

1218B THIRD DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT INVOLVING EJACULATION, ETC. — § 940.225(3)(b)**Statutory Definition of the Crime**

Third degree sexual assault, as defined in § 940.225(3)(b) of the Criminal Code of Wisconsin, is committed by one who has sexual contact 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 contact with (name of victim).
2. (Name of victim) did not consent to the sexual contact.

Meaning of "Sexual Contact"

Sexual contact requires

[intentional [penile ejaculation of ejaculate] [emission of (urine) (feces)] by the defendant upon any part of the body clothed or unclothed of (name of victim).]¹

[that the defendant intentionally caused (name of victim) to [ejaculate] [emit (urine) (feces)] on any part of the defendant's body, whether clothed or unclothed.]²

Sexual contact also requires that the defendant acted with intent to [become sexually aroused or gratified] [sexually degrade or humiliate (name of victim)].³

Deciding About Intent

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent.

Meaning of "Did Not Consent"⁴

"Did not consent" means that (name of victim) did not freely agree to have sexual contact 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.⁵

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

Wis JI-Criminal 1218B was originally published in 1996 and revised in 2002 and 2004. The 2004 revision involved a correction of an inadvertent error in the definition of consent. 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)(b), as amended by 2017 Wisconsin Act 174. For violations of sub. (3)(a), see Wis JI-Criminal 1218A. Act 174 amended former sub. (3) by splitting it into two subdivs. (a) and (b). The text and the penalty were not changed. This instruction applies only to sexual contact as defined in § 940.225(5)(b)2. and 3. which provide that sexual contact includes:

Sub. (b)2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant.

Sub. (b)3. For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

2017 Wisconsin Act 174 amended former sub. (3) by splitting it into subivs. (a) and (b). The text and the penalty were not changed. See Wis JI-Criminal 1218A for violations under sub. (3)(a): sexual intercourse without consent.

Unlike the other instructions for sexual contact offenses, this instruction builds in the applicable alternative specified in subs. (5)(b) 2. and 3. This is to emphasize that this instruction is only for those specific types of sexual contact. For sexual contact offense generally, see Wis JI-Criminal 1219.

1. This definition of "sexual contact" was created by 1995 Wisconsin Act 69 [effective date: December 2, 2095], which also created the offense addressed by this instruction.

2. The instruction phrases the alternatives as requiring that the defendant acted "with intent to" achieve one of the prohibited results. The statute refers to acting with "the purpose of ..." No change in meaning is intended.

Note that only the two identified alternatives apply to sexual contact involving intentional ejaculation or intentional emission of urine or feces. The "intent to cause bodily harm" alternative that applies to other types of sexual contact does not apply to the offense defined by this instruction. See Wis JI-Criminal 1200A.

3. This definition of "sexual contact" was created by 2005 Wisconsin Act 273 [effective date: April 20, 2006.]

4. 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.

5. 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).