

**1205 FIRST DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE WHILE AIDED AND ABETTED — § 940.225(1)(c)**

**Statutory Definition of the Crime**

First degree sexual assault, as defined in § 940.225(1)(c) 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 force or violence, and is aided and abetted<sup>1</sup> by one or more other persons.

**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 four 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 force or violence.<sup>2</sup>

The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).<sup>3</sup>

SELECT THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

[This element is satisfied if the use or threat of force or violence compelled (name of victim) to submit.]<sup>4</sup>

[Use or threat of force or violence on one date can carry over to an alleged sexual assault on a later date if the use or threat of force or violence continued to weigh on (name of victim) and caused (him) (her) to cooperate out of fear for (his) (her) safety.]<sup>5</sup>

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.]<sup>6</sup>

4. The defendant was aided and abetted by one or more other persons.<sup>7</sup>

#### **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"<sup>8</sup>**

"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.<sup>9</sup>

### Meaning of "Aiding and Abetting"

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.<sup>10</sup>

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE:<sup>11</sup>

[However, a person does not aid and abet if (he) (she) is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all four 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 1204 [for sexual intercourse offenses] and Wis JI-Criminal 1205 [for sexual contact offenses]. Those instructions were revised in 1983, 1988, and 1990. A revision combining the instructions as Wis JI-Criminal 1205 was published in 1996 and revised in 2002 and 2005. A nonsubstantive change was made in 2016. This revision was approved by the Committee in 2018; it involved an editorial correction to footnote 10.

The 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.

This offense, like the offense defined in sub. (2)(a), has an element requiring the "use or threat of force." The case law interpreting that element has developed in cases under sub. (2)(a), but the Committee concluded that the interpretations apply to this offense as well. See footnotes 2-6.

1. Section 940.225(1)(c) uses the phrase, "aided or abetted," (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in this instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

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.

3. "[T]he use or threat of force or violence element of second degree sexual assault includes forcible contact or force used as a means of making the sexual contact. Thus, the element is satisfied whether the force is used or threatened as part of the sexual contact itself or whether it is used or threatened before the sexual contact." State v. Hayes, 2003 WI App 99, ¶15, 264 Wis.2d 377, 633 N.W.2d 351, citing State v. Bonds, supra. (Affirmed, 2004 WI 80, 273 Wis.2d 1, 681 N.W.2d 203.)

4. State v. Hayes, 2004 WI 80, ¶59, 273 Wis.2d 1, 681 N.W.2d 203:

The "use or threat of force or violence" element . . . is satisfied if the use or threat of force or violence is directed to compelling the victim's submission. The element is satisfied whether the force is used or threatened as part of the sexual contact or whether it is used or threatened as part of the sexual contact to compel the victim's submission.

5. State v. Jaworski, 135 Wis.2d 235, 239-40, 400 N.W.2d 29 (Ct. App. 1986):

[W]e reject Jaworski's argument that . . . the state must therefore establish a separate threat for each count charged.

. . . The crucial inquiry is whether on each date sexual intercourse was achieved by threat of violence.

...

A reasonable trier of fact could well conclude . . . that the initial threat of violence lingered on the latter dates. . . Part of S.H.'s fear may also have been attributable to Jaworski's alleged threats to tell other inmates as well as S.H.'s family and friends what had happened. However, that fact does not preclude a finding that the original threat of violence continued to weigh upon S.H. and caused him to cooperate out of fear for his safety.

State v. Speese, 191 Wis.2d 205, 213-14, 528 N.W.2d 63 (Ct. App. 1995):

In State v. Jaworski, . . . we held that a reasonable trier of fact could infer that an initial threat of violence, made two to five days earlier than the charged sexual assaults, had lingered on the days the charged assaults occurred, and that the earlier threat had caused the victim to submit out of fear. . . .

Speese . . . asserts that her subjective fear was unreasonable and insufficient to prove the threat or use of force. We disagree.

The jury could infer from the evidence that Teresa had good reason to fear Speese, he having used force on her on at least one prior occasion when she refused to have sexual intercourse with him. The fact finder may take into account the context of the threat. . . . The context here is the relationship between Speese and Teresa and their respective ages. The relationship of some ten years' duration is between a stepfather and his juvenile female stepchild whom he has sexually abused throughout the period and beaten.

6. State v. Bonds, 165 Wis.2d 27, 32, 477 N.W.2d 265 (1991):

. . . Section 940.225(2)(a) does not state that the force used or threatened may not be the force employed in the actual nonconsensual contact. Nor does it state that the force must be directed toward compelling the victim's submission. The phrase "by use of force" includes forcible contact or the force used as the means of making contact.

. . . Force used at the time of the contact can compel submission as effectively as force or threat occurring before contact. Regardless of when the force is applied, the victim is forced to submit. When force is used at the time of contact, the victim has no choice at the moment of simultaneous use of force and making of contact. When force is used before contact, the choice is forced. In both cases, the victim does not consent to the contact.

7. Section 940.225(1)(c) states that the defendant must have been aided or abetted and have sexual contact or sexual intercourse without consent by use or threat of force or violence. The nature of the connection between being aided and having intercourse or contact is not clear. The earlier version of this instruction tried to express this connection by stating that the aiding and abetting must have "compelled the victim to submit" to the sexual assault.

This issue was discussed in State v. Thomas, 128 Wis.2d 93, 104-05, 381 N.W.2d 567 (Ct. App. 1985). In Thomas, the 1983 version of Wis JI-Criminal 1204, and relevant footnotes, were cited by the defendant in support of his argument that the statute was intended to apply only to the "gang rape situation." The Thomas court rejected the argument, holding that "aiding and abetting" has the same meaning in § 940.225(1)(c) as it has in § 939.05. Since the Committee had not intended to suggest a different result, the 1988 revision deleted the "compelled the victim to submit" language and revised the aiding and abetting explanation to track closely the one used for purposes of § 939.05.

8. 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.

9. 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).

10. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where the actor is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of first or second degree sexual assault? If aiding is established, the principal is guilty of the first degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a second degree offense, Sexual Contact or Intercourse Without Consent by use or threat of force or violence under § 940.225(2)(a). The aiding is the only factor that elevates the

offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello-Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984).

11. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.