

1203 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF USE OF A DANGEROUS WEAPON — § 940.225(1)(b)

Statutory Definition of the Crime

First degree sexual assault, as defined in § 940.225(1)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with another person without consent and by use or threat of use of [a dangerous weapon] [an article used or fashioned in a manner to lead the other person to reasonably believe it was a dangerous weapon].

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 had sexual [contact] [intercourse] with (name of victim) by use or threat of use of [a dangerous weapon] [an article used or fashioned in a manner to lead the other person to reasonably believe¹ it was a dangerous weapon].

This requires that the defendant actually used or threatened to use² [the dangerous weapon] [an article which (name of victim) reasonably believed capable of producing death or great bodily harm)³ to compel (name of victim) to submit⁴ to sexual [contact] [intercourse].

[Meaning of "Dangerous Weapon"]

[A dangerous weapon is (any firearm, whether loaded or not) (any device designed as a weapon and capable of producing death or great bodily harm) (any device or instrumentality which in the manner it is used or intended to be used is calculated or likely to produce death or great bodily harm).⁵]

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 Consent"⁶

"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.⁷

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 1202 [for sexual intercourse offenses] and Wis JI-Criminal 1203 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1203 was published 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.

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. "Reasonably believe" is defined by § 939.22(32) to mean "that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

2. The phrase, "by use or threat of force or violence," as used in subsection (2)(a) of § 940.225 was construed in *State v. Baldwin*, 101 Wis.2d 441, 304 N.W.2d 742 (1981). The court held that jury agreement is not required on "use" as opposed to "threat" or on "force" as opposed to "violence." Thus instructing the jury in the disjunctive is acceptable in this instance, although the Committee recommends selecting one of the alternatives whenever the evidence supports only one. See Wis JI-Criminal 1207, note 2, regarding the construction of the same phrase used in § 940.225(2)(a).

3. Section 940.225(1)(b) describes this alternative as "an article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon." There are three categories within the definition of dangerous weapon, see § 939.22(10) and note 3, *supra*. Rather than reiterate the three alternatives of the dangerous weapon definition in the instruction, the Committee determined it was clearer to use a modified statement of the third statutory alternative: "A device likely to produce death or great bodily harm." This alternative goes to the crux of the matter where the victim does not actually see the weapon – what did the victim believe – and is broad enough to cover the other alternatives of the dangerous weapon definition: firearm and a device designed as a weapon.

The "article used or fashioned . . ." alternative is also used in the Wisconsin armed robbery statute, § 943.32(2). The appellate decisions interpreting that provision are discussed in the footnotes to Wis JI-Criminal 1480 and 1480A.

4. Section 940.225(1)(b) states that the defendant must have had sexual intercourse or sexual contact "by use or threat of use of a dangerous weapon. . . ." The nature of the connection between the intercourse or contact and the use of the weapon is left unclear. The Committee feels the intent of the statute is to cover those situations where the defendant used a weapon (or article . . .) to compel the victim to submit to the contact or intercourse and has expressed the connection in those terms in the instructions.

5. The Committee suggests using the part of the statutory definition that applies to the facts of the case. The definition in the instruction does not include all the alternatives provided in § 939.22(10), which defines "dangerous weapon" as follows:

"Dangerous weapon" means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon as defined in § 941.295(4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

See Wis JI-Criminal 910 for suggested instructions for all the statutory alternatives and a discussion of some of the substantive issues relating to "dangerous weapons."

6. 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.

7. 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).