

218A CHIPS: ABUSE BY SEXUAL EXPLOITATION: VIOLATION OF WIS. STAT. § 948.05(1)(b) [WIS. STAT. § 48.13(3) and § 48.02(1)(c)]

The petition in this case alleges that (child) has been the victim of abuse. Your role as jurors will be to answer the following question in the special verdict:

1. Was (child) the victim of abuse?

The burden is on (petitioner) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that the question should be answered "yes."

In this case, "abuse" means sexual exploitation. Sexual exploitation of a child occurs when a person records or displays in any way the child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.

The burden is on (petitioner) to establish that the following three elements were present:

First, that some person (photographed) (filmed) (videotaped) (recorded the sound of) (displayed in any way) (child) while (child) was engaged in sexually explicit conduct.

Second, that this person knew that (child) was engaged in sexually explicit conduct.

Third, that (child) had not attained the age of 18 years.¹

"Sexually explicit conduct" means actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of intimate parts). [Emission of semen is not required.]

(Petitioner) is not required to prove that an alleged abuser had knowledge of (child)'s age, and any mistake regarding (child)'s age is not a defense.² Similarly, consent is not an issue, and any consent by (child) is not a defense.

While the burden is on (petitioner) to establish that abuse occurred, (petitioner) need not prove who caused the abuse.

If you are convinced by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (child) was the victim of abuse, you should answer the question in the special verdict "yes." If you are not so convinced, you must answer the question "no."

SPECIAL VERDICT

1. Was (child) the victim of abuse?

Answer: _____
Yes or No

COMMENT

Wis JI-Children 218.1 and comment were approved in 1997 and revised in 2004. The instruction was renumbered JI-Children 218A in the 2005 edition. The instruction was revised in 2009 and 2010. An editorial change was made to the comment in 2005. The comment was revised in 2008 and 2009. The notes were revised in 2010.

This instruction is for use when jurisdiction is alleged under subsections 48.13(3) and 48.02(1)(c), which define "abuse" by reference to the crime of sexual exploitation of a child. Wis. Stat. § 948.05.

Wis. Stat. § 48.13(3) provides as follows:

48.13 Jurisdiction over children alleged to be in need of protection or services.

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

- (3) Who has been the victim of abuse, as defined in s. 48.02(1)(a), (b), (c), (d), (e), (f), or (g), including injury that is self-inflicted or inflicted by another

Wis. Stat. § 48.02(1)(c) defines "abuse" by reference to § 948.05:

(1) "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:

(c) A violation of s. 948.05.

Wis. Stat. § 948.05 covers sexual exploitation of a child. See also Wis JI-Criminal 2120 and 2120A.

NOTES

1. **Directed Verdict.** While it might be appropriate to "direct a verdict" on the element of age, some finding needs to be made by the court or jury as to this element. See Special Materials, SM-2, at the end of this publication.

2. **Affirmative Defense.** Subsection 948.05(3) provides that it is an affirmative defense if the defendant had reasonable cause to believe that the child had attained the age of 18. It is unlikely that this will ever be an issue in a CHIPS case, but if the facts support this defense, the jury should be instructed as follows:

The petitioner is not required to prove that the alleged abuser had knowledge of (child)'s age, and a mistake regarding (child)'s age is not, by itself, a defense. However, the law further provides that it is a defense to this crime if the alleged abuser had reasonable cause to believe that (child) had attained the age of 18 years. The burden is on (parent) to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that this defense is established.

While this defense raises a unique question as to where the burden lies in a CHIPS case, particularly if the alleged abuser is not the parent, the most reasonable choice is to assign the burden to the parent.

See Wis JI-Criminal 2120A.