

**1218A THIRD DEGREE SEXUAL ASSAULT: SEXUAL INTERCOURSE
WITHOUT CONSENT — § 940.225(3)(a)**

Statutory Definition of the Crime

Third degree sexual assault, as defined in § 940.225(3)(a) of the Criminal Code of Wisconsin, is committed by one who has sexual intercourse with another person without consent.

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).
2. (Name of victim) did not consent to the sexual intercourse.

Meaning of "Sexual Intercourse"

"Sexual intercourse" means any intrusion, however slight, of any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.¹

Meaning of "Did Not Consent"²

"Did not consent" means that (name of victim) did not freely agree to have sexual intercourse with the defendant. In deciding whether (name of victim) did not consent, you

should consider what [he] [she] said and did, along with all the other facts and circumstances.

This element does not require that (name of victim) offered physical resistance.³

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of third 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 II-Criminal 1218 and revised in 1983 and 1990. A revision renumbering it as Wis JI-Criminal 1218A was published in 1996. A revision in 2001 involved adoption of a new format and nonsubstantive changes to the text. This revision was approved by the Committee in June 2018; it reflects changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].

This instruction is for violations of § 940.225(3)(a): sexual intercourse without consent, as amended by 2017 Wisconsin Act 174. Act 174 amended former sub.(3) by splitting it into subdvs. (a) and (b). The text and the penalty were not changed.

See Wis JI-Criminal 1218B for violations under sub. (3)(b): sexual contact [as defined in § 940.225(5)(b)2. and 3.] without consent.

1. The alternatives for defining "sexual intercourse" are those found in Wis JI-Criminal 1200B. They are built in to this instruction for the convenience of users and to emphasize that this instruction is for third degree sexual assaults involving sexual intercourse, not third degree sexual assaults involving the new type of sexual contact created by 1995 Wisconsin Act 69. The definition of "sexual intercourse" is explained in the Comment to Wis JI-Criminal 1200R.

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).