

1396 REPRESENTATIONS DEPICTING NUDITY — § 942.09(2)(am)1.**Statutory Definition of the Crime**

Section 942.09(2)(am)1. of the Criminal Code of Wisconsin is violated by a person who captures an intimate representation without the consent of the person depicted under circumstances in which he or she has a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted does not consent to the capture of the intimate representation.

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 captured an intimate representation.

Meaning of "Captures a Representation"

"Captures a representation" means takes a photograph, makes a motion picture, videotape, recording, or other visual or audio representation, or records or stores in any medium data that represents a visual image.¹

Meaning Of "Intimate Representation"

"Intimate representation" means (a representation of a nude or partially nude person) (a representation of clothed, covered, or partially clothed or covered

genitalia or buttock that is not otherwise visible to the public) (a representation of a person urinating, defecating, or using a feminine hygiene product) (a representation of a person engaged in sexual intercourse or sexual contact).²

[Meaning of "Nude or Partially Nude Person"]³

["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).]

2. The defendant captured the intimate representation without the consent of the person who is depicted.

Meaning Of "Without Consent"

"Without consent" means that (name) did not freely agree to the defendant capturing the intimate representation.⁴

3. The person was depicted under circumstances in which (he) (she) had a reasonable expectation of privacy.

Meaning of "Reasonable Expectation of Privacy"⁵

"Reasonable expectation of privacy" requires:

- that the person who was depicted nude had an actual expectation of privacy at the time in question; and

- that the expectation of privacy was reasonable.
4. The defendant knew or had reason to know that the person who is depicted did not consent to the capture of the intimate representation.

Jury's Decision

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

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS H FELONY AND THERE IS EVIDENCE THAT THE VICTIM HAD NOT ATTAINED THE AGE OF 18 YEARS AT THE TIME OF THE OFFENSE.⁶

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 1396 was originally published in 2002 and revised in 2007, 2009, and twice in 2016. This revision was approved by the Committee in December 2016; it reflects changes made to § 942.09 by 2015 Wisconsin Acts 292, 320, and 370.

This instruction is for a violation of sub. (2)(am)1. of § 942.09. Section 942.09 was formerly § 944.025, the original version of which was found to be unconstitutional in *State v. Stevenson*, 2000 WI 71, 236 Wis.2d 86, 613 N.W.2d 90. Section 944.025 was amended by 2001 Wisconsin Act 16, but those changes were superseded by 2001 Wisconsin Act 33, which renumbered the statute § 942.09 [effective date: December 18, 2001].

Two other offenses are defined in § 942.09(2)(am): making a reproduction of a representation captured in violation of sub. (2)(a) [see sub. (2)(am)2.]; and, possessing, distributing, or exhibiting a representation captured in violation of sub. (2)(a) [see sub. (2)(am)3.]. Uniform instructions have not been drafted for those offenses.

For violations of §§ 942.09(3m)(a)1. and 2., see Wis JI-Criminal 1398A and 1398B.

Subsection (2)(bm) of § 942.09 creates an exception for representations of nude children, captured or possessed by parents, that do not constitute violations of § 948.05, Sexual Exploitation of a Child, or § 948.12, Possession of Child Pornography. Subsection (2)(cm) extends the exception to those who receive a representation covered by sub. (2)(am) in a non-commercial context. Both provisions were amended by 2015 Wisconsin Act 370 [effective date: April 21, 2016]. Act 370 also created an exception to providers of an interactive computer service or an information service or telecommunications service if the representation is provided by a third party or the representation is provided to a person who posts or publishes a private representation that is newsworthy or of public importance. See § 942.09(2)(dm).

In State v. Adams, 2015 WI App 34, 361 Wis.2d 766, 863 N.W.2d 640, the defendant appealed his conviction for violating § 942.09(2)(am)1. He videotaped his sexual activity with a prostitute and argued that he had a legitimate reason for doing so – "to memorialize their illicit encounter in case she overdosed on drugs or later accused him of beating her up." ¶1. The court rejected the argument: "The victim did not relinquish her reasonable expectation of privacy by engaging in commercial sexual activity. Recording a nude person for legitimate reasons is not an element the state has to disprove and Adams's reasons are no defense to the crime." ¶1.

In State v. Schmucker, [No. 2014AP2165-CR] [Not published], the court of appeals affirmed a conviction for an attempt to violate § 942.09(2)(am)1., capturing a representation of nudity, based on taking a picture up a woman's skirt without consent. [Cited for informational purposes; see § 809.23(3)(b).] 2015 Wisconsin Act 80 [Eff. Date: Nov. 13, 2015] created § 942.08(3) to prohibit using a device to view under the outer clothing of an individual. Wis JI-Criminal 1395A has been approved as an instruction for this offense.

1. This is the definition provided in § 942.09(1)(a), without change. The references to "recording" and "audio" representations were added by 2015 Wisconsin Act 292 [effective date: April 1, 2016].

2. This is the definition provided in § 942.09(1)(ag), as created by 2015 Wisconsin Act 292 [effective date: April 1, 2016]. That definition provides a cross-reference to §§ 940.225(5)(b) and (c) for definitions of "sexual contact" and "sexual intercourse." See Wis JI-Criminal 1200A [sexual contact] and 1200B [sexual intercourse].

3. Add this definition when the basis for the representation being an "intimate representation" is that it involved a nude or partially nude person. The definition is the one provided in § 942.08(1)(a), which applies to this offense because of a cross-reference in § 942.09(1)(am).

4. § 942.09(1)(ae) defines "consent":

... words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to the act. A person who has not attained the age of 18 is incapable of consent. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

1. A person suffering from a mental illness or defect that impairs capacity to appraise personal conduct.
2. A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

The statutory definition is modeled on the one provided in § 940.225(4) for sexual assault. The instruction defines "without consent" in essentially the same manner as the instructions for sexual assault under § 940.225. A complete explanation of that definition is provided in, for example, footnote 2, Wis JI-Criminal 1201. Also see Wis JI-Criminal 1200C, 1200D, and 1200E, which provide alternatives for the victim's not being competent to give informed consent, suffering from a mental illness or defect, or being unconscious.

5. The definition of "reasonable expectation of privacy" is based on one used in the 2002 version of this instruction. The note in that instruction stated that the definition was based on the one used for 4th Amendment purposes.

In State v Nelson, 2006 WI App 124, 294 Wis.2d 578, 718 N.W.2d 168, the court of appeals acknowledged Wis JI-Criminal 1396 and the footnote referring to the 4th Amendment meaning of the term:

The comment does not purport to be an analysis of whether "reasonable expectation of privacy" was intended by the legislature to import all Fourth Amendment case law applying this term, as Nelson argues. Moreover, there is no need to resort to Fourth Amendment case law, as opposed to the language of the statute, to arrive at the definition the comment refers to: the common and ordinary meaning of "a person who has a reasonable expectation of privacy" is that the person actually has an expectation of privacy and the expectation is a reasonable one.
2006 WI App 124, footnote 7.

The Committee believes the definition in the instruction is consistent with the Nelson decision.

In State v. Jahnke, 2009 WI App 4, 316 Wis.2d 324, 762 N.W.2d 696, the defendant argued that because his girlfriend knowingly exposed her nude body to him while he was secretly videotaping her, she had no "reasonable expectation of privacy." The court of appeals rejected the argument, concluding that "the phrase 'reasonable expectation of privacy' in Wis. Stat. § 942.09(2)(am)1. means a reasonable expectation under the circumstances that one will not be recorded in the nude." 2009 WI App 4, ¶14.

In State v. Adams, 2015 WI App 34, 361 Wis.2d 766, 863 N.W.2d 640, the court of appeals rejected the defendant's argument that a prostitute did not have a reasonable expectation of privacy when engaged in sexual activity with him: "Permission to be viewed in the nude does not mean permission to be recorded in the nude . . . That Adams and the woman were engaged in the crime of prostitution does not mean that the woman relinquished her reasonable expectation of privacy under § 942.09(2)(am)1." ¶5.

6. 2015 Wisconsin Act 320 [effective date: April 1, 2016] changed the penalty structure for violations of sec. 942.09: the offense is a Class H felony if the victim had not attained the age of 18 years at the time of the offense. See § 942.09(2)(dr). The instruction reflects this change by providing a special question to be used where the Class H felony is charged. If the Class H felony is not charged, the instruction should be used without the special question.