

**1212 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO IS UNDER THE INFLUENCE OF AN INTOXICANT — § 940.225(2)(cm)**

**Statutory Definition of the Crime**

Second degree sexual assault, as defined in § 940.225(2)(cm) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and has the purpose to have sexual (contact) (intercourse) with the person while the person is incapable of giving consent.

**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 five 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) was under the influence of an intoxicant at the time of the sexual (contact) (intercourse).

[ \_\_\_\_\_ is an intoxicant.]<sup>1</sup>

[“Intoxicant” means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.]<sup>2</sup>

3. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.

This requires that (name of victim) was incapable of giving freely given agreement to engage in sexual (intercourse) (contact).<sup>3</sup>

4. The defendant had actual knowledge<sup>4</sup> that (name of victim) was incapable of giving consent.
5. The defendant had the purpose to have sexual (contact) (intercourse) while (name of victim) was incapable of giving consent.<sup>5</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.

### **Deciding About Purpose and Actual Knowledge**

You cannot look into a person’s mind to find purpose and actual knowledge. Purpose and actual knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon purpose and actual knowledge.

### **Jury’s Decision**

If you are satisfied beyond a reasonable doubt that all five 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 1212 was originally published in 1998 and revised in 2002, 2007, and 2014. 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.

Section 940.225(2)(cm) was created by 1997 Wisconsin Act 220 (effective date: May 14, 1998). It originally provided that it was second degree sexual assault if one “[h]as sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person’s conduct, and the defendant knows of such condition.” Although the statute referred to “intoxicant,” alcohol, the most common intoxicant, was excluded from the definition. The original statute was apparently intended to address the so-called date rape drugs such as “gamma hydroxybutyrate” or “GHB,” “gamma hydroxybutyrolactone” or “GBL,” ketamine, or flunitrazepam, the possession of which was also criminalized by the same legislation creating this sexual assault offense. See § 961.41(3g)(f) as created by 1997 Wisconsin Act 220.

Section 940.225(2)(cm) was amended by 2005 Wisconsin Act 436 (effective date: June 6, 2006). Act 436 made the following changes:

- it included “alcohol beverage” in the definition of “intoxicant” in sub. (5)(ai);
- it changed “incapable of appraising the person’s conduct” to “incapable of giving consent”;
- it restated the knowledge requirement as “has actual knowledge that the person is incapable of giving consent”; and,
- it added: “and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.”

Section 940.225(2)(cm) was further amended by 2013 Wisconsin Act 83 [effective date: Dec. 14, 2013] to add “hazardous inhalant” to the definition of “intoxicant.” Act 83 also created a definition of “hazardous inhalant” in § 939.22(15). For a model tailored to Motor Vehicle Code offenses involving a “hazardous inhalant,” see Wis JI-Criminal 2667.

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. If the charging document specifies one of the substances that qualifies as an “intoxicant” under § 940.225(5)(ai), the Committee suggests simply telling the jury that, for example: “A controlled substance is an intoxicant.” If one of the alternatives is not specified or if reading the full statutory definition is believed to be preferable, that definition is provided in the second set of brackets.

2. This is the definition of “intoxicant” in § 940.223(5)(ai). The definition was revised by 2005 Wisconsin Act 436 to include “alcohol beverage” as an “intoxicant.” It was further revised by 2013 Wisconsin Act 83 to include “hazardous inhalant.”

3. 2005 Wisconsin Act 436 amended s. 940.225(2)(cm) to refer to the victim being under the influence to a degree which renders that person “incapable of giving consent” in place of “rendered the person incapable of appraising the person's conduct.” The statement in the instruction incorporates the key parts of the definition of “consent” in s. 940.225(4).

Act 436 did not amend the second sentence of s. 940.225(4), which provides that “consent is not an issue in alleged violations of sub. (2)( c), (cm) . . .” While “without consent” is not an element of this offense, evidence relating to consent may be relevant to the elements that refer to the victim being incapable of giving consent. Thus, the revised instruction does not include the statement found in the prior version that informs the jury that “consent is not a defense.” See, for example, Wis JI-Criminal 1211.

4. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant “has actual knowledge that the person is incapable of giving consent.” “Actual knowledge” replaced “knows” used in the prior version of the statute. The Committee interprets this change as emphasizing the subjective nature of the mental element required for this offense.

5. Section 940.225(2)(cm), as amended by 2005 Wisconsin Act 436, requires that the defendant “has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.” The 2006 revision of the instruction added the fifth element to reflect this addition to the statutory definition.