1219 FOURTH DEGREE SEXUAL ASSAULT: SEXUAL CONTACT WITHOUT CONSENT — § 940.225(3m)

Statutory Definition of the Crime

Fourth degree sexual assault, as defined in § 940.225(3m) 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"

FOR SEXUAL CONTACT INVOLVING THE DEFENDANT TOUCHING THE VICTIM:

[Sexual contact is an intentional touching by the defendant of the (name intimate part)[1] of (name of victim). The touching may be of the (name intimate part) directly or it may be through the clothing. The touching may be done by any body part or by any object, but it must be an intentional touching.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm

to (name of victim).) (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[2]]

FOR SEXUAL CONTACT INVOLVING THE VICTIM BEING CAUSED OR ALLOWED TO TOUCH THE DEFENDANT:

[Sexual contact is an intentional touching by (name of victim) of the (name intimate part)[3] of the defendant, if the defendant intentionally caused[4] (name of victim) to do that touching. The touching may be of the (name intimate part) directly or it may be through the clothing.

Sexual contact also requires that the defendant acted with intent to (cause bodily harm to (name of victim).) (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)[5]]

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"[6]

"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.[7]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both elements of fourth 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 1219 was originally published in 1980 and revised in 1983, 1990, 1992, 1996, 2002, and 2004. This revision was approved by the Committee in June 2025; it amended the "Meaning of 'Did Not Consent'" section to use gender-neutral language.

This instruction is for fourth degree sexual assault as defined in § 940.225(3m). It applies to cases involving "sexual contact" as defined in § 940.225(5)(b)1. A new type of third degree sexual assault was created by 1995 Wisconsin Act 69, effective date: December 2, 1995. It applies only to sexual contact as defined in § 940.225(5)(b)2., which provides that sexual contact includes:

> 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.

See Wis JI-Criminal 1218B for an instruction for third degree sexual assault based on the new definition of "sexual contact."

Unlike the other instructions for sexual contact offenses, this instruction builds in the alternatives for defining "sexual contact" that are found in Wis JI-Criminal 1200A. This was done for the convenience of users and to emphasize that the definition of a new type of sexual contact created by 1995 Wisconsin Act 69 [see above] does not apply to fourth degree sexual assault as defined in § 940.225(3m).

1. Section 939.22(19) defines "intimate parts": "'Intimate parts' means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved in the sexual contact.

In State v. Morse, 126 Wis.2d 1, 374 N.W.2d 388 (Ct, App. 1985), the court of appeals held that a trial court did not improperly broaden the scope of the sexual contact definition in § 939.22(19) by defining "intimate part" to include "the vaginal area."

2. Each alternative definition includes the requirement that the contact be for a prohibited purpose. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded

that it was preferable to deal with at as a second part of the sexual contact definition. The Committee also concluded that including purpose as part of each alternative will reduce the possibility that it would be inadvertently overlooked. Failure to include the purpose of the contact as a part of the jury instruction is reversible error. State v. Krueger, 2001 WI App 14, 240 Wis.2d 644, 623 N.W.2d 211. Likewise, failure to include reference to purpose when accepting a guilty plea may be grounds for withdrawal of the plea. State v. Bollig, 2000 WI 6, 232 Wis.2d 561, 605 N.W.2d 199.

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.

3. See note 1, supra.

4. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "causes" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit.

For sexual assault offenses against children, another alternative exists for this type of sexual contact: allowing a child to touch an intimate part of the defendant. This alternative was recognized in State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). See the discussion in note 5, Wis JI-Criminal 2101A. Under § 940.225, certain adult victims are in a situation very similar to that of a child victim: persons suffering from mental illness or deficiency [sub. (2)(c)]; persons under the influence of an intoxicant [sub. (2)(cm)]; or, patients or residents [sub. (2)(g)]. However, the Committee decided not to incorporate the "or allowed" alternative in this instruction in the absence of clear authority extending the Traylor decision beyond offenses against children.

Applied literally to a case where the victim is caused to touch the defendant, § 940.225(5)(b) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts. . . ." The Committee concluded that it is proper to interpret this definition in a manner that focuses on the defendant's, rather than the victim's, intent. Thus, the instruction refers simply to "a touching" by the victim that the defendant "intentionally caused." This is consistent with the Traylor decision's interpretation of almost identical language in the definition of "sexual contact" in § 948.01(5)(a).

The constitutionality of the sexual contact definition (prior to its amendment by Chapter 309, Laws of 1981) was considered by the Wisconsin courts in several cases. The constitutionality of the basic definition was upheld in State ex rel. Skinkis v. Treffert, 90 Wis.2d 528, 280 N.W.2d 316 (Ct. App. 1979). In State v. Nye, 105 Wis.2d 63, 312 N.W.2d 826 (1981), the Wisconsin Supreme Court summarily affirmed a Wisconsin Court of Appeals decision (101 Wis.2d 398, 302 N.W.2d 83 (Ct. App. 1981)) which held that it was error to include in a jury instruction the former statutory language "if that touching can reasonably be construed to be for the purpose of sexual arousal or gratification." Chapter 309, Laws of 1981, eliminated the phrase from § 940.225(5)(b); the standard instructions had never included it in the definition of sexual contact.

5. See note 2, supra.

6. 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.

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).