

1201 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR 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 [contact] [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 [contact] [intercourse] with (name of victim).
2. (Name of victim) did not consent to the sexual [contact] [intercourse].
3. The defendant caused great bodily harm to (name of victim).¹

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 1200A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 1200B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

Meaning of Did Not Consent²

"Did not consent" means that (name of victim) did not freely agree to have sexual [contact] [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.³

Meaning of Great Bodily Harm

"Great bodily harm" means serious bodily injury.⁴ [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

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 and 2000. The 2000 revision involved adoption of a new format and nonsubstantive changes to the text. This revision made a minor change in the definition of consent and was approved by the Committee in December 2001.

This instruction is for two of the types of first degree sexual assault defined by § 940.225(1)(a): sexual contact or 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.

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 1200A and 1200B. 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.

1. In the Committee's judgment, if the act of intercourse or 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 intercourse or 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.]

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.

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 "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.

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. 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 227 720 (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.