

**1200E "WITHOUT CONSENT" — COMPLAINANT UNCONSCIOUS —  
§ 940.225(4)(c)**

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

ADD THE FOLLOWING<sup>1</sup> TO THE STANDARD DEFINITION OF "WITHOUT CONSENT" IF THERE IS EVIDENCE THAT THE VICTIM WAS UNCONSCIOUS OR OTHERWISE UNABLE TO COMMUNICATE UNWILLINGNESS TO AN ACT AT THE TIME OF THE ALLEGED OFFENSE.

**Effect of Unconsciousness on Consent**

There is evidence in this case that (name of victim) was (unconscious) (unable to communicate unwillingness to an act) at the time of the alleged offense.

If you find that (name of victim) was (unconscious) (unable to communicate unwillingness to an act) 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.<sup>2</sup>

**COMMENT**

This instruction was originally published as Wis JI-Criminal 1200D in 1983 and revised in 1990. It was revised and renumbered as JI 1200E 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)(c) which provide that a person who is "unconscious or otherwise unable to communicate unwillingness to an act" is "presumed" incapable of consent. Sexual contact or intercourse with an unconscious person is also prohibited by § 940.225(2)(d) as a second degree sexual assault; consent is not in issue for that offense. See Wis JI-Criminal 1213.

In a case which requires it, this material should be added to the standard definition of "without consent" found in each instruction on sexual assault offenses. It was the Committee's judgment that this instruction will seldom be used. If the victim was unconscious or unable to communicate at the time of the offense, there could clearly be no "words or overt actions" indicating consent as required by § 940.225(4).

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 (e.g., being unconscious). 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 (e.g., being unconscious), 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 and "prima facie cases."