

**1217E SECOND-DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE BY A LAW ENFORCEMENT OFFICER WITH A PERSON DETAINED OR IN CUSTODY — § 940.225(2)(k)**

**Statutory Definition of the Crime**

Second-degree sexual assault, as defined in § 940.225(2)(k) of the Criminal Code of Wisconsin, is committed by a law enforcement officer who has sexual intercourse with any person who (is detained by any law enforcement officer, as provided under s. 968.24) (is in the custody of any law enforcement officer).

**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 law enforcement officer.

“Law enforcement officer” means any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed and sworn to enforce. [“Law enforcement officer” includes a university police officer, as defined in s. 175.42 (1) (b)].<sup>1</sup>

2. 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>2</sup>

Consent to sexual intercourse is not a defense.<sup>3</sup>

3. (Name of victim) was (detained by any law enforcement officer, as provided under s. 968.24) (in the custody of any law enforcement officer).

This applies (whether the custody is lawful or unlawful) (whether the detainment or custody is actual or constructive).<sup>4</sup>

[Section 968.24 provides that after having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.]<sup>5</sup>

### **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 1217E was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 1217B, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 1217B 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 drafted for violations of § 940.225(2)(k), created by 2021 Wisconsin Act 188 [effective date: March 19, 2022].

This instruction is for the type of second-degree sexual assault defined by § 940.225(2)(k): sexual intercourse by a law enforcement officer with a person detained or in custody. Wis JI–Criminal 1217B is drafted for sexual contact by a law enforcement officer with a person detained or in custody.

1. This is the definition provided in Wis. Stat. § 165.85(2)(c). The Committee recommends including the bracketed reference to a university police officer only when there is evidence that the defendant was a university police officer.

2. 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.

3. Section 940.225(2)(k) provides in part “Consent is not an issue in an action under this paragraph.” 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.

4. The definition of the offense in § 940.225(2)(k) provides this language. § 940.225 does not define “actual” or “constructive” custody.

5. Section 968.24 concerns the temporary questioning of a person in a public place without arrest. More specifically, the section is the statutory codification of “Terry stop” authority. Because the connection between the statutory offense and an on-the-street detention may be confusing to a jury, the Committee concluded it may be helpful to include the bracketed statement if the facts of the case so require.