the facility) (was responsible<sup>12</sup> for managing the facility).

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2137B was approved by the Committee in August 2006. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.085(2) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2137D.



This instruction is for violations of § 948.085(2), which was created by 2005 Wisconsin Act 277 [effective date: April 20, 2006]. For violations of § 948.085(1), see Wis JI–Criminal 2137A and Wis JI–Criminal 2137C.

1. The instruction uses the term “substitute care facility,” borrowing it from the title of the statute. The offense definition refers to “any of the following facilities” and then lists three types of facilities that are defined primarily by cross references to other statutes. See notes 9, 10, and 11, below.

2. The statute refers to a person who “is directly or indirectly responsible” for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being “indirectly” responsible for managing the facility it may be helpful to add “directly or indirectly” to the fifth element. See note 12, below.

3. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

4. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

5. “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.”

6. Section 939.23(6).

7. Section 939.43(2).

8. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

9. Section 48.66(1)(a) refers to licensing shelter care facilities but does not provide a definition of the term.

10. Section 48.625 requires a license to operate a group home but does not provide a definition of the term. Section 48.66(1) lists a variety of institutions and agencies.

11. Section 940.295(2)(m) refers to: “A residential care center for children and youth operated by a child welfare agency licensed under s. 48.60 or an institution operated by a public agency for the care of

neglected, dependent, or delinquent children.” Sec. 48.60 does not include a definition or list of agencies to which it applies. Sub. (2) lists many types of institutions to which it does not apply.

12. The statute refers to a person who “is directly or indirectly responsible” for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being “indirectly” responsible for managing the facility it may be helpful to add “directly or indirectly” to the fifth element.

**2137C SEXUAL ASSAULT OF A FOSTER CHILD: SEXUAL INTERCOURSE —  
§ 948.085(1)****Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.085(1) of the Criminal Code of Wisconsin, is committed by a person who has sexual intercourse with a child for whom the person is a foster parent.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>1</sup>

2. (Name of victim) was under the age of 18 years<sup>2</sup> at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

Consent to sexual intercourse is not a defense.<sup>5</sup>

3. The defendant was a foster parent to (name of victim).

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI Criminal 2137C was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2137A, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2137A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in *State v. Goth*, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.085(1) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2137A.

This instruction is for violations of § 948.085(1), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(2), see Wis JI Criminal 2137B and Wis JI Criminal 2137D.

The 2010 revision deleted reference to “treatment foster parent” which was removed from § 948.085 by 2009 Wisconsin Act 28 (Section 3353).

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.”

3. Section 939.23(6).

4. Section 939.43(2).

5. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

**2137D SEXUAL ASSAULT OF A CHILD PLACED IN A SUBSTITUTE CARE FACILITY<sup>1</sup>: SEXUAL INTERCOURSE — § 948.085(2)****Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.085(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual intercourse with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible<sup>2</sup> for managing the facility).

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).<sup>3</sup>

2. (Name of victim) was under the age of 18 years<sup>4</sup> at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required<sup>5</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>6</sup>

Consent to sexual intercourse is not a defense.<sup>7</sup>

3. (Name of victim) was placed in a substitute care facility.

“Substitute care facility” means

[a shelter care facility licensed under s. 48.66(1)(a).]<sup>8</sup>

[a group home licensed under s. 48.625 or 48.66(1).]<sup>9</sup>

[a facility described in s. 940.295(2)(m).]<sup>10</sup>

4. The defendant (worked or volunteered at the facility) (was responsible<sup>11</sup> for managing the facility).

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2137D was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2137B, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2137B to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.085(2) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2137B.

This instruction is for violations of § 948.085(2), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(1), see Wis JI–Criminal 2137A and Wis JI–Criminal 2137C.

1. The instruction uses the term “substitute care facility,” borrowing it from the title of the statute. The offense definition refers to “any of the following facilities” and then lists three types of facilities that are defined primarily by cross references to other statutes. See notes 8, 9, and 10, below.

2. The statute refers to a person who “is directly or indirectly responsible” for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being “indirectly” responsible for managing the facility it may be helpful to add “directly or indirectly” to the fourth element. See note 11, below.

3. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

4. “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.”

5. Section 939.23(6).

6. Section 939.43(2).

7. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

8. Section 48.66(1)(a) refers to licensing shelter care facilities but does not provide a definition of the term.

9. Section 48.625 requires a license to operate a group home but does not provide a definition of the term. Section 48.66(1) lists a variety of institutions and agencies.

10. Section 940.295(2)(m) refers to: “A residential care center for children and youth operated by a child welfare agency licensed under s. 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.” Sec. 48.60 does not include a definition or list of agencies to which it applies. Sub. (2) lists many types of institutions to which it does not apply.

11. The statute refers to a person who “is directly or indirectly responsible” for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being “indirectly” responsible for managing the facility it may be helpful to add “directly or indirectly” to the fourth element.

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**2138A UNDERAGE SEXUAL ACTIVITY: SEXUAL CONTACT — § 948.093****Statutory Definition of the Crime**

Underage sexual activity, as defined in § 948.093 of the Criminal Code of Wisconsin, is committed by one who has not attained the age of 19 years and has sexual contact—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate the victim)—with a child who has attained the age of 15 years but has not attained the age of 16 years and is not his or her spouse.

**State’s Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim).

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
3. The defendant had not attained the age of 19 years at the time of the alleged sexual contact.

4. (Name of victim) had attained the age of 15 years but had not attained the age of 16 years at the time of the alleged sexual contact.

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

Consent to sexual contact is not a defense.<sup>5</sup>

5. (Name of victim) was not the defendant’s spouse at the time of the alleged sexual contact.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2138A was approved by the Committee in June 2018. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.093 involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2138B.

This instruction is for criminal violations of § 948.093, underage sexual activity, created by 2017 Wisconsin Act 174 [effective date: March 30, 2018], concerning sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years. For violations of § 948.09, see Wis JI–Criminal 2138.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. The appropriate definition of "sexual contact" should be selected from the alternatives provided in Wis JI-Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the "Elements of the Crime That the State Must Prove" section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a "Meaning of 'Sexual Contact'" section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court's earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of "sexual contact," including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted "with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim."

3. See § 939.23(6).

4. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2) . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause for or reasonableness of that belief is relevant."

5. "Without consent" is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

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**2138B UNDERAGE SEXUAL ACTIVITY: SEXUAL INTERCOURSE — § 948.093****Statutory Definition of the Crime**

Underage sexual activity, as defined in § 948.093 of the Criminal Code of Wisconsin, is committed by one who has not attained the age of 19 years and has sexual intercourse with a child who has attained the age of 15 years and is not his or her spouse.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>1</sup>

2. The defendant had not attained the age of 19 years at the time of the alleged sexual intercourse.

3. (Name of victim) had attained the age of 15 years but had not attained the age of 18 years<sup>2</sup> at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

Consent to sexual intercourse is not a defense.<sup>5</sup>

4. (Name of victim) was not the defendant's spouse at the time of the alleged sexual intercourse.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 2138B was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI-Criminal 2137A, which addressed both "sexual contact" and "sexual intercourse" in a single instruction. In October 2025, the Committee bifurcated Wis JI-Criminal 2137A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.093 involving "sexual intercourse" only. For violations involving "sexual contact," see Wis JI-Criminal 2138A.

This instruction is for criminal violations of § 948.093, underage sexual activity, created by 2017 Wisconsin Act 174 [effective date: March 30, 2018], concerning sexual intercourse with a child who has attained the age of 15 years. For violations of § 948.09, see Wis JI-Criminal 2138.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. The appropriate definition of "sexual intercourse" should be selected from the alternatives provided in Wis JI-Criminal 2101B, based on the specific facts of the case.

2. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

3. See § 939.23(6).

4. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that “no affirmative defense of the victim’s intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2) . . . If an accused’s reasonable belief about the victim’s age, based on the victim’s intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant’s belief about the victim’s age nor evidence regarding the cause for or reasonableness of that belief is relevant.”

5. “Without consent” is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

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**2139 SEXUAL ASSAULT OF A CHILD BY A SCHOOL STAFF PERSON:  
SEXUAL CONTACT — § 948.095(2)**

**Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.095(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual contact—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate the victim)—with a child who has attained the age of 16 years and who is not the person’s spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student.

**State’s Burden of Proof**

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present at the time of the offense.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual contact with (name of victim), who was not the defendant’s spouse.

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101A).<sup>1</sup>

2. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>

3. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.<sup>3</sup>

Knowledge of (name of victim)’s age is not required<sup>4</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>5</sup>

Consent to sexual contact is not a defense.<sup>6</sup>

4. (Name of victim) was enrolled as a student in a school or a school district.

[“School” means a public or private elementary or secondary school.]<sup>7</sup>

5. The defendant was a member of the school staff of the school or school district in which (name of victim) was enrolled as a student.

[“School staff” means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract.]<sup>8</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2139 was originally published in 1997 and revised in 2004 and 2007. The 2007 revision reflects changes made by 2005 Wisconsin Act 274. This revision was approved by the Committee

in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.095(2) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2139C.

This instruction is for violations of § 948.095, which was created by 1995 Wisconsin Act 456 [effective date: July 11, 1996]. 2005 Wisconsin Act 274 amended the title of the statute to read as follows: “Sexual assault of a child by a school staff person or a person who works or volunteers with children.” Act 274 also created sub. (3), which defines a new offense addressed by Wis JI–Criminal 2139A and Wis JI–Criminal 2139D.

Before being amended by Act 274, the title of the statute referred to “instructional staff” but the text referred simply to “staff.” The definition of “school staff” in sub. (1)(b) extends to anyone who provides “services” – it is not limited to “instructional services.” In State v. Kaster, 2003 WI App 105, 264 Wis. 2d 751, 663 N.W.2d 390, the court of appeals noted the potentially broad application of the statutory definition but concluded that it did not make the statute unconstitutional or ambiguous. The statute does not require that a person be “under contract” and can apply to volunteers. The court also concluded that Wis JI–Criminal 2139 adequately instructs the jury on § 948.095. 2003 WI App 105, ¶16. Kaster returned to the appellate courts, claiming that the court of appeals had added a new element to the statute and that he was denied the opportunity to present a defense to that element. The court of appeals held that the first decision “did not create an additional element but instead provided a description of Kaster’s relationship with the school for the purpose of analyzing whether Kaster was school staff. . . . Thus, we reject Kaster’s argument that he was denied the right to present a defense . . .” State v. Kaster, 2006 WI App 72, ¶18, 292 Wis. 2d 252, 714 N.W.2d 238.

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. The statute requires that the victim be “a child who has attained the age of 16 years.” “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.” Thus, the victim must have

attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

4. Section 939.23(6).
5. Section 939.43(2).
6. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.
7. This is the definition provided in § 948.095(1)(a).
8. This is the definition provided in § 948.095(1)(b). See the discussion of State v. Kaster in the Comment preceding footnote 1.

**2139A SEXUAL ASSAULT OF A CHILD BY A PERSON WHO WORKS OR VOLUNTEERS WITH CHILDREN: SEXUAL CONTACT— § 948.095(3)****Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.095(3) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual contact with a child who has attained the age of 16 years—meaning contact undertaken with intent to (become sexually aroused or gratified) (sexually degrade or humiliate the child)—who is not the person’s spouse, and with whom the person works or interacts through that occupation or volunteer position.

**State’s Burden of Proof**

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following six elements were present at the time of the offense.

**Elements of the Crime That the State Must Prove**

1. The defendant had attained the age of 21 years.
2. The defendant (engaged in an occupation) (participated in a volunteer position) that required (him) (her) to work or interact directly with children.
3. The defendant had sexual contact with (name of victim), who was not the defendant’s spouse.

“Sexual contact” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101A).<sup>1</sup>

4. The defendant acted with intent to (become sexually aroused or gratified) (sexually degrade or humiliate (name of victim)).<sup>2</sup>
5. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.<sup>3</sup>

Knowledge of (name of victim)’s age is not required<sup>4</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>5</sup>

Consent to sexual contact is not a defense.<sup>6</sup>

6. (Name of victim) was a person with whom the defendant worked or interacted through (his) (her) (occupation) (volunteer position).

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all six elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2139A was approved by the Committee in 2006. This revision was approved by the Committee in October 2025. It separated the instructions for sexual contact offenses from those for sexual intercourse offenses to clarify all essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.095(3) involving “sexual contact” only. For violations involving “sexual intercourse,” see Wis JI–Criminal 2139D.

This instruction is for violations of § 948.095(3)(a), which was created by 2005 Wisconsin Act 274 [effective date: April 20, 2006]. For violations of § 948.095(2), see Wis JI–Criminal 2139 and Wis JI–Criminal 2139C.

Act 274 also changed the title of § 948.095 to refer to “school staff person or a person who works or volunteers with children.” This, with the addition of sub. (3), arguably makes it more clear that the statute applies to a broad category of individuals. See State v. Kaster, 2003 WI App 105, 264 Wis.2d 751, 663 N.W.2d 390, where the court of appeals noted the potentially broad application of the statute before the changes made by Act 274 and concluded that it did not make the statute unconstitutional or ambiguous. See the discussion in the Comment, Wis JI–Criminal 2139.

Subsection (3)(d) of § 948.095 provides that evidence that a person engages in any of several listed occupations or positions is “prima facie evidence that the occupation or position requires him or her to work or interact directly with children . . .” The instruction does not address this provision. See Wis JI–Criminal 225 for a general model for instructing on “prima facie cases.”

1. The appropriate definition of “sexual contact” should be selected from the alternatives provided in Wis JI–Criminal 2101A, based on the specific facts of the case.

2. Prior to the 2026 revision, the “Elements of the Crime That the State Must Prove” section did not explicitly include the requirement that the sexual contact be for a prohibited purpose. Instead, this purpose element was embedded within a “Meaning of ‘Sexual Contact’” section and incorporated into each alternative definition of sexual contact under Wis. Stat. § 948.01(5)(b)1.

However, as the court of appeals observed in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished), this structural approach did not comply with the court’s earlier holding in State v. Jipson, 2003 WI App 222, ¶¶9–10 & n.4, 267 Wis. 2d 467, 671 N.W.2d 18. In Jipson, the court held that, before accepting a guilty or no-contest plea to a sexual assault charge, the circuit court must ensure the defendant understands the complete statutory definition of “sexual contact,” including its purpose element.

In response, the Committee revised the instruction to present the purpose requirement as a separate, standalone element. The instruction now expressly states that the defendant must have acted “with the intent to either become sexually aroused or gratified or to sexually degrade or humiliate the victim.”

3. The statute requires that the victim be “a child who has attained the age of 16 years.” “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.” Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

4. Section 939.23(6).

5. Section 939.43(2).

6. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2139C SEXUAL ASSAULT OF A CHILD BY A SCHOOL STAFF PERSON:  
SEXUAL INTERCOURSE — § 948.095(2)****Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.095(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual intercourse with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student.

**State's Burden of Proof**

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present at the time of the offense.

**Elements of the Crime That the State Must Prove**

1. The defendant had sexual intercourse with (name of victim), who was not the defendant's spouse.

"Sexual intercourse" is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>1</sup>

2. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.<sup>2</sup>

Knowledge of (name of victim)'s age is not required<sup>3</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>4</sup>

Consent to sexual intercourse is not a defense.<sup>5</sup>

3. (Name of victim) was enrolled as a student in a school or a school district.

[“School” means a public or private elementary or secondary school.]<sup>6</sup>

4. The defendant was a member of the school staff of the school or school district in which (name of victim) was enrolled as a student.

[“School staff” means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract.]<sup>7</sup>

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2139C was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2139, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2139 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.095(2) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2139.

This instruction is for violations of § 948.095, which was created by 1995 Wisconsin Act 456 [effective date: July 11, 1996]. 2005 Wisconsin Act 274 amended the title of the statute to read as follows: “Sexual assault of a child by a school staff person or a person who works or volunteers with children.” Act

274 also created sub. (3), which defines a new offense addressed by Wis JI–Criminal 2139A and Wis JI–Criminal 2139D.

Before being amended by Act 274, the title of the statute referred to “instructional staff” but the text referred simply to “staff.” The definition of “school staff” in sub. (1)(b) extends to anyone who provides “services” – it is not limited to “instructional services.” In State v. Kaster, 2003 WI App 105, 264 Wis. 2d 751, 663 N.W.2d 390, the court of appeals noted the potentially broad application of the statutory definition but concluded that it did not make the statute unconstitutional or ambiguous. The statute does not require that a person be “under contract” and can apply to volunteers. The court also concluded that Wis JI–Criminal 2139 adequately instructs the jury on § 948.095. 2003 WI App 105, ¶16. Kaster returned to the appellate courts, claiming that the court of appeals had added a new element to the statute and that he was denied the opportunity to present a defense to that element. The court of appeals held that the first decision “did not create an additional element but instead provided a description of Kaster’s relationship with the school for the purpose of analyzing whether Kaster was school staff. . . . Thus, we reject Kaster’s argument that he was denied the right to present a defense . . .” State v. Kaster, 2006 WI App 72, ¶8, 292 Wis. 2d 252, 714 N.W.2d 238.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. The statute requires that the victim be “a child who has attained the age of 16 years.” “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.” Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

3. Section 939.23(6).

4. Section 939.43(2).

5. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

6. This is the definition provided in § 948.095(1)(a).

7. This is the definition provided in § 948.095(1)(b). See the discussion of State v. Kaster in the Comment preceding footnote 1.

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**2139D SEXUAL ASSAULT OF A CHILD BY A PERSON WHO WORKS OR VOLUNTEERS WITH CHILDREN: SEXUAL INTERCOURSE — § 948.095(3)**

**Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.095(3) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual intercourse with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

**State's Burden of Proof**

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following five elements were present at the time of the offense.

**Elements of the Crime That the State Must Prove**

1. The defendant had attained the age of 21 years.
2. The defendant (engaged in an occupation) (participated in a volunteer position) that required (him) (her) to work or interact directly with children.
3. The defendant had sexual intercourse with (name of victim), who was not the defendant's spouse.

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).<sup>1</sup>

4. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.<sup>2</sup>

Knowledge of (name of victim)’s age is not required<sup>3</sup> and mistake regarding (name of victim)’s age is not a defense.<sup>4</sup>

Consent to sexual intercourse is not a defense.<sup>5</sup>

5. (Name of victim) was a person with whom the defendant worked or interacted through (his) (her) (occupation) (volunteer position).

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2139D was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2139A, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2139A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.095(3) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2139A.

This instruction is for violations of § 948.095(3)(a), which was created by 2005 Wisconsin Act 274 (effective date: April 20, 2006). For violations of § 948.095(2), see Wis JI–Criminal 2139 and Wis JI–Criminal 2139C.

Act 274 also changed the title of § 948.095 to refer to “school staff person or a person who works or volunteers with children.” This, with the addition of sub. (3), arguably makes it more clear that the statute applies to a broad category of individuals. See State v. Kaster, 2003 WI App 105, 264 Wis.2d 751, 663 N.W.2d 390, where the court of appeals noted the potentially broad application of the statute before the changes made by Act 274 and concluded that it did not make the statute unconstitutional or ambiguous. See the discussion in the Comment, Wis JI–Criminal 2139.

Subsection (3)(d) of § 948.095 provides that evidence that a person engages in any of several listed occupations or positions is “prima facie evidence that the occupation or position requires him or her to work or interact directly with children . . .” The instruction does not address this provision. See Wis JI–Criminal 225 for a general model for instructing on “prima facie cases.”

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

2. The statute requires that the victim be “a child who has attained the age of 16 years.” “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.” Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

3. Section 939.23(6).

4. Section 939.43(2).

5. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

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**2620A OPERATING WHILE REVOKED: CRIMINAL OFFENSE<sup>1</sup>:  
REVOCATION RESULTED FROM AN OWI RELATED OFFENSE — §  
343.44(1)(b) and (2)(ar)2.**

**Statutory Definition of the Crime**

Section 343.44 of the Wisconsin Statutes is violated by one who operates a motor vehicle upon any highway in this state while (that person's operating privilege is duly revoked.) (in violation of any restriction on an occupational license issued to the person during the period of revocation.)

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following (two) (three)<sup>2</sup> elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant operated a motor vehicle<sup>3</sup> on a highway.<sup>4</sup>

A motor vehicle is operated when it is set in motion.<sup>5</sup>

2. The defendant's (operating privilege<sup>6</sup> was duly revoked at the time the defendant operated a motor vehicle.) (operation of the motor vehicle violated a restriction on an occupational license.)

[A person's operating privilege remains revoked until it is reinstated.]<sup>7</sup>

["Restriction on an occupational license" means restrictions imposed as to hours of the day, area, routes or purpose of travel, vehicles allowed to be operated,

use of an ignition interlock device, sobriety or use of alcohol, controlled substances or controlled substance analogs.]

**NOTE:** IF THE STATE, THE DEFENDANT, AND THE ATTORNEY FOR THE DEFENDANT HAVE STIPULATED THAT THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE, THE FACT IS TREATED AS CONCLUSIVELY PROVED, AND THE JURY SHOULD NOT BE INSTRUCTED ON THE FOLLOWING THIRD ELEMENT.

ADD THE FOLLOWING THIRD ELEMENT IF THERE IS NO STIPULATION CONCERNING WHETHER THE REVOCATION WAS BASED ON AN OWI-RELATED OFFENSE.<sup>8</sup>

[3. The revocation resulted from an offense that may be counted under section 343.307(2).<sup>9</sup> (Insert offense) is an offense that may be counted under section 343.307(2).]

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that (both) (all three) elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI–Criminal 2620A was approved by the Committee in April 2018. This revision was approved by the Committee in February 2026. It added language that more clearly addresses both the revoked-operating-privilege theory and the occupational-license restriction theory under § 343.44(1)(b). It also clarified how to apply State v. Alexander when the third “status” element is not stipulated to by the defendant, defense counsel, and the State.

[Note: A previously published instruction also numbered Wis JI–Criminal 2620A was withdrawn in 2006.]

This instruction is to be used for offenses committed on or after December 10, 2017. That date is the effective date for 2017 Wisconsin Act 127, which deleted the knowledge requirement from § 343.44(1)(b). For offenses committed before that date see Wis JI–Criminal 2621.

Under section 343.44(1)(b) as amended by 2005 Wisconsin Act 25 [effective date: July 27, 2005], operating while revoked was a crime under two circumstances: when there was a prior conviction for operating while revoked [see Wis JI–Criminal 2620]; and, when the revocation “resulted from an offense that may be counted under s. 343.307(2),” the offense addressed by this instruction. [The captions in the instruction and the comment refer to this as revocation “for an OWI related offense.”] Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

The Committee concluded that the fact that the revocation “resulted from an offense that may be counted under s. 343.307(2)” is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI–Criminal 2600, Sec. IV, D.

This requirement is reflected in the third element of the instruction. That element is in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI related. The Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI–Criminal 2660C and Wis JI–Criminal 2600, Sec. IX.

This type of violation is addressed in State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997). In Alexander, the Wisconsin Supreme Court referred to this element as a “status element” and held that if the defendant admits having two or more prior convictions, suspensions or revocations [the relevant number under prior law], the “admission dispenses with the need for proof of the status element, either to a jury or to a judge.” 214 Wis.2d 628, 646. When there is an admission of the status element, “admitting any evidence of the defendant’s prior convictions, suspensions or revocations and submitting the status element to the jury . . . [is] an erroneous exercise of discretion.” 214 Wis.2d 628, 651. The court’s rationale for removing an element in this situation was that the status element involves facts “entirely outside the gravamen of the offense” and “adds nothing to the State’s evidentiary depth or descriptive narrative.” 214 Wis.2d 628, 649-50.

The court gave explicit direction to the trial courts as to how to handle this situation:

“When a circuit court is faced with the circumstances presented in this case, the circuit court should simply instruct the jury that they must find beyond a reasonable doubt that: 1) the defendant was driving or operating a motor vehicle on a highway; and 2) the defendant had a prohibited alcohol concentration at the time . . . The ‘prohibited alcohol concentration’ means 0.08 . . .”

214 Wis.2d 628, 651-52.

By placing the “status element” in brackets, the Committee intends to implement the approach approved in Alexander. If the defendant admits the “status element,” the instruction should be given with

two elements: The defendant operated a motor vehicle on a highway, and the defendant's operating privilege was duly revoked at the time the defendant operated the motor vehicle.

If the defendant does not admit the "status element," the instruction should be given with a third element: The revocation resulted from an offense that may be counted under section 343.307(2). (Insert offense) is an offense that may be counted under section 343.307(2).]

Because the defendant's admission removes an element from the jury's consideration, the record should reflect the defendant's acknowledgment that a jury determination is, in effect, being waived on the "status element."

**NOTE: Defendant's offer to stipulate**

A defendant may offer to stipulate or agree that the revocation resulted from an offense counted under section 343.307(2). For a standard statement on the effect of such a stipulation, see Wis JI-Criminal 162, **AGREED FACTS**.

Care must be taken where a stipulation goes to an element of a crime. A waiver should be obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

**TO THE DEFENDANT:**

1. Do you understand that one element of the crime of operating while revoked—when the revocation resulted from an OWI-related offense—is that, at the time of the offense, your operating privilege was duly revoked as a result of an offense that may be counted under § 343.307(2)?
2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the state has proved beyond a reasonable doubt that your operating privilege was duly revoked as a result of an offense that may be counted under § 343.307(2) before the date of this offense?
3. Do you understand that the State has to convince each member of the jury that your operating privilege was duly revoked as a result of an offense that may be counted under § 343.307(2) before the date of this offense?
4. Do you understand that with this stipulation, you are agreeing that I tell the jury that your operating privilege was duly revoked as a result of an offense that may be counted under § 343.307(2) before the date of this offense and that they are to accept this fact as conclusively proved?
5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?
6. Have you had enough time to talk all of this over with your attorney?

7. Has anyone pressured you or threatened you in any way, or made any promises to you, to get you to enter into this agreement?
8. Are you entering into this agreement of your own free will?
9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands (his) (her) right to enter into this agreement regarding (his) (her) revocation resulting from an offense counted under section 343.307(2) or to not enter into this agreement?
2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.

1. This instruction applies to operating while revoked offenses that are criminal because the revocation "resulted from an offense that may be counted under s. 343.307(2)." The Committee has concluded that this is a fact for the jury, unless admitted by the defendant. See note 8, below. From May 1, 2002, to July 26, 2005, all operating while revoked offenses were criminal, including first offenses. Under § 343.44(1)(b), as amended by 2005 Wisconsin Act 25, operating while revoked offenses were criminal if the revocation resulted from an OWI related offense, addressed by this instruction, or if they were second offenses. [See Wis JI-Criminal 2620.] The effective date of Act 25 was July 27, 2005. Section 343.44(1)(b) was amended again by 2009 Wisconsin Act 28 to eliminate the criminal penalty for second and subsequent OAR violations. The effective date of the change is January 1, 2010.

2. The instruction is drafted to allow for use with either two or three elements, depending on whether the third element, relating to the cause of the revocation, is submitted to the jury. See note 8, below.

3. Regarding the definition of "motor vehicle," § 340.01(35) and Wis JI-Criminal 2600 Introductory Comment, Sec. II.

4. "Highway" is defined by subsec. 340.01(22):

(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as

defined in § 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

“Highway” includes the entire platted or dedicated right of way of a public road; it is not limited to the paved portion or the paved portion plus the shoulder. E.J.H. v. State, 112 Wis.2d 439, 234 N.W.2d 77 (1983).

5. This instruction has always used “set in motion” as the definition of “operated.” This is the same definition that was used in operating under the influence cases before 1977. See Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955); State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955); and Monroe County v. Kruse, 76 Wis.2d 126, 250 N.W.2d 375 (1977).

In 1977, the definition of “operate” for operating under the influence cases was changed. Subsection 346.63(3)(b) defines “operate” as follows: “the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.” Because § 346.63(3)(b) definition is prefaced by the phrase “in this section,” it can be argued that it applies only to under the influence cases. The Committee reached no conclusion on this issue but left the definition of “operate” unchanged in this instruction.

Subsection 340.01(41), applicable to all motor vehicle code offenses, does define “operator” as “a person who drives or is in actual physical control of a vehicle.”

Also see Wis JI–Criminal 2600 Introductory Comment, Sec. III.

6. Subsection 340.01(40) defines “operating privilege” as follows:

“Operating privilege” means, in the case of a person who is licensed under ch. 343, the license, including every endorsement and authorization to operate vehicles of specific vehicle classes or types, instruction permit, and temporary, restricted or occupational license granted to such person; in the case of a resident of this state who is not so licensed, it means the privilege to secure a license under ch. 343; in the case of a nonresident, it means the operating privilege granted by § 343.05(2)(a)2 or (4)(b)1.

7. Subsection 343.44(1g) provides:

Notwithstanding any specified term of suspension, revocation, cancellation or disqualification, the period of any suspension, revocation, cancellation or disqualification of an operator’s license issued under this chapter or of an operating privilege continues until the operator’s license or operating privilege is reinstated.

Sections 343.38 and 343.39 provide the requirements for reinstatement. Also see Best v. State, 99 Wis.2d 495, 299 N.W.2d 604 (Ct. App. 1980), regarding the department’s duty to promulgate rules relating to determining the length of suspension periods.

8. The third element has been placed in brackets because it is not to be submitted to the jury if the defendant admits that the revocation is OWI-related. The Committee concluded that the fact that the revocation “resulted from an offense that may be counted under § 343.307(2)” is a fact that must be decided by the jury. It is the sole fact that makes this offense criminal and thus is subject to the general rule that it

must go to the jury. The only exception is the fact of a prior conviction. See, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) and Wis JI–Criminal 2600, Sec. IV, D.

The element is in brackets because the Committee concluded that a defendant may wish to admit this fact to avoid possible prejudice if the fact is elicited before the jury. This is the procedure used for OWI offenses involved the .02 level of prohibited alcohol concentration, which applies where the defendant has three or more priors. See, Wis JI–Criminal 2660C, and State v. Alexander, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

9. The text of the third element is based on the text of § 343.44(2)(ar)2. The types of convictions, suspensions, and revocations that are counted under § 343.307(2) are convictions for operating while intoxicated or suspensions or revocations for refusal to submit to chemical tests for alcohol. The priors may include offenses in other jurisdictions.

The Committee concluded that the instruction should use the statutory language “may be counted under § 343.307(2)” because evidence of the cause of the revocation will usually be submitted with testimony that the cause is one that is counted under that statute.

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# WISCONSIN JURY INSTRUCTIONS

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## CRIMINAL

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## VOLUME IV

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**Wisconsin Criminal Jury  
Instructions Committee**

[Cite as Wis JI-Criminal]

- Includes 3/2026 Supplement (Release No. 70)

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**2664B OPERATING A MOTOR VEHICLE WITH A DETECTABLE AMOUNT OF A RESTRICTED CONTROLLED SUBSTANCE — § 346.63(1)(am)****Statutory Definition of the Crime**

Section 346.63(1)(am) of the Wisconsin Statutes is violated by one who drives or operates a motor vehicle on a highway<sup>1</sup> while the person has a detectable amount of a restricted controlled substance in his or her blood.

**Burden of Proof**

Before you may find the defendant guilty of this offense, the ((identify prosecuting agency)<sup>2</sup>) (State) must prove by evidence which satisfies you (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt)<sup>3</sup> that the following two elements were present.

**Elements of the Offense That Must Be Proved**

1. The defendant (drove) (operated) a motor vehicle<sup>4</sup> on a highway.<sup>5</sup>

[“Drive” means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.]<sup>6</sup>

[“Operate” means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.]<sup>7</sup>

2. The defendant had a detectable amount of a restricted controlled substance in his or her blood at the time the defendant (drove) (operated) a motor vehicle.

[(Name restricted controlled substance) is a restricted controlled substance.]<sup>8</sup>

GIVE THE FOLLOWING IF DELTA-9-TETRAHYDROCANNABINOL IS THE ALLEGED RESTRICTED CONTROLLED SUBSTANCE.

[Delta-9-tetrahydrocannabinol is considered a restricted controlled substance if it is at a concentration of one or more nanograms per milliliter of a person's blood.]

### **How to Use the Test Result Evidence**

The law states that a chemical analysis showing a detectable amount of a restricted controlled substance in a defendant's blood sample is evidence of the presence of a detectable amount of a restricted controlled substance in a defendant's blood at the time of the (driving) (operating).<sup>9</sup>

USE THE FOLLOWING IF APPROPRIATE:

[If you are satisfied (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt) that there was a detectable amount of a restricted controlled substance in the defendant's blood at the time the sample was taken, you may find from that fact alone that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the (driving) (operating) but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had a detectable amount of a restricted controlled substance in (his) (her) blood at the time of the alleged (driving) (operating) unless you are satisfied of that fact (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt).]

### Jury's Decision

If you are satisfied (to a reasonable certainty by evidence which is clear, satisfactory, and convincing) (beyond a reasonable doubt) that both elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

Wis JI–Criminal 2664B was originally published in 2004 and revised in 2005, 2006, 2007, 2010, and 2020. The 2020 revision added an alternative element to the instruction and to footnotes 8 and 9 based on 2019 Wisconsin Act 68. This revision was approved by the Committee in February 2026. It added to the comment, clarifying that methamphetamine is a “restricted controlled substance” regardless of isomer as provided in State v. Johnson, 2025 WI App 20, ¶54, 415 Wis. 2d 682, 19 N.W.3d 645.

This instruction is for a violation of § 346.63(1)(am), which was created by 2003 Wisconsin Act 97. Subsection (1)(am) provides that no person may drive or operate a motor vehicle while “[t]he person has a detectable amount of a restricted controlled substance in his or her blood.” The statute applies to offenses committed on or after the Act’s effective date: December 19, 2003. For a general discussion of Act 97, see Wis JI–Criminal 2600 Introductory Comment, Sec. IX.

The penalties for this offense are the same as those for operating under the influence offenses: a first offense is a civil forfeiture; second and subsequent violations are criminal. The instruction is drafted for both types of cases with the different burdens of proof in brackets; the applicable alternative should be selected.

Section 346.63(1)(d) recognizes a defense for cases involving “a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol” that applies if the person proves that he or she had a valid prescription for the substance.

This instruction can also be used as a model for violations of other statutes that have been amended to prohibit operating with a “detectable amount . . .” See Wis JI–Criminal 2600 Introductory Comment, Sec. IX.

The Wisconsin Court of Appeals has found the “detectable amount” provision to be constitutional. See State v. Smet, 2005 WI App 263, 288 Wis. 2d 525, 709 N.W.2d 474; and, State v. Gardner, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720. See also Wis JI–Criminal 2600 Introductory Comment, Sec. IX.

See Wis JI–Criminal 2664 and 2664A for instructions involving operating while under the influence of a controlled substance and a combination of an intoxicant and a controlled substance. For offenses involving operating under the influence of “any other drugs,” see Wis JI–Criminal 2666.

The 2004 revision adopted a new format for footnotes. Footnotes common to several instructions are collected in Wis JI–Criminal 2600 Introductory Comment. They are cross-referenced by section number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Regarding the “on a highway” requirement, see Wis JI–Criminal 2600 Introductory Comment, Sec. I.

2. The instruction has been revised to include a blank where the identity of the prosecuting agency can be provided: the State, the county, the municipality, etc.

3. This instruction is drafted to be used for both civil forfeiture and criminal offenses. Use the first bracketed phrase for civil forfeitures and the second for crimes.

4. Regarding the definition of “motor vehicle,” see Wis JI–Criminal 2600 Introductory Comment, Sec. II.

5. Regarding the definition of “highway,” see Wis JI–Criminal 2600 Introductory Comment, Sec. I.

6. This is the definition of “drive” provided in § 346.63(3)(a).

7. Regarding the definition of “operate,” see Wis JI–Criminal 2600 Introductory Comment, Sec. III.

8. The Committee concluded that it adds clarity to tell the jury that the alleged substance does qualify as a restricted controlled substance under the statute. Whether the defendant actually had a restricted controlled substance in his or her blood remains a jury question. Section 340.01(50m) defines “restricted controlled substance” as follows:

(50m) ‘Restricted controlled substance’ means any of the following:

- (a) A controlled substance included in schedule I other than tetrahydrocannabinol.
- (b) A controlled substance analog, as defined in s. 961.01(4m), of a controlled substance described in par. (a).
- (c) Cocaine or any of its metabolites.
- (d) Methamphetamine.
- (e) Delta-9-tetrahydrocannabinol, excluding its precursors or metabolites, at a concentration of one or more nanograms per milliliter of a person’s blood.

2019 Act 68 amended the definition of delta-9-tetrahydrocannabinol to require that delta-9-tetrahydrocannabinol be at a concentration of one or more nanograms per milliliter of a person’s blood. Prior to Act 68, the statute required only a detectable amount of delta-9-tetrahydrocannabinol.

Methamphetamine is a restricted controlled substance as defined by statute, and the statutes do not distinguish between its isomers. Accordingly, the State is not required to prove whether the methamphetamine detected was dextromethamphetamine or levomethamphetamine; proof of a detectable amount of methamphetamine is sufficient. State v. Johnson, 2025 WI App 20, ¶¶24–26, 54, 415 Wis. 2d 682, 19 N.W.3d 645.

9. This statement is similar to the one used for the results of properly conducted alcohol tests. See, for example, Wis JI–Criminal 2663. [The Committee’s general approach to instructing on test results is discussed in Wis JI–Criminal 2600 Introductory Comment, Sec. VII.] The Committee concluded that it is proper for tests in “restricted controlled substance” cases as well.

Whether additional instruction on the evidentiary significance of the test should be given is not clear, however, because the statute created for “detectable amount of a restricted controlled substance” cases is not phrased in the same way that the alcohol test statutes are. Section 885.235(1k), created by 2003 Wisconsin Act 97, reads as follows:

885.235(1k) In any action or proceeding in which it is material to prove that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . . if a chemical analysis of a sample of the person’s blood shows that the person had a detectable amount of a restricted controlled substance in his or her blood, the court shall treat the analysis as prima facie evidence on the issue of the person having a detectable amount of a restricted controlled substance in his or her blood without requiring any expert testimony as to its effect.

As for the admissibility of evidence concerning the concentration of delta-9-tetrahydrocannabinol in a person’s blood, sec. 885.235(5), created by 2019 Wisconsin Act 68, reads as follows:

[t]he only form of chemical analysis of a sample of human biological material that is admissible as evidence bearing on the question of whether or not the person had delta-9-tetrahydrocannabinol at a concentration of one or more nanograms per milliliter of the person’s blood is a chemical analysis of a sample of the person’s blood.

Comparing this statute to § 885.235(1g), the statute addressing alcohol tests, reveals several differences:

- sub. (1k) does not require that the test be taken within 3 hours of driving;
- sub. (1k) does not directly provide for admissibility of test results; and,
- sub. (1k) does not explicitly connect having a detectable amount in the blood at the time of the test with having a detectable amount at the time of driving.

As to the second difference – admissibility – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence” strongly implies that the analysis is admissible. As to the third difference – connection with the time of driving – the Committee concluded that the statement “the court shall treat the analysis as prima facie evidence on the issue of the person having . . .” may express a legislative intent that the analysis be admissible to prove the material issue “that a person had a detectable amount of a restricted controlled substance in his or her blood while operating or driving a motor vehicle . . .” as stated at the beginning of sub. (1k). For that reason, the instruction includes a paragraph that addresses

the “prima facie” effect of the chemical analysis. The paragraph is in brackets to suggest that trial courts make an independent determination about whether its use is appropriate. To be admissible, the analysis must be found to be relevant to the issue which it is offered to prove.



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