

**2105A ATTEMPTED SECOND DEGREE SEXUAL ASSAULT OF A CHILD:
SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS
NOT ATTAINED THE AGE OF 16 YEARS: ACTUAL CHILD — §§
948.02(2); 939.32**

Statutory Definition of the Crime

Attempted second degree sexual assault of a child, as defined in § 939.32 and § 948.02(2) of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual (contact) (intercourse) with a person who has not attained the age of 16 years, does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

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 intended¹ to have sexual [contact] [intercourse] with (name of victim).

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.]

2. (Name of victim) was under the age of 16 years.

Knowledge of (name of victim)'s age is not required² and mistake regarding (name of victim)'s age is not a defense.³

3. The defendant did acts which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have had sexual [contact] [intercourse] with (name of victim) except for the intervention of another person or some other extraneous factor.⁴

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

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 in this case bearing upon intent.

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 2105A was approved by the Committee in August 2004.

This instruction provides a model for attempted second degree sexual assault of a child based on an attempt to assault an actual child. It combines Wis JI-Criminal 2104 and 580 but departs from the format recommended by the general instruction on attempt and involves three elements: the first two being the elements of the completed crime and the third being the definition of attempt.

A separate instruction is provided for cases based on attempts to assault what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. See Wis JI-Criminal 2105B.

The 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.

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 State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts.

2. Section 939.23(6).

3. Section 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 age nor evidence regarding the cause for or reasonableness of that belief is relevant." ¶3.

4. The definition of "attempt" is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.