2102A FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 13 YEARS: CAUSING GREAT BODILY HARM — § 948.02(1)(am)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(am) of the Criminal Code of Wisconsin, is committed by one who has sexual [contact] [intercourse] with a person who has not attained the age of 13 years and causes great bodily harm to 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 were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. (Name of victim) was under the age of 13 years at the time of the alleged sexual [contact] [intercourse].

   Knowledge of (name of victim)'s age is not required[1] and mistake regarding (name of victim)'s age is not a defense.[2]

   Consent to sexual [contact] [intercourse] is not a defense.[3]
3. The defendant caused great bodily harm to (name of victim).

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"Great bodily harm" means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.[4]

Meaning of [Sexual Contact] [Sexual Intercourse]

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.

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.

COMMENT

Wis JI-Criminal 2102A was approved by the Committee in April 2008. It reflects changes made in § 948.02 by 2007 Wisconsin Act 80.

This instruction is drafted for violations of § 948.02(1)(am) as created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. A violation of this subsection is a Class A felony.

As revised by Act 80, the statute defines the crime in the same manner as § 940.225(1)(a): "Has sexual contact or sexual intercourse . . . and causes . . . great bodily harm." Under § 940.225(1)(a), the act itself need not cause the great bodily harm. See Wis JI-Criminal 1201, footnote 1, and State v. Schambow, 176 Wis.2d 286, 298-99, 500 N.W.2d 362 (Ct. App. 1993). The Wisconsin Legislative Council Act Memo for 2007 Wisconsin Act 80 states that the revision "clarifies that harm to the victim caused by the offender at the time of a first-degree sexual of a child, and not necessarily caused by the sexual intercourse or contact, would satisfy the great bodily harm element . . ."

The revised instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each offense instruction. 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

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separate instructions for the definitions. 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.

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a "crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged" is a lesser included crime.

1. See § 939.23(6).

2. See § 939.43(2).

3. "Without consent" is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

4. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

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