1216 SECOND DEGREE SEXUAL ASSAULT: SEXUAL CONTACT OR INTERCOURSE BY A CORRECTIONAL STAFF MEMBER — § 940.225(2)(h)

Statutory Definition of the Crime

Second degree sexual assault, as defined in § 940.225(2)(h) of the Criminal Code of Wisconsin, is committed by a correctional staff member who has sexual (contact) (intercourse) with an individual who is confined in a correctional institution.

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 was a correctional staff member.

   "Correctional staff member" means an individual who works at a correctional institution [and includes a volunteer].[1]

2. The defendant had sexual (contact) (intercourse) with (name of victim).[2]

   Consent to sexual (contact) (intercourse) is not a defense.[3]

3. (Name of victim) was confined in a correctional institution.

   (Name institution) is a correctional institution.[4]

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.

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 1216 was originally published in 2004 and revised in 2007, 2012, and 2018. This revision was approved by the Committee in December 2021; it added to the comment.

This instruction is drafted for violations of § 940.225(2)(h), created by 2003 Wisconsin Act 51, effective date: September 5, 2003.

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. This is the definition provided in § 940.225(5)(ad). The Committee recommends including the bracketed reference to a volunteer only when there is evidence that the defendant was a volunteer.

A Milwaukee County sheriff's deputy, assigned to work as a bailiff in the courthouse, is not a "correctional staff member" for purposes of § 940.225(2)(h), even though the deputy's duties included escorting inmates from the criminal justice facility to the courthouse holding cell. State v. Terrell, 2006 WI App 166, 295 Wis.2d 619, 721 N.W.2d 527.

2. The definition of the offense in § 940.225(2)(h) includes the following statement:

> This paragraph does not apply if the individual with whom the actor has sexual contact or sexual intercourse is subject to prosecution for the sexual contact or sexual intercourse under this section.

It is not clear to the Committee whether this statement presents an issue for the court or for the jury. In addition, it is not clear what "subject to prosecution" means. The legislative history indicates that this language was added to the original bill in response to concerns of the Attorney General that "the bill as [originally] drafted would make a crime any incident in which a correctional officer is a victim of a sexual assault." Letter of February 26, 2003, from Attorney General Lautenschlager to Reps. Bies and Albers, Co-Chairpersons, Assembly Committee on Corrections and the Courts. (Emphasis in original.)

In State v. Blum, an unpublished decision (No. 2010AP2363 CR, decided August 1, 2012), the court of appeals concluded that the "subject to prosecution" issue is a question of law for the court, not an affirmative defense that should be determined by the fact finder at trial. [Cited for informational purposes; see § 809.23(3)(b).]

3. "Without consent" is not an element of this offense because it is not included in the offense definition. Further, § 940.225(4) provides in part: "Consent is not an issue in alleged violations of sub. (2)(c), (cm), (d), (g),(h), and (i)." The Committee concluded that it may be helpful to advise the jury of this fact.

4. Section 940.225(5)(acm) provides:

> "Correctional institution" means a jail or correctional facility, as defined in s. 961.01(12m), a juvenile correctional facility, as defined in s. 938.02(10p), or a juvenile detention facility, as defined in s. 938.02(10r).

By following these cross references, one may find a statute that provides that a particular institution or facility is a correctional institution. See, for example, the list of "state prisons" in § 302.01. When a statute so provides, the Committee recommends advising the jury that, for example, "The Waupun Correctional Institution is a correctional institution." It will be for the jury to determine whether, in fact, the victim was confined to that institution.

A "person detained at his or her residence by virtue of participation in the home detention program is 'confined in a correctional institution' for purposes of § 940.225(2)(h)." State v. Hilgers, 2017 WI App 12, ¶17, 373 Wis.2d 756, 893 N.W.2d 261.