1208 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT BY USE OR THREAT OF FORCE OR VIOLENCE — § 940.225(2)(a)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(a) 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.

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 force or violence.[1]

   The use or threat of force or violence may occur before or as part of the sexual (contact) (intercourse).[2]

   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.][3]

[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.][4]

[The phrase "by use of force" includes forcible sexual contact or force used as the means of making sexual contact.][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 second 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 1208 [for sexual intercourse offenses] and Wis JI-Criminal 1209 [for sexual contact offenses]. Those instructions were revised in 1983 and 1990. A revision combining the instructions as Wis JI-Criminal 1208 was published in 1996 and revised in 2002, 2004, 2005, and 2016. The 2016 revision involved a nonsubstantive change in the text and an addition to footnote 3. This revision was approved by the Committee in December 2021; it added to the comment.

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.

2021 Wisconsin Act 76 [effective date: August 8, 2021] created Wis. Stat. sec. 940.225(1)(d), which makes it a first degree sexual assault to commit what would otherwise be a second degree sexual assault "against an individual who is 60 years of age or older." Wis JI-Criminal 1204 provides a model for integrating the instruction for the second degree offense into instruction for a violation of § 940.225(1)(d).

1. 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.

2. "[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.)

3. 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.

Also see, State v. Long, 2009 WI 36, 317 Wis.2d 92, 765 N.W.2d 557, where the court found that the evidence was sufficient to establish the "use of force" element: "force has been used when the victim is compelled to submit." 317 Wis.2d 92, 96.

4. 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.

5. 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.

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), (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.

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).