

2108A PHYSICAL ABUSE OF A CHILD: FAILING TO ACT TO PREVENT GREAT BODILY HARM — § 948.03(4)(a)**Statutory Definition of the Crime**

Physical abuse of a child, as defined in § 948.03(4)(a) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who has knowledge that another person intends to cause great bodily harm to the child, is physically and emotionally capable of taking action which will prevent the great bodily harm from occurring, fails to take that action, and whose failure to act facilitates the great bodily harm to the child that is intentionally caused by 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. First, that 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) had not attained the age of 18 years at the time of the alleged offense.

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

3. (Name of principal) intentionally⁴ caused great bodily harm to (name of victim).

This requires that (name of principal) had the mental purpose to cause great bodily harm to (name of victim) or was aware that (his) (her) conduct was practically certain to cause that result.

"Great bodily harm" means injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.⁵

4. The defendant knew or believed⁶ that (name of principal) intended to cause⁷ great bodily harm to (name of victim).

What the defendant knew or believed must be determined from the standpoint of the defendant at the time of the alleged offense and not from the viewpoint of the jury now.⁸

5. The defendant was physically and emotionally capable of taking action which would have prevented the great bodily harm from occurring.⁹
6. The defendant failed to take that action.

7. The defendant's alleged failure to act facilitated the great bodily harm to (name of victim) that was intentionally caused by (name of principal).¹⁰

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 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

This instruction was originally published as Wis JI-Criminal 2108.1 in 1993. This revision renumbered the instruction and was approved by the Committee in December 2008; it involved adoption of a new format and nonsubstantive changes to the text.

Section 948.03 defines crimes relating to the physical abuse of children. Subsection (2) identifies three types of intentional physical abuse. Subsection (3) identifies three types of reckless physical abuse. Subsection (4), addressed by this instruction, imposes liability for failing to act to prevent great bodily harm.

This instruction is drafted for one type of liability defined by § 948.03(4)(a) – that where a person's failure to act facilitates great bodily harm intentionally caused by another person. The statute also prohibits exposing a child to an unreasonable risk of great bodily harm. That alternative is not covered by this instruction.

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). The 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.

Section 940.201 was repealed and replaced by § 948.03. 1987 Wisconsin Act 332. In Rundle, supra, the court held that the Williquette holding was codified in § 948.03(4). The court reversed Rundle's conviction for aiding and abetting a violation of § 948.03 because the evidence was not sufficient to prove "conduct, either verbal or overt, that as a matter of objective fact, aids another in the execution of a crime." 176 Wis.2d 985, 1004. The court held that omissions cannot be used to satisfy the "conduct" requirement of party to crime liability (at least for violations of § 948.03): "In sec. 948.03(4) the legislature has specified which omissions to act are unlawful." 176 Wis.2d 985, 1003.

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.

NOTE: The same phrase is used in defining the class of persons who have the privilege to discipline a child under § 939.45(5), but a different definition applies. Compare § 939.45(5)(c)3 with § 948.01(3).

See Wis JI-Criminal 2106A for discussion of authority relating to "person responsible for the welfare of a child."

2. Section 939.23(6).

3. Section 939.43(2).

4. This instruction is drafted for cases where great bodily harm is intentionally caused by another person. Section 948.03(4)(a) applies where the other person "intends to cause, is causing or has intentionally or recklessly caused great bodily harm." The Committee concluded that for the variety of conduct addressed by this instruction, the other person must have intentionally caused great bodily harm and the defendant must have known that the person intended to cause such harm.

5. See § 939.22(14) and Wis JI-Criminal 914. The reference to "other serious bodily injury" at the end of the statutory definition is intended to broaden the scope of the statute rather than to limit it by application of an "ejusdem generis" rationale. LaBarge v. State, 74 Wis.2d 327, 246 N.W.2d 794 (1976).

6. The instruction uses "knew or believed" in place of the phrase "has knowledge that" which is used in the statute. No change in meaning is intended. See § 939.23(2).

7. See note 4, above.

8. Section 939.23(2).

9. Section 948.03(4)(a) also applies to preventing the harm from "being repeated." The Committee concluded that the "being repeated" alternative fits better with exposing the child to a risk of

harm, which is not addressed by this instruction.

10. The instruction addresses the case where the defendant's failure to act is alleged to have facilitated great bodily harm caused by another. The statute also covers exposing the child to a risk of harm, which is not addressed by this instruction.