

**1201A FIRST DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE
WITHOUT CONSENT CAUSING PREGNANCY — § 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 intercourse with another person without consent and causes that person to become pregnant.

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 intercourse¹ with (name of victim).
2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant caused (name of victim) to become pregnant.²

Meaning of "Did Not Consent"³

"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.⁴

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 1200A and revised in 1983 and 1990 and was renumbered Wis JI-Criminal 1201A in 1996. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

1. "Sexual intercourse" is not defined in this instruction because "causing pregnancy" is an element of the crime. If it is established that pregnancy was caused, both penetration and emission must have occurred, which makes much of the definition of "sexual intercourse" in § 940.225(5)(c) inapplicable. If definition is believed to be necessary, see Wis JI-Criminal 1200B.

2. "Pregnancy" is not defined in the instruction. In the rare case where this offense is charged and causation is in issue, Wis JI-Civil 5001, Paternity, may be helpful.

3. 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.

4. 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).