

1213A SECOND-DEGREE SEXUAL ASSAULT: SEXUAL 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 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 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) was unconscious² at the time of the sexual intercourse.
3. The defendant knew that (name of victim) was unconscious at the time of the sexual intercourse.³

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

[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 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

Wis JI-Criminal 1213A was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI-Criminal 1213, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI-Criminal 1213 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consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).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)(d): sexual intercourse with a person the defendant knows is unconscious. Wis JI-Criminal 1213 is drafted for sexual contact with a person the defendant knows is unconscious.

Third-degree and fourth-degree sexual assault are not lesser included offenses of this subsection because they require proof of an element that second-degree sexual assault of an unconscious victim does not. Specifically, proof that the victim did not consent to the sexual intercourse.

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 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 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,” id., 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.

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

4. Section 940.225(4) provides in part: “Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g), (h), and (i).” 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 his or her conduct and whether the defendant knew that the victim was under the influence to a degree that rendered him or her incapable of appraising his or her conduct.