1214 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE WITHOUT CONSENT WHILE AIDED AND ABETTED — § 940.225(2)(f)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(f) of the Criminal Code of Wisconsin, is committed by one who has sexual (contact) (intercourse) with another person without consent and is aided and abetted[1] by one or more other persons.

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) did not consent to the sexual (contact) (intercourse).

3. The defendant was aided and abetted by one or more other persons.

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.

Meaning of "Did Not Consent"[2]

"Did not consent" means that (name of victim) did not freely agree to have sexual

(contact) (intercourse) with the defendant. In deciding whether (name of victim) did not consent, you should consider what (name of victim) said and did, along with all the other facts and circumstances. This element does not require that (name of victim) offered physical resistance.[3]

Meaning of "Aiding and Abetting"

The defendant was aided and abetted if another person knew that the defendant was having or intended to have sexual [contact] [intercourse] without consent and either:

- provided assistance to the defendant; or,
- was willing to assist the defendant if needed and the defendant knew of the willingness to assist.

Assistance may be provided by words, acts, encouragement, or support.[4]

ADD THE FOLLOWING IF RAISED BY THE EVIDENCE.[5]

[However, a person does not aid and abet if the person is only a bystander or spectator and does nothing to assist or encourage the commission of a crime.]

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 1988 as Wis JI-Criminal 1217.1 [for sexual intercourse offenses] and Wis JI-Criminal 1217.2 [for sexual contact offenses]. Those instructions were revised in 1990. A revision combining the instructions as Wis JI-Criminal 1214 was published in 1996 and 2002. This revision was approved by the Committee in December 2021; it added to the comment.

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.

This offense was created by 1987 Wisconsin Act 245, effective date: April 21, 1988. A related offense is defined as first degree sexual assault by § 940.225(1)(c); it has the additional element of the "use or threat of force or violence." See Wis JI-Criminal 1205.

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. Section 940.225(2)(f) uses the phrase "aided or abetted" (emphasis added). Since traditional criminal statutes have referred to "aiding and abetting," the Committee has used that construction in the instruction. The Committee feels that this does not change the meaning of the statute or of the aiding and abetting concept. In State v. Thomas, 128 Wis.2d 93, 381 N.W.2d 567 (Ct. App. 1985), the court held that "aided or abetted" in § 940.225(1)(c) has the same meaning as the phrase "aids and abets" in § 939.05 and therefore is not unconstitutionally vague.

2. The definition of "consent," found in Wis. Stat. § 940.225(4), applies to prosecutions under § 940.225. The definition of "without consent," found in § 939.22(48), is applicable to other Criminal Code offenses but does not apply to prosecutions under § 940.225. Section 940.225(4) reads as follows:

> "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. Consent is not an issue in alleged violations of subs. (2)(c), (d) and (g). The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of § 972.11(2):
>
> (b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.
> (c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The definition of "without consent" used in the instruction is designed for the usual case where no special circumstances recognized by the statute as affecting consent are present. If the evidence raises an issue about the victim's being "competent to give informed consent," being unconscious, or being mentally

ill, see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for these special circumstances.

The instruction on "without consent" rephrases the statutory definition in the interest of clarifying it for the jury. First, it states the element in the active voice by requiring that the victim did not consent. Second, the Committee concluded that it was more clear to refer to consent as a freely given agreement which may be shown by words or actions rather than to reiterate the statute which refers to consent as "words or overt actions indicating a freely given agreement." No change in meaning is intended. It is more direct to speak of consent as an agreement, evidence of which may be provided by words or actions of the victim, along with the other facts concerning the incident.

If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

3. See State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980); State v. Clark, 89 Wis.2d 804, 275 N.W.2d 715 (1979).

4. The use of the aiding and abetting concept in § 940.225(1)(c) is somewhat different from that of traditional criminal statutes, because this statute provides for increased penalty for the principal actor where he is aided by others. The usual situation, for example, Wis. Stat. § 939.05(2)(b), Parties to Crime, involves defining the culpability of the aider and abettor. For further definition of "aiding and abetting," see Wis JI-Criminal 400 and the 1953 Judiciary Committee Report on the Criminal Code, Comment to § 339.05.

The requirement that the aider(s) must have known that the defendant was committing the sexual assault is added to the instruction on the basis of the definition of the aider's culpability in § 939.05. Section 939.05 refers to "intentionally aid and abets," which has been interpreted as "acting with knowledge or belief that another person is committing or intends to commit a crime." The Committee also concluded that the defendant must know of the aider's presence or willingness to assist.

Another question arising under this subsection relates to the liability of the aider. Is the aider guilty of second or third degree sexual assault? If aiding is established, the principal is guilty of the second degree offense. Usually, the aider is guilty of the same offense as the principal. In the sexual assault case, however, the crime the aider intended to aid was arguably a third degree offense, Sexual Intercourse Without Consent under § 940.225(3). The aiding is the only factor that elevates the offense as far as the principal is concerned. Does it also increase the seriousness for the aider? The Wisconsin Court of Appeals so held in State v. Curbello Rodriguez, 119 Wis.2d 414, 351 N.W.2d 758 (Ct. App. 1984), with respect to the same situation under § 940.225(1)(c).

5. The sentence in brackets is recommended for use when the evidence raises an issue whether the person actually gave assistance or merely stood by without intending to assist.