

**1212A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL 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 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 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 intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 1200B).<sup>1</sup>

2. (Name of victim) was under the influence of an intoxicant at the time of the sexual intercourse.

[ \_\_\_\_\_ is an intoxicant.]<sup>2</sup>

[“Intoxicant” means any alcohol beverage, hazardous inhalant, controlled substance, controlled substance analog or other drug, any combination thereof.]<sup>3</sup>

3. (Name of victim) was under the influence of an intoxicant to a degree which rendered (him) (her) incapable of giving consent.
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 intercourse while (name of victim) was incapable of giving consent.<sup>5</sup>

### **Meaning of Consent**

“Consent” means words or actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.<sup>6</sup>

### **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 1212A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1212, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1212 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)(cm): sexual intercourse with a person who is under the influence of an intoxicant. Wis JI–Criminal 1212 is drafted for sexual contact with a person who is under the influence of an intoxicant.

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. 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. 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.

3. This is the definition of “intoxicant” in § 940.225(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.”

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.

6. This is the definition provided in § 940.225(4).

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.”

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), (d), (g), (h), (i) . . .” 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 “consent is not a defense.” See, for example, Wis JI–Criminal 1211.