

2101A SEXUAL CONTACT — § 948.01(5)

SELECT ONE OF THE FOLLOWING ALTERNATIVES RELATING TO THE TYPE OF SEXUAL CONTACT AND INSERT IT IN THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.¹

Meaning of "Sexual Contact"

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING OF THE INTIMATE PARTS OF THE VICTIM:

[Sexual contact is an intentional touching of the (name intimate part)² of (name of victim) (by the defendant) (by another person upon the defendant's instruction)³. 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 (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)⁴

FOR SEXUAL CONTACT INVOLVING INTENTIONAL TOUCHING BY THE VICTIM OF THE INTIMATE PARTS OF THE DEFENDANT OR OF ANOTHER PERSON:

[Sexual contact is a touching by (name of victim) of the (name intimate part)⁵ (of the defendant) (of another person upon the defendant's instruction),⁶ if the defendant intentionally caused or allowed⁷ (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 (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)⁸

FOR SEXUAL CONTACT INVOLVING INTENTIONAL EJACULATION OR INTENTIONAL EMISSION OF URINE OR FECES UPON THE COMPLAINANT:

[Sexual contact is intentional penile ejaculation of ejaculate or intentional emission of urine or feces (by the defendant) (by another person upon the defendant's instruction)⁹ upon any part of the body clothed or unclothed of (name of victim).¹⁰

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)¹¹

FOR SEXUAL CONTACT INVOLVING INTENTIONALLY CAUSING THE VICTIM TO EJACULATE OR EMIT URINE OR FECES ON ANY PART OF THE DEFENDANT'S BODY:

[Sexual contact is ejaculation or emission of urine or feces by (name of victim) on any part of the defendant's body, clothed or unclothed, which the defendant intentionally causes.¹²

Sexual contact also requires that the defendant acted with intent to (become sexually aroused or gratified.) (sexually degrade or humiliate (name of victim).)¹³

GIVE THE FOLLOWING IN ALL CASES.

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.

CONTINUE WITH THE INSTRUCTION FOR THE SEXUAL ASSAULT OF A CHILD OFFENSE.

COMMENT

Wis JI-Criminal 2101A was originally published in 1996 and revised in 1999, 2001, 2002, and 2003. This revision was approved by the Committee in October 2006; it reflected changes made by 2005 Wisconsin Acts 273 and 435.

This instruction provides definitions of "sexual contact" that are to be integrated into the instruction for sexual assault of a child offenses involving sexual contact as appropriate to the facts of the case. The material provided here was formerly included in the text of each offense instruction, dividing the sexual contact definition into two separate elements: one involving the type of touching; the other involving the purpose of the touching. When a new alternative was added to the statutory definition of sexual contact by 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing this separate instruction with all the alternatives for both the type of touching and the purpose of the touching. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instruction that is tailored to the facts of the case.

A similar instruction is provided at Wis JI-Criminal 1200A for offenses in violation of § 940.225. This instruction differs in several ways, due to differences between the statutory definition of "sexual contact" provided in § 948.01(5), addressed in this instruction, and the definition of the same term provided in § 940.225(5)(b), addressed in Wis JI-Criminal 1200A. This instruction should be used only for violations of § 948.02.

The following definition of "sexual contact" is provided in § 948.01(5), as amended by 2005 Wisconsin Acts 273 and 435 (effective date: June 6, 2006):

(5) "Sexual contact" means any of the following:

(a) Any of the following types of intentional touching whether direct or through clothing if that intentional touching is either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:

1. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

2. Intentional touching by the complainant, by the use of any body part or object, of the defendant's intimate parts or, if done upon the defendant's instructions, the intimate parts of another person.

(b) Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by another person 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.

(c) For the purpose of sexually degrading or humiliating the complainant or sexually arousing or gratifying the defendant, intentionally causing the complainant to ejaculate or emit urine or feces on any part of the defendant's body, whether clothed or unclothed.

1. The definition of "sexual contact" in § 948.01(5) identifies two types of intentional touchings and two alternatives involving intentional emission of bodily substances. The instruction provides separate alternatives for each alternative, one of which should be selected and added to the instruction for the sexual assault of a child offense.

Each alternative includes the second part of the statutory sexual contact definition: that the contact was for a sexual purpose. See note 4, below.

2. 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."

A child's testimony referring to her "private," her "potty place," and "between her legs" was sufficient to support a jury finding that the defendant touched her "groin, vagina, or pubic mound." State v. Brunette, 220 Wis.2d 431, 453-54, 583 N.W.2d 174 (Ct. App. 1998).

"[T]he plain language of Wis. Stat. § 939.22(19) is meant to include a female and a male breast because each is 'the breast . . . of a human being' and thereby the touching of a [15 year old] boy's breast constitutes 'sexual contact' within the meaning of Wis. Stat. § 948.02(2)." State v. Forster, 2003 WI App 29, 260 Wis.2d 149, 659 N.W.2d 144.

3. "By another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

4. Each alternative definition includes the requirement that the contact be for one of two prohibited purposes. Earlier versions of the instructions included the purpose as a separate element, but the Committee concluded that it was preferable to deal with it 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; State v. Jipson, 2003 WI App 222, 267 Wis.2d 467, 671 N.W.2d 18; and, State v. Nichelson, 220 Wis.2d 214, 582 N.W.2d 460 (1998).

The two purposes set forth as alternatives are the only two contained in the definition of "sexual contact" provided in § 948.01(5). The definition of "sexual contact" in § 940.225(5)(b) includes touching which "contains the elements of actual or attempted battery . . ." The Committee has interpreted this as a "purpose to cause bodily harm," but note that this purpose does not apply to offenses under § 948.02.

The instruction phrases the two 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.

5. See note 2, supra.

6. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

7. The instruction refers to the touching of the defendant by the complainant as a touching which the defendant "caused or allowed" the complainant to do. The statute does not expressly provide for the "causing" alternative, but the Committee concluded that the requirement is implicit. The "or allowed" alternative was added after the Wisconsin Court of Appeals approved an instruction to which it had been added. State v. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992). In Traylor, the court rejected the defendant's argument that sexual contact requires an affirmative act and that mere passivity is not "intentional touching" as contemplated by the statute:

. . . the defendant does not have to initiate sexual contact with a child. If the defendant allows the contact, that is sufficient to constitute intentional touching because it indicates that the defendant had the requisite purpose of causing sexual arousal or gratification. 170 Wis.2d 393, 404.

In a footnote, the court emphasized that there must be evidence that a defendant allowed the touching:

The mere fact of a child's touching an adult does not raise the inference [that the defendant sanctioned the touching for the purpose of sexual arousal or gratification]. There might indeed be evidence in a specific case that the adult called an immediate halt to this activity. Absent other evidence that the event was sanctioned by the adult, the mere fact that a touching took place is not the same as "allowing" it. 170 Wis.2d 393, 404, note 2.

Applied literally to a case where the victim is caused to touch the defendant, § 948.01(5)(a) requires an "intentional touching by the complainant . . . of the . . . defendants' intimate parts . . ." The Committee concluded that the Traylor decision interpreted 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 or allowed."

8. See note 4, supra.

9. "Of another person upon the defendant's instruction" was added by 2005 Wisconsin Act 435, effective date: June 6, 2006.

10. This is the type of "sexual contact" defined in sub. (5)(b) of § 948.01. It was created by 1995 Wisconsin Act 69, which first applies to offenses committed on December 2, 1995.

11. See note 4, supra.

12. This is the type of "sexual contact" defined in sub. (5)(c) of § 948.01. It was created by 2005 Wisconsin Act 273, which first applies to offenses committed on April 20, 2006.

13. See notes 4 and 5, supra.