2120A SEXUAL EXPLOITATION OF A CHILD: AFFIRMATIVE DEFENSE — § 948.05(1)(a)

[USE THIS INSTRUCTION IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(a) of the Criminal Code of Wisconsin, is committed by one who employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording[2] or displaying in any way the conduct, with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant (employed) (used) (persuaded) (induced) (enticed) (coerced) (name of child) to engage in sexually explicit conduct.[4]

   [Consent by (name of child) is not a defense.][5]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][6]

3. The defendant acted for the purpose of (recording) (displaying in any way) the sexually explicit conduct.

["Record" means to reproduce an image or a sound or to store data representing an image or a sound.][7]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[8]

"Sexually explicit conduct" means[9] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[10]

Consider Whether the Defense is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[11]

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[12]

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[13]

If you find the defendant guilty, you must answer the following question:

Had the defendant attained the age of 18 years at the time of the offense?

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

Wis JI-Criminal 2120A was approved by the Committee in June 2010. This revision was approved by the Committee in July 2019; it added to the Comment to reflect changes made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

NOTE: The instruction previously designated as Wis JI-Criminal 2120A was renumbered JI 2121A in 2010.

This instruction is for a case involving a violation of sub. (1)(a) of § 948.05 where there is evidence of the affirmative defense defined in sub. (3) of the same statute. See Wis JI-Criminal 2120 for an instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

The definition of the affirmative defense in § 948.05(3) was amended by 1999 Wisconsin Act 3; effective date: May 13, 1999. The defense was limited to violations of subs. (1)(a), (1)(b), and (2) and requirements that the defendant's reasonable belief be supported by some sort of documentary proof of age exhibited by the child were deleted. The defense now requires only that "the defendant had reasonable cause to believe that the child had attained the age of 18 years."

The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by providing a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations § 948.05.

1. Wis JI-Criminal 2120A provides instruction for violations of § 948.05(1)(a) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(a) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

6. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2120A.

7. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

8. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the recording was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

10. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

11. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

12. This statement is included to assure that both options for a not guilty verdict are clearly presented:

(1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and

(2) not guilty even though the elements are proven, because the defense has been established.

13. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age

of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), at the time and place charged in the information.
>
> We, the jury find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"