

**1200C "WITHOUT CONSENT" — COMPETENCE TO GIVE INFORMED
CONSENT IN ISSUE — § 940.225(4)**

CAUTION: THIS INSTRUCTION APPLIES ONLY TO SEXUAL ASSAULT
OFFENSES UNDER SECTION 940.225.

SUBSTITUTE THE FOLLOWING¹ FOR THE STANDARD DEFINITION OF
"WITHOUT CONSENT" WHEN THE VICTIM'S BEING "COMPETENT TO
GIVE INFORMED CONSENT" IS AN ISSUE IN THE CASE.

Meaning of "Did Not Consent"²

"Did not consent" means that (name of victim) did not freely agree to have sexual
[contact] [intercourse] with the defendant or that (name of victim) was not competent to
give informed consent. 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.³

A person is not competent to give informed consent if that person does not have the
mental capacity to understand the nature and the consequence of having sexual (intercourse)
(contact).⁴ The burden is on the State to satisfy you by proof beyond a reasonable doubt that
(name of victim) was not competent to give informed consent.

COMMENT

This instruction was originally published as Wis JI-Criminal 1200B in 1983 and revised in 1990. It was
revised and renumbered as Wis JI-Criminal 1200C in 1996. This revision adopted a new format and was
approved by the Committee in December 2001.

The substance of this instruction was originally included in the body of each standard instruction to which
it was relevant. It has been placed in a separate instruction in the interest of simplifying the instructions for the
various sexual assault offenses.

1. This instruction is designed to implement § 940.225(4) which defines "consent" as "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." (Emphasis added.) It should be substituted for the entire "without consent" definition found in the individual sexual assault instructions, in cases where the evidence supports its use.

The standard definition of "without consent" found in the sexual assault jury instructions does not include the "competent to give informed consent" material. The Committee assumed that in most cases the issue would be whether the victim did freely agree to the sexual intercourse or sexual contact. If there was no agreement, it makes no difference whether or not the victim was "competent to give informed consent." The victim's being "competent . . ." would be in issue primarily in cases where consent was indicated and where the state contends that the victim was not competent to consent. These cases were thought to be rare enough to justify removing the "competent to give informed consent" material from the standard definition and treating it separately here.

2. 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 unconscious, or being mentally ill, see Wis JI-Criminal 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.

3. 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).

4. Section 940.225(4) does not define "competent to give informed consent." There is no indication whether the classes of persons described in § 940.225(4)(b) and (c) are those who are not "competent to give informed consent," or whether a different category of individuals is contemplated. The Committee took the view that a broader category was intended and defined "competent to give informed consent" by reference to the general principles that apply to "informed consent" in other contexts – the ability to understand the act and its consequences.