

1211 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON SUFFERING FROM MENTAL ILLNESS — § 940.225(2)(c)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(c) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

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) suffered from a mental (illness) (deficiency) at the time of the sexual (contact) (intercourse).¹
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising (his) (her) conduct. In other words, (name of victim) must have lacked the ability to evaluate the significance of (his) (her) conduct because of (his) (her) mental (illness) (deficiency).²

4. The defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) and knew that the mental condition rendered (name of victim) temporarily or permanently incapable of appraising (his) (her) conduct.³

Meaning of [“Sexual Contact”] [“Sexual Intercourse”]

REFER TO WIS JI-CRIMINAL 1200A FOR THE DEFINITION OF “SEXUAL CONTACT” AND WIS JI-CRIMINAL 1200B FOR THE DEFINITION OF “SEXUAL INTERCOURSE” AND INSERT THE APPROPRIATE DEFINITION HERE.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.⁴

[Use of Consent Evidence]

[Consent to sexual (contact) (intercourse) is not a defense. However, you may consider any words or actions of (name of victim) indicating consent in determining (whether (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising her conduct) (or) (whether the defendant knew that (name of victim) was suffering from a mental (illness) (deficiency) that rendered (him) (her) incapable of appraising her conduct).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four 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 1212 [for sexual intercourse offenses] and Wis JI-Criminal 1213 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1211 was published in 1996 and revised in 1998, 2002, 2015, and 2021. This revision was approved by the Committee in December 2023; it amended 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.

Section 940.225(2)(c) provides that it is second degree sexual assault if one “[h]as sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person’s conduct, and the defendant knows of such condition.” This offense is similar to a violation under § 940.225(3), Third Degree Sexual Assault, which prohibits sexual intercourse without consent, where, in satisfying the consent element, the state relies on the presumption of no consent under § 940.225(4)(b), which applies where the victim “suffers from a mental illness or defect which impairs capacity to appraise personal conduct.” This statement in subsection (4)(b) is almost identical to the wording of § 940.225(2)(c) but is not exactly the same.

The distinguishing feature of the more serious offense under subsection (2)(c) is that the defendant must know of the victim’s mental illness or deficiency. Such knowledge is not required where the presumption applies under subsection (4)(b), so in this sense, the subsection (2)(c) offense requires greater proof than does the offense under subsection (3). However, “without consent” is not an element of the (2)(c) offense, while it is an element of the (3) offense. Each offense, therefore, requires proof of an element that the other does not, although the victim could be essentially the same under either offense. Therefore, under the strict Wisconsin test (see § 939.66 and Randolph v. State, 83 Wis.2d 630, 266 N.W.2d 334 (1978)), third degree sexual assault apparently cannot be a lesser included offense of a crime charged under subsec. (2)(c).

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 Committee decided not to define “mental illness or deficiency” in the uniform instruction. Existing statutory definitions did not seem suitable because they are written in the context of determining when treatment is required or when involuntary commitment of the mentally ill person is appropriate. (See, for example, Wis. Stat. § 51.01(13)(a) and (b) and § 51.75(2)(c) and (d).) For the purposes of the Sexual Assault Law, the Committee concluded that the term “mental illness or deficiency” has a meaning within the common understanding of the jury. Additional guidance as to the type of illness or deficiency required is offered by the qualifying phrase in the statute: “. . . which renders that person temporarily or permanently incapable of appraising the person’s conduct.”

In State v. Perkins, 2004 WI App 213, ¶19, 277 Wis.2d 243, 689 N.W.2d 684, the court of appeals court cited the discussion above with apparent approval. The court held that “[W]hen, as here, there is lay opinion testimony supported by ample testimony as to the victim’s behavior, the existence of a mental illness or deficiency that rendered the victim temporarily or permanently incapable of appraising his or her conduct can be established without the presentation of expert testimony.” Also see State v. Onyeukwu, 2104AP518 CR, [not published] for an example of a decision finding the evidence sufficient to establish “mental deficiency” based on evidence showing that the 22 year old victim “was probably functioning on a sixth-grade level.” ¶16.

2. This is an attempt to elaborate on the meaning of “rendered the person temporarily or permanently incapable of appraising the person’s conduct.” It is adapted from the discussion in State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

3. Section 940.225(2)(c) requires that the defendant know of the victim’s condition. The Committee concluded that this requires knowledge of the existence of the mental illness or deficiency and knowledge that the illness or deficiency “renders the person temporarily or permanently incapable of appraising the person’s conduct.”

4. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (d) and (g).” Thus, “without consent” is not an element of this offense, and consent is not a defense. The Committee concluded it may be helpful to advise the jury of that fact.

While consent is not a defense as such, evidence of facts indicating that the victim appeared to give consent might be relevant to other elements of the crime: whether the victim was mentally incapable of appraising his or her conduct and whether the defendant knew that the victim was suffering from a mental illness that rendered her incapable of appraising his or her conduct.