

1211A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL 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 intercourse with a person who suffers from a mental (illness) (deficiency) which renders that person temporarily or permanently incapable of appraising their own conduct, and the person committing the act 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 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) suffered from a mental (illness) (deficiency) at the time of the sexual intercourse.²
3. The mental (illness) (deficiency) rendered (name of victim) temporarily or permanently incapable of appraising (name of victim)’s own conduct.³

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 (name of victim)'s own conduct.⁴

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE THIRD OR FOURTH ELEMENTS.⁵

[Use of Consent Evidence]

[Consent to sexual 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 (his) (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 (his) (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

Wis JI-Criminal 1211A was approved by the Committee in October 2025. Previously, this material

appeared in an earlier version of Wis JI–Criminal 1211, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1211 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 type of second-degree sexual assault defined by § 940.225(2)(c): sexual intercourse with a person suffering from mental illness. Wis JI–Criminal 1211 is drafted for sexual contact with a person suffering from mental illness.

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 subsection (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 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. 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 the 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, 2014AP518-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.

3. For additional discussion on this element, see State v. Smith, 215 Wis.2d 84, 94, 572 N.W.2d 496 (Ct. App. 1997).

4. 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."

5. 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 him or her incapable of appraising his or her conduct.