

**2104 SECOND DEGREE SEXUAL ASSAULT OF A CHILD: SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS NOT ATTAINED THE AGE OF 16 YEARS — § 948.02(2)**

**Statutory Definition of the Crime**

Second degree sexual assault of a child, as defined in § 948.02(2) 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 16 years.

**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 two 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 16 years at the time of the alleged sexual [contact] [intercourse].

Knowledge of (name of victim)'s age is not required<sup>1</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>2</sup>

Consent to sexual [contact] [intercourse] is not a defense.<sup>3</sup>

**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 both 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

This instruction was originally published in 1989 as Wis JI-Criminal 2104 [for sexual intercourse offenses] and Wis JI-Criminal 2105 [for sexual contact offense]. It was revised in 1996 to combine the instructions as Wis JI-Criminal 2104. The 2001 revision adopted a new format, made nonsubstantive changes to the text, and updated the Comment. The 2008 revision added a reference to 2007 Wisconsin Act 80 to the Comment. The 2018 revision reflected a change made by 2017 Wisconsin Act 174. This revision was approved by the Committee in June 2020; it corrected an inadvertent error in the statutory citation.

Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: “This section does not apply if s. 948.093 applies.” Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19. The Committee concluded that any factual discrepancies regarding the applicability of § 948.093 would likely be resolved before trial and in any event should be treated in the same manner as statutory exceptions. The Committee’s judgment has been that statutory exceptions are best addressed as follows. The question whether an exception applies is not an issue in the case until there is some evidence of that fact. Once there is evidence sufficient to raise that issue, the burden is on the state to prove beyond a reasonable doubt that the exception does not apply. See the Comment to Wis JI-Criminal 1335B explaining the application of this approach to exceptions to the prohibition on carrying a concealed weapon.

This instruction is for two of the types of second degree sexual assault of a child defined by § 948.02(2): sexual contact or sexual intercourse with a person who has not attained the age of 16 years.

2008 Wisconsin Act 80 made significant changes in subsection (1) of § 948.02(2). Subsection (2) was not affected.

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.

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 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.

Second degree sexual assault of a child under § 948.02(2) is a lesser included offense of first degree sexual assault of a child under § 948.02(1) and is properly submitted when the evidence supports a reasonable doubt about the child's age. State v. Moua, 215 Wis.2d 511, 573 N.W.2d 2020 (Ct. App. 1997).

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. See § 939.23(6).
2. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's ages nor evidence regarding the cause for or reasonableness of that is relevant." ¶3.

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.