1213 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON THE DEFENDANT KNOWS IS UNCONSCIOUS — § 940.225(2)(d)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(d) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who the defendant knows is unconscious.

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) was unconscious[1] at the time of the sexual [contact] [intercourse].
3. The defendant knew that (name of victim) was unconscious at the time of the sexual [contact] [intercourse].[2]

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.

ADD THE FOLLOWING IF THERE IS EVIDENCE RELATING TO THE VICTIM'S CONDUCT THAT IS RELEVANT TO THE SECOND OR THIRD ELEMENTS.[3]

[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 unconscious) (or) (whether the defendant knew that (name of victim) was unconscious).]

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 1214 [for sexual intercourse offenses] and Wis JI-Criminal 1215 [for sexual contact offenses]. Those instructions were revised in 1983, 1990, and 1993. A revision combining the instructions as Wis JI-Criminal 1213 was published in 1996 and revised in 1998. This revision was approved by the Committee in December 2001 and involved adoption of a new format and nonsubstantive changes to the text.

The revised 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)(d) provides that it is second degree sexual assault if one "[h]as sexual contact or sexual intercourse with a person who defendant knows is unconscious." 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)(c), which applies where the victim "is unconscious or for any other reason unable to communicate unwillingness to an act." This statement in subsection (4)(c) appears to be the equivalent of the wording of § 940.225(2)(d).

The distinguishing feature of the more serious offense under subsection (2)(d) is that the defendant must know of the victim's unconscious condition. Such knowledge is not required where the presumption applies under subsection (4)(c), so in this sense the subsection (2)(d) offense requires greater proof than does the offense under subsection (3). However, "without consent" is not an element of the (2)(d) offense although 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. 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)(d).

1. The statute does not define "unconscious." The Committee decided not to include a definition in the text of the instruction because a definition would be most helpful if tied to the facts of the case. When a case involves a substantial question about the meaning of "unconscious," the following material may be helpful.

Webster's New Collegiate Dictionary defines "unconscious" as "not knowing or perceiving, or being unaware." The Committee believes the common meaning of unconscious includes the loss of awareness caused by intoxication, the taking of drugs, or heavy sleep. In State v. Curtis, 144 Wis.2d 691, 695-96, 424 N.W.2d 719 (Ct. App. 1988), the court held that "unconscious" under § 940.225(2)(a) includes "a loss of awareness which may be caused by sleep" and that it was proper for the trial court to instruct the jury in those terms.

The constitutionality of § 940.225(2)(d) was upheld in State v. Pittman, 174 Wis.2d 255, 496 N.W.2d 74 (1993). The court held that the statutory standard "provides clear notice that sexual intercourse with a person who is asleep is illegal." 174 Wis.2d 255, 277. Further, the statute "provides an objective standard for those applying the law," ibid., since sleep is within the common knowledge of the jury. (The jury in Pittman was instructed, in accord with Curtis, supra, that "unconsciousness is a loss of awareness which may be caused by sleep.") Pittman also affirmed the exclusion of expert testimony on the effects of alcohol on sleep and consciousness, holding that it was irrelevant and tended to convey to the jury the expert's belief that the complaining witness was lying.

2. Knowledge that the victim is unconscious is expressly required by § 940.225(2)(d).

3. Section 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (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 incapable of appraising her conduct; and, whether the defendant knew that the victim was under the influence to a degree that rendered her incapable of appraising her conduct.

