

2106 SEXUAL ASSAULT OF A CHILD: FAILURE TO ACT TO PREVENT SEXUAL INTERCOURSE OR SEXUAL CONTACT — § 948.02(3)**Statutory Definition of the Crime**

Failure to act to prevent sexual assault of a child, as defined in § 948.02(3) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has not attained the age of 16 years, if that person has knowledge that another person (intends to have) (is having) (has had) sexual (intercourse) (contact) with a child, is physically and emotionally capable of taking action which will prevent sexual (intercourse) (contact) from (taking place) (being repeated), fails to take that action, and whose failure to act [exposes the child to an unreasonable risk that (intercourse) (contact) may occur between the child and the other person] [facilitates the sexual (intercourse) (contact) that does occur between the child and the other 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 seven elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person responsible for the welfare of a child, (name of victim).

A "person responsible for the welfare of a child" includes (use the appropriate term from § 948.01(3)).¹

2. (Name of victim) was under the age of 16 years² at the time of the alleged offense.
3. (Name of principal)³ (intended to have) (was having) (had) sexual (intercourse) (contact) with (name of victim).
4. The defendant had knowledge⁴ that (name of principal) (intended to have) (was having) (had) sexual (intercourse) (contact) with (name of victim).
5. The defendant was physically and emotionally capable of taking action which would have prevented the sexual (intercourse) (contact) from (taking place) (being repeated).
6. The defendant failed to take action that would have prevented the sexual (intercourse) (contact) from (taking place) (being repeated).
7. The defendant's alleged failure to act [exposed the child to an unreasonable risk that sexual (intercourse) (contact) may occur] [facilitated the sexual (intercourse) (contact) that occurred between (name of victim) and (name of principal)].

["Facilitate" means to make easier.]⁵

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 seven 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 2106 was originally published in 1996 and revised in 2002. This revision was approved by the Committee in December 2008. It involved updating footnote 1.

Section 948.02 defines crimes relating to the sexual assault of children. Subsection (1) defines first degree sexual assault – see Wis JI-Criminal 2102. Subsection (2) defines second degree sexual assault – see Wis JI-Criminal 2104. Subsection (3), addressed by this instruction, imposes liability for failing to act to prevent the sexual assault of a child who has not attained the age of 16 years.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B.

As revised in 2001, the instruction includes bracketed or parenthetical material that cover all the alternative ways of committing the offense defined by § 948.02(3), including exposing the child to an unreasonable risk that a sexual assault will occur or be repeated.

In State v. Carol M.D., 198 Wis.2d 162, 542 N.W.2d 476 (Ct. App. 1995), the court affirmed multiple charges of failing to act to prevent sexual assault. Carol was informed by her son that Carol's live-in boyfriend had sexually assaulted him on a number of occasions. Carol confronted the boyfriend and he denied the assaults. Carol did nothing further. The boyfriend allegedly assaulted the son nine more times during September 1994. The son did not inform Carol of any of those assaults. Carol was charged under § 948.02(3) for failing to act to prevent the September 1994 assaults. The court of appeals held that she can be charged with nine counts – one for each of the assaults allegedly committed by the boyfriend. "[A] defendant may be convicted of more than one count under this statute if knowledge of the prior sexual assault is accompanied by failure to take action on each separate occasion." 198 Wis.2d 162, 168.

A similar provision relating to physical abuse of a child is found in § 948.03(4). See Wis JI-Criminal 2108.1. The Wisconsin Supreme Court has stated that "[t]he legislature deliberately enacted sec. 948.03(4) to penalize the conduct described in the Williquette decision." State v. Rundle, 176 Wis.2d 985, 999, 500 N.W.2d 916 (1993). That reference is to State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), where the Wisconsin Supreme Court held that a person could violate the prior child abuse statute (§ 940.201, 1985-86 Stats.) by failing to protect children from a risk of physical abuse by another. That statute required that the defendant "subject the child to cruel maltreatment," which the court found was established where the defendant mother was shown to have failed to act in the face of repeated abuse of her children by the children's father. The Williquette court also recognized that general omissions liability exists in Wisconsin, notwithstanding the fact that no specific statute exists. 129 Wis.2d 239, 251-55.

1. The Committee recommends inserting the appropriate term from § 948.01(3), which defines "person responsible for the child's welfare" to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authorities relating to "person responsible for the child's welfare."

2. For purposes of offenses under Chapter 948, "child" is generally defined as "a person who has not attained the age of 18 years." § 948.01(1). However, § 948.02(3) applies only to a person responsible for the welfare of a child who has not attained the age of 16 years.

3. The "principal" is the person who intends to have, was having, or had sexual intercourse or contact with the child. The defendant accused of the crime addressed by this instruction is charged with failing to act to prevent that sexual intercourse or contact from taking place or being repeated.

4. This element was revised in 2001 to use the words of the statute: "has knowledge that." The previous version of the instruction substituted "knew or believed," based on the definition of "know" in § 939.23(2): "'Know' requires only that the actor believes that the specified fact exists." The Committee concluded that in the context of this offense, it may be confusing to introduce the concept of "believes." That is, a defendant may "have knowledge of" facts that indicate sexual activity but may not "believe" that the activity is taking place. Repeating the words of the statute was believed to be the better approach.

5. This is based on a typical dictionary definition of "facilitate." See The American Heritage Dictionary Of The English Language, Third Edition (1992).