

**2107 REPEATED ACTS OF SEXUAL ASSAULT OF A CHILD — § 948.025****Statutory Definition of the Crime**

Section 948.025 of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,<sup>1</sup> commits three or more sexual assaults of the same child.

**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 committed at least three sexual assaults of (name of victim).

In this case, the defendant is alleged to have committed sexual assault of a child by violating (identify the subsection of § 948.02 that defines the sexual assault alleged).<sup>2</sup>

Section \_\_\_\_\_ requires the State to prove that:<sup>3</sup>

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.<sup>4</sup>

2. At least three sexual assaults took place within a specified period of time. The specified period of time is from (beginning date of specified period) through (ending date of specified period).<sup>5</sup>

GIVE THE FOLLOWING ONLY IF MORE THAN THREE ACTS HAVE BEEN ALLEGED.

**[More Than Three Acts Alleged]**

[Before you may find the defendant guilty you must unanimously agree that at least three sexual assaults occurred between (beginning date of specified period) and (ending date of specified period), but you need not agree on which acts constitute the required three.]<sup>6</sup>

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that the defendant committed three violations of (specify statute) within the specified period of time, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 2107 was originally published in 1994 and revised in 1996, 2002, 2003, 2008, and 2018. This revision was approved by the Committee in February 2019; it updated the Comment.

This instruction is for a violation of § 948.025(1), which was created by 1993 Wisconsin Act 227 [effective date: April 23, 1994]. Act 227 provided that “[t]his act first applies to offenses committed on the effective date of this SECTION.” 1993 Wisconsin Act 227, Section 44, Initial Applicability. Thus it appears that all of the acts must have occurred after April 23, 1994. The statute was amended by 2007 Wisconsin Act 80 [effective date: March 27, 2008].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. [See Wis JI-Criminal 2107 EXAMPLE for a case where all predicates are violations of § 948.02(1)(b).] If the charge alleges violations of different subsections of § 948.02, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- slight variations in the elements of the predicate crimes, as with, for example, the age limits;
- determining whether less serious violations of § 948.025 are lesser included offenses – there is no special rule for § 948.025 in § 939.66, so the strict compare-the-statutory elements test would apply;
- submitting individual predicate offenses as lesser included offenses;
- making a proper statement regarding jury agreement – see § 948.025(2); and,
- potential confusion if evidence of other similar acts are submitted under § 904.04(2).

The 2008 revision of Wis JI-Criminal 2107 reflected the penalty changes made by 2007 Wisconsin Act 80. There are five possible penalties for convictions under § 948.025:

- § 948.025(1)(a) requires at least three violations of § 948.02(1)(am) and is a Class A felony with a mandatory minimum of 25 years confinement before extended supervision eligibility – see § 939.616(1g).
- § 948.025(1)(b) requires at least three violations of § 948.02(1)(am), (b), or (c) and is a Class B felony with a mandatory minimum term of confinement of 25 years – see § 939.616(1r).
- § 948.025(1)(c) requires at least three violations of § 948.02(1)(am), (b), (c), or (d) and is a Class B felony with a mandatory minimum term of confinement of 5 years – see § 939.616(2).
- § 948.025(1)(d) requires at least three violations of § 948.02(1) and is a Class B felony with no mandatory minimum term of confinement.
- § 948.025(1)(e) requires at least three violations of § 948.02(1) or (2) and is a Class C felony with no mandatory minimum term of confinement.

Penalties and elements for offenses defined in § 948.02 are outlined in Wis JI-Criminal 2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 AND 2013 WISCONSIN ACT 167.

Section 939.635 provides that the maximum penalty for violations of § 948.025 “may be increased by not more than 5 years” if the offense was “against a child for whom the person was providing child care for compensation.” See Wis JI-Criminal 2115 for a special question that should be added to the instruction when that penalty-increasing fact is charged.

State v. Colton M., 2015 WI App 94, 366 Wis.2d 119, 875 N.W.2d 642, concerned a claim by the 15-year-old defendant that applying § 948.025(1)(e) to him violated his due process and equal protection rights because statutes defined him as both a victim and an offender. The court concluded that “§ 948.025(1)(e), as applied to Colton, is not unconstitutionally vague beyond a reasonable doubt and, therefore, his delinquency adjudication under that statute does not violate his due process rights. We also conclude the prosecutor’s decision to charge Colton and not D. [the underage victim] was not made on a discriminatory basis and, therefore, did not violate Colton’s right to equal protection.” 2015 WI App 94, ¶6.

Section 948.025(3) prohibits separate charges for sexual assaults that are predicates for the repeated sexual assault charge. See State v. Cooper, 2003 WI App 227, 267 Wis.2d 886, 672 N.W.2d 118. Separate charges for offenses that are not predicates for the repeated sexual assault charge are permissible. State v. Nommensen, 2007 WI App 224, 305 Wis.2d 695, 741 N.W.2d 481.

1. The statute refers to 3 or more violations “within a specified period of time.” The Committee concluded that the intent of the statute must be that the prosecutor will specify the applicable period in the charge. That “specified period” should be carried over to the jury instruction. See note 5, below.

2. This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.02. Refer to the standard instruction for that subsection and insert it here, using the bullet points in place of numbers for each element. For an illustration, see Wis JI-Criminal 2107 EXAMPLE.

3. To avoid a second reference to “elements” in defining the predicate crimes, the Committee decided that a bulleted list should be used instead of a numerical one. The instruction introduces the list with “. . . requires the State to prove that: . . .” to allow simply plugging in the regular statement of the element without change, using a bullet point instead of a number. See Wis JI-Criminal 2107 EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the “predicate crime” be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [*State v. Henning*, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and the intimidation of a victim under § 940.44 [*State v. Thomas*, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App. 1991)].

5. Here identify the beginning and ending dates of the period specified by the prosecution. For example: “The specified period of time is from January 1, 2008 through June 16, 2008.”

In *State v. Schultz*, 2019 WI App 3, 385 Wis.2d 494, 922 N.W.2d 866, the defendant was tried and acquitted on a charge of repeated sexual assault of child. The specified time period was identified as “late summer or early fall” of 2012. After the acquittal, he was charged with a single act of child sexual assault against the same victim alleged to have occurred on or about Oct. 19, 2012. This was based on a paternity test showing he was the father of a child conceived at that time. Schultz argued that principles of double jeopardy should bar the charge for child sexual assault. The issue for the court of appeals was whether Oct. 19 was included in the specified time period of “late summer or early fall.”

The court concluded that “early fall” was ambiguous and that it was “appropriate to look at the entire record to clarify the meaning of the phrase ...” ¶25. The proper test “is to consider how a reasonable person familiar with the facts and circumstances of a particular case would understand that charging language.” ¶30. The court concluded that the reasonable person “would not consider the phrase ‘early fall of 2012’ to include October 19.” ¶34.

The court added:

We thus emphasize an important point, lest our decision be read to encourage the use of ambiguous charging language to manipulate double jeopardy protections in future prosecutions: well-established law in Wisconsin already provides a remedy for a defendant facing an ambiguous charge. Specifically, a defendant may move for the dismissal – or, in the alternative, move to make more definite and certain the allegations against him or her – of charges based on allegedly overbroad or ambiguous timeframes in a charging document.

¶35.

[The Wisconsin Supreme Court granted review in *Schultz* on April 2, 2019.]

6. This statement is based on § 948.025(2). It is sufficient for cases where all the alleged predicate violations are of the same subsection of § 948.02. If the alleged predicate violations are of different subsections of § 948.02, a more detailed statement is required. See subs. (b) and (c) of § 948.025.

The rules in subsec. (2) of § 948.025 do “not violate due process or the right to a unanimous verdict.” State v. Johnson, 2001 WI 52, ¶28, 243 Wis.2d 365, 627 N.W.2d 455.