

1201B FIRST-DEGREE SEXUAL ASSAULT: SEXUAL 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 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 intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 1200B).¹

2. (Name of victim) did not consent to the sexual intercourse.
3. The defendant caused great bodily harm to (name of victim).²

Meaning of Did Not Consent³

“Did not consent” means that (name of victim) did not freely agree to have sexual 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

Meaning of Great Bodily Harm

“Great bodily harm” means serious bodily injury.⁵ [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

Wis JI–Criminal 1201B was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1201, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1201 to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction is for the types of first-degree sexual assault defined by § 940.225(1)(a): sexual intercourse without consent causing great bodily harm. Wis JI–Criminal 1201 is drafted for sexual contact 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.

1. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 1200B, based on the specific facts of the case.

2. In the Committee's judgment, if the act of intercourse 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. 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.

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), (cm), (d), (g), (h), and (i). 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, 87 Wis.2d 804, 275 N.W.2d 715 (1979).

5. 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 720 (1977). 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.