## 1200B SEXUAL INTERCOURSE — § 940.225(5)(c)

### Meaning of "Sexual Intercourse"

INSERT THE ALTERNATIVE[S] SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.

["Sexual intercourse" means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.][1]

["Sexual intercourse" includes (cunnilingus) (fellatio).

(Cunnilingus means oral contact with the clitoris or vulva.)[2]

(Fellatio means oral contact with the penis.)[3]]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[The act of sexual intercourse must be either by the defendant or upon the defendant's instruction.][4]

["Sexual intercourse" does not include an intrusion for a bona fide medical, health care, or hygiene procedure.][5]

**COMMENT**

Wis JI-Criminal 1200B was originally published in 1996 and revised in 2000 and 2006. This revision added to the text at footnote 5 and was approved by the Committee in February 2010.

[An instruction formerly numbered Wis JI-Criminal 1200B, "Without Consent" – Competency to Give Informed Consent in Issue, has been renumbered Wis JI-Criminal 1200C.]

The definitions provided here were formerly provided in each instruction for a sexual assault offense involving sexual intercourse. The 1996 revision combined sexual contact and sexual intercourse offenses into one instruction, making it necessary to refer to this instruction for definition of "sexual intercourse" and to Wis JI-Criminal 1200A for definition of "sexual contact."

 

The 2006 revision changed the definitions of "cunnilingus" and "fellatio." See footnotes 2 and 3.

1. Section 940.225(5)(c) defines "sexual intercourse" for purposes of the Sexual Assault Law as follows:

> "Sexual intercourse" includes the meaning assigned under § 939.22(36) 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 the defendant or upon the defendant's instruction. The emission of semen is not required.

Section 939.22(36) defines "sexual intercourse" as follows: "'Sexual intercourse' requires only vulvar penetration and does not require emission." Thus the Sexual Assault Law definition begins with the relatively narrow definition in § 939.22(36) and broadens it considerably. The instruction begins with the broader definition, "any . . . intrusion . . .," since the § 939.22(36) definition is clearly contained therein.

2. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, 289 Wis.2d 222, 710 N.W.2d 482, which held that defining cunnilingus as "oral stimulation . . ." is not required by the "statutory scheme of the sexual assault law" and "offends the principles underpinning the sexual assault law." Par. 14. The former definition was taken from Webster's New Collegiate Dictionary, but the court of appeals held that "a standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." Par. 17. The court stated: "We think a better resource is BLACK'S LAW DICTIONARY 380 (6th ed. 1990) which more neutrally defines cunnilingus as '[a]n act of sex committed with the mouth and the female sexual organ.'" Par. 17. The Committee decided not to use that definition because it refers to a "sex act," which is inconsistent with the emphasis of Harvey that a purpose of the sexual assault law was to recognize that sexual assaults were crimes of violence, not of sexual passion. Par. 15. As noted in the Harvey decision, the current edition of Black's does not define the term. [See Par. 17, footnote 6.] The Committee believes the revised definition in the instruction is faithful to the substance of the Harvey decision.

3. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, see note 2, supra. Harvey was concerned only with the definition of "cunnilingus," but the Committee concluded that the logic of the court's analysis would also apply to defining fellatio as "oral stimulation," which the instruction formerly did. The former definition had been approved in State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

4. In State v. Olson, 2000 WI APP 158, 238 Wis.2d 74, 616 N.W.2d 144, the court construed the definition provided in § 948.01(6) to require that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself." Olson, ¶10. The Committee concluded that the same interpretation applies to the definition in § 940.225(5)(c) and that the bracketed sentence in the instruction adequately addresses the Olson requirement. The Olson decision also implies that "allowing" the sexual intercourse to take place may also satisfy the statute (see ¶12), but the holding is limited to the "upon the defendant's instruction" issue.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the

 

defendant was raped, the act of having sexual intercourse with a child does not constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, supra, to conclude that the entire definition in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction." The Committee concluded the same interpretation must apply to the definition in § 940.225(5)(c), applicable to prosecutions under § 940.225.

5. This statement is based on the decision in State v. Neumann, 179 Wis.2d 687, 508 N.W.2d 54 (Ct. App. 1993). The court of appeals construed the definition of "sexual intercourse" in § 940.225(5)(c) narrowly in rejecting the defendant's claim that the definition was overbroad: "Although his argument is based on the literal language of the statute, it stretches all bounds of reason to believe that the legislature intended to include bona fide medical, health care, and hygiene procedures within the definition of 'sexual intercourse.'" Neumann, 179 Wis.2d 687, 712, n. 14. Also see State v. Lesik, 2010 WI App 12, ___ Wis.2d ___, ___ N.W.2d ___, [2008 AP 3072-CR], reaching the same conclusion with respect to the definition of "sexual intercourse" applicable to prosecutions under § 948.02.

 