

2102D FIRST DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS BY USE OR THREAT OF FORCE OR VIOLENCE BY A PERSON WHO HAS ATTAINED THE AGE OF 18 YEARS — § 948.02(1)(d)

Statutory Definition of the Crime

First degree sexual assault of a child, as defined in § 948.02(1)(d) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 18 years who has sexual contact with a person who has not attained the age of 16 years by the use or threat of force or violence.

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 had sexual contact with (name of victim).
2. The defendant had attained the age of 18 years.
3. (Name of victim) was under the age of 16 years at the time of the alleged sexual contact.

Knowledge of (name of victim)'s age is not required¹ and mistake regarding (name of victim)'s age is not a defense.²

4. The defendant had sexual contact with (name of victim) by the use or threat of force or violence.

The use or threat of force or violence may occur at any time before or as part of the sexual contact.³

As a matter of law, a person who has not attained the age of 16 years cannot consent to sexual contact. Any consideration of the conduct of (name of victim) must be limited to determining whether the defendant had sexual contact by the use or threat of force or violence.⁴

[The phrase "use or threat of force or violence" includes forcible sexual contact or force used as the means of making sexual contact.]⁵

Meaning of Sexual Contact

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

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.

COMMENT

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

Section 948.02(1)(d) was created by 2008 Wisconsin Act 80 [effective date: March 27, 2008]. The offense is a Class B felony.

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. This is based on State v. Hayes, 2003 WI App 99, 264 Wis.2d 377, 633 N.W.2d 351, discussed in footnote 2, Wis JI-Criminal 1208.

4. This material is used in place of the statement in other instructions for child sexual assault offenses that "consent is not a defense" because the latter could be interpreted as inconsistent with the defendant's right to challenge proof of the "by the use or threat of force or violence" element by reference to conduct of the victim. For a similar situation, see Wis JI-Criminal 926, Contributory Negligence.

5. See State v. Bonds, 165 Wis.2d 27, 477 N.W.2d 265 (1991), discussed in footnote 5, Wis JI-Criminal 1208.