

**1392 INVASION OF PRIVACY: USE OF A SURVEILLANCE DEVICE — § 942.08(2)(a)****Statutory Definition of the Crime**

Invasion of privacy, as defined in § 942.08(2)(a) of the Criminal Code of Wisconsin, is committed by one who knowingly installs a surveillance device in any private place, or uses a surveillance device to observe in a private place, with the intent to observe any nude or partially nude person without the consent of that person.

**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 three elements are present.

**Elements of the Crime That the State Must Prove**

1. The defendant knowingly (installed a surveillance device in a private place) (used a surveillance device to observe in a private place).<sup>1</sup>
2. The defendant intended to use the surveillance device to observe any nude or partially nude person.
3. The defendant intended to observe a nude or partially nude person without the consent of that person.

**Meaning of “Surveillance Device”**

“Surveillance device” means any device that can be used to observe activities of another person. [It includes a peephole.]<sup>2</sup>

### Meaning of “Private Place”

“Private place” means a place where a person may reasonably expect to be safe from being observed without his or her knowledge and consent.<sup>3</sup>

### Meaning of “Nude or Partially Nude Person”

“Nude or partially nude person” means [any human being who has less than fully and opaquely covered genitals, pubic area or buttocks] [any female human being who has less than a fully opaque covering over any portion of a breast below the top of the nipple] [any male human being with covered genitals in a discernibly turgid state].<sup>4</sup>

### Deciding About Intent and Knowledge

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

### Jury’s Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS I FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.<sup>5</sup>

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

Was (name of victim) under 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 1392 was originally published in 2007 and revised in October 2016 to reflect changes made to § 942.08 by 2015 Wisconsin Acts 292 and 320. This revision was approved by the Committee in February 2020; it added to the comment.

This instruction is for a violation of sub. (2)(a) of §942.08. Three additional offenses are defined in subs. (2)(b), (c), and (d). See Wis JI-Criminal 1395 for violations of sub. (2)(d); uniform instructions have not been drafted for the other two offenses.

1. 2019 Wisconsin Act 72 [effective date: January 23, 2020] created a narrow exception in regard to the installation of a surveillance device by an owner of real estate in connection with the sale of the real estate. See § 995.60(2). This exception does not apply to surveillance devices installed in bathrooms or washrooms. § 995.60(3).

2. This is a simplification of the definition provided in s. 942.08(1)(c). The Committee concluded that referring to “device” covered the other terms used in the statutory definition: “instrument, apparatus, implement, mechanism or contrivance.” While referring to a device that “can be used” is arguably broader than the statute’s “used, designed to be used to observe, or capable of observing,” any potential problem is cured by the second element of the offense, which requires that the defendant intended to use the device to observe a nude or partially nude person.

3. This is the definition provided in s. 942.08(1)(b).

4. This is the definition provided in s. 942.08(1)(a), without change, except for bracketing separable parts of the definition. The applicable bracketed definition should be selected.

5. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.08: the offense is a Class I felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.08(4). The instruction reflects this change by providing a special question to be used where the Class I felony is charged. If the Class I felony is not charged, the instruction should be used without the special question.