2101B SEXUAL INTERCOURSE — § 948.01(6)

Meaning of "Sexual Intercourse"

INSERT THE ALTERNATIVE[S] SUPPORTED BY THE EVIDENCE INTO THE INSTRUCTION ON THE SEXUAL ASSAULT OFFENSE.

["Sexual intercourse" means any intrusion, however slight, by 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]

["Sexual intercourse" includes (cunnilingus) (fellatio).

(Cunnilingus means oral contact with the clitoris or vulva.)[2]

(Fellatio means oral contact with the penis.)[3]]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[The act of sexual intercourse must be either by the defendant or upon the defendant's instruction.][4]

["Sexual intercourse" does not include an intrusion for a proper non-sexual purpose, such as a medical examination or appropriate child care or treatment.][5]

COMMENT

Wis JI-Criminal 2101B was originally published in 1996 and revised in 2001, 2006, and 2007. This revision added bracketed material to the text at footnote 5 and was approved by the Committee in February 2010.

The definitions provided here were formerly provided in each instruction for a sexual assault of a child offense involving sexual intercourse. The 1996 revision combined sexual contact and sexual intercourse offenses into one instruction, making it necessary to refer to this instruction for definition of "sexual intercourse" and to Wis JI-Criminal 2101A for definition of "sexual contact."

The 2006 revision changed the definitions of "cunnilingus" and "fellatio." See footnotes 2 and 3.

A similar instruction is provided in Wis JI Criminal 1200B for sexual assault offenses under § 940.225. Though there is one difference in the definitions of "sexual intercourse" found in § 948.01(6) and § 940.225(5)(c), the Committee concluded that no substantive difference is intended. Thus, the text of Wis JI Criminal 2101B and Wis JI Criminal 1200B is the same. Note that both the § 948.01(6) and § 940.225(5)(c) definitions are substantially broader than the one provided in § 939.22(36).

1. The definition of "sexual intercourse" is a paraphrase of the complete statutory definition found in § 948.01(6). NOTE: The definition in § 948.01(6) is substantially broader than the one provided in § 939.22(36) and is essentially the same as the one provided in § 940.225(5)(b).

2. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, 289 Wis.2d 222, 710 N.W.2d 482, which held that defining cunnilingus as "oral stimulation . . ." is not required by the "statutory scheme of the sexual assault law" and "offends the principles underpinning the sexual assault law." Par. 14. The former definition was taken from Webster's New Collegiate Dictionary, but the court of appeals held that "a standard dictionary definition should not by default become the legal definition of a term if it unfairly or inaccurately states the law or misconveys the legislative intent." Par. 17. The court stated: "We think a better resource is BLACK'S LAW DICTIONARY 380 (6th ed. 1990) which more neutrally defines cunnilingus as '[a]n act of sex committed with the mouth and the female sexual organ.'" Par. 17. The Committee decided not to use that definition because it refers to a "sex act," which is inconsistent with the emphasis of Harvey that a purpose of the sexual assault law was to recognize that sexual assaults were crimes of violence, not of sexual passion. Par. 15. As noted in the Harvey decision, the current edition of Black's does not define the term. [See Par. 17, footnote 6.] The Committee believes the revised definition in the instruction is faithful to the substance of the Harvey decision.

3. This definition was revised in 2006 in light of the decision in State v. Harvey, 2006 WI App. 26, see note 2, supra. Harvey was concerned only with the definition of "cunnilingus," but the Committee concluded that the logic of the court's analysis would also apply to defining fellatio as "oral stimulation," which the instruction formerly did. The former definition had been approved in State v. Childs, 146 Wis.2d 116, 430 N.W.2d 353 (Ct. App. 1988).

4. This phrase appears in the definition of "sexual intercourse" in § 948.01(6) and in the similar definition found in § 940.225(5)(b).

In State v. Olson, 2000 WI App. 158, 238 Wis.2d 74, 616 N.W.2d 144, the court construed the definition provided in § 948.01(6) to require that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to perform one of them on him- or herself." Olson, ¶10. The Committee concluded that the bracketed sentence in the instruction adequately addresses the Olson requirement. The Olson decision also implies that "allowing" the sexual intercourse to take place may also satisfy the statute (see ¶12), but the holding is limited to the "upon the defendant's instruction" issue.

In State v. Lackershire, 2007 WI 74, 288 Wis.2d 609, 707 N.W.2d 891, the court held there was a defect in establishing a factual basis for a guilty plea to second degree sexual assault of a child, where the defendant claimed to be the victim of a sexual assault by the "child." The court held that being a victim constitutes a defense and that the trial court should have explored that issue as part of the factual basis inquiry: ". . . If the defendant was raped, the act of having sexual intercourse with a child does not

constitute a crime. § 948.01(6)." ¶29. The court relied on State v. Olson, supra, to conclude that the entire definition in § 948.01(6) is modified by the phrase "by the defendant or upon the defendant's instruction." Thus, sexual intercourse resulting from being forced to engage in it by the other party is not "by the defendant or upon the defendant's instruction."

5. This statement is based on State v. Lesik, 2010 WI App 12, ___ Wis.2d ___, ___ N.W.2d ___, [2008 AP 3072-CR]. The court of appeals construed the definition of "sexual intercourse" in § 948.01(6) narrowly and agreed with the trial court's conclusion that "it would be 'patently and obviously absurd' to make medical personnel and parents guilty of a Class B felony for performing 'certain appropriate conduct relative to proper treatment of children.'" Lesik, ¶10. The court of appeals held that the trial court was correct in giving the statute a limiting construction by adding the following to the jury instruction:

> "Sexual intercourse" does not, however include such an intrusion for a proper non-sexual purpose, such as a medical examination or appropriate child care or treatment.

Lesik, ¶5.

Also see, State v. Neumann, 179 Wis.2d 687, 712, n. 14, 508 N.W.2d 54 (Ct. App. 1993), reaching the same conclusion with respect to the definition of "sexual intercourse" applicable to prosecutions under § 940.225.

