

**2105B ATTEMPTED SECOND DEGREE SEXUAL ASSAULT OF A CHILD:
SEXUAL CONTACT OR INTERCOURSE WITH A PERSON WHO HAS
NOT ATTAINED THE AGE OF 16 YEARS: FICTITIOUS 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 intended to have sexual [contact] [intercourse] with another person.

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. The defendant believed that the person was under the age of 16 years.¹
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 that person except for the intervention of another person or some other extraneous factor.²

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.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual (contact) (intercourse) with that person.³

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 2105B 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 what turns out to be a fictitious child, which result from "sting" operations based on electronic communications. It combines Wis JI-Criminal 2104 and 580. A separate instruction is provided for cases based on attempts to assault an actual child. See Wis JI-Criminal 2105A.

Prosecutions based on activities directed toward fictitious children have been upheld in connection with charges of enticing a child under § 948.07 and sexual assault of a child under § 948.02.

In State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

... attempted child enticement ... can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, 242 Wis.2d 693, 626 N.W.2d 359, where the court of appeals reached the same conclusion: "the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact." 2001 WI APP 93, ¶28.

State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, and State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, held that prosecutions for attempted sexual assault of a child can also be maintained in "internet sting" situations. "... [T]he reasoning in Koenck and Robins is equally applicable to the charge of attempted second-degree sexual assault of a child." Grimm, 258

Wis.2d 166, ¶10. Brienzo held that "the crime of attempted sexual assault of a child by means of sexual intercourse is a crime known to law. A defendant may have the intent to engage in sexual intercourse and may engage in acts in furtherance of that intent. When he or she does, he or she is liable for that attempt." 267 Wis.2d 349, ¶21.

Also see § 948.075, which prohibits use of a computerized communication system to facilitate a child sex crime. Wis JI-Criminal 2135 provides a model for violations of that statute.

1. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact or intercourse with a child in violation of § 948.02(2), for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287: "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 253 Wis.2d 298, ¶34.

The two cases dealing with attempted sexual assault of a child also contain statements supporting this conclusion: "The facts alleged and their reasonable inferences permit the conclusion that [the defendant] intended to have sexual contact with a person he believed to be under the age of sixteen." State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284, ¶20; State v. Brienzo, 2003 WI App 203, 267 Wis.2d 349, 671 N.W.2d 700, ¶25.

2. 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.

3. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 253 Wis.2d 298, ¶34.