

1200D "WITHOUT CONSENT" — COMPLAINANT SUFFERING FROM MENTAL ILLNESS — § 940.225(4)(b)

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

ADD THE FOLLOWING¹ TO THE STANDARD DEFINITION OF "WITHOUT CONSENT" IF THERE IS EVIDENCE THAT THE VICTIM WAS SUFFERING FROM MENTAL ILLNESS OR DEFECT AT THE TIME OF THE ALLEGED OFFENSE.

Effect of Mental Illness or Defect on Consent

There is evidence in this case that (name of victim) was suffering from a mental (illness) (defect) at the time of the alleged offense.

If you find that (name of victim) was suffering from a mental (illness) (defect) which impaired capacity to appraise personal conduct at the time of the alleged act of sexual (intercourse) (contact), you may find from that fact alone that (name of victim) did not consent, but you are not required to do so. You should not find that (name of victim) did not consent unless you are so satisfied beyond a reasonable doubt from all the evidence.²

COMMENT

This instruction was originally published as Wis JI-Criminal 1200C in 1983 and revised in 1990. It was revised and renumbered as JI 1200D in 1996. This revision adopted a new format and was approved by the Committee in May 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) and (4)(b) which provide that a person "suffering from a mental illness or defect which impairs capacity to appraise personal conduct" is "presumed" to be incapable of consent. (Sexual contact or intercourse with a mentally ill person is also prohibited by § 940.225(2)(c) as a second degree sexual assault; consent is not an issue for that offense. See Wis JI-Criminal 1211.)

The Committee decided not to define "mental illness or defect" 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 involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b), and Wis. Stat. § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term "mental illness or defect" has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or defect required is offered by the qualifying phrase in the statute: ". . . which impairs capacity to appraise personal conduct."

2. In Wisconsin, presumptions in criminal cases are "permissive," that is, the jury may, but is not required to, find the presumed fact (no consent) from the basic fact (mental illness). Moreover, the judge may not direct the jury to find a presumed fact against the accused. Where the presumed fact is an element of the offense, it must be proved beyond a reasonable doubt. (See Wis. Stat. § 903.03 and Judicial Council Committee's note reported at 59 Wis.2d R57-66.) The Committee believes the proper method for instructing on a presumption is illustrated in the instruction: The jury is told that if they find the basic fact (mental illness), they may, from that fact alone, find the presumed fact (no consent), but they are not required to do so and if they do so find, they must be satisfied beyond a reasonable doubt from all the evidence. See Wis JI-Criminal 225 for a discussion of instructing on presumptions.