

**2108B PHYSICAL ABUSE OF A CHILD: FAILING TO ACT TO PREVENT RECKLESS CAUSING OF 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 has recklessly caused 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 recklessly 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)).<sup>1</sup>

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 required<sup>2</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>3</sup>

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

This requires that the defendant's conduct created a situation of unreasonable risk of harm to (name of victim) and demonstrated a conscious disregard for the safety of (name of victim).<sup>4</sup>

In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of (name of victim), you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why (he) (she) was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of (name of victim).<sup>5</sup>

"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.<sup>6</sup>

4. The defendant knew or believed<sup>7</sup> that (name of principal) recklessly caused 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.<sup>8</sup>

5. The defendant was physically and emotionally capable of taking action which would have prevented the great bodily harm from occurring.<sup>9</sup>
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 recklessly caused by (name of principal).<sup>10</sup>

### **Deciding About Knowledge and Belief**

You cannot look into a person's mind to find knowledge and belief. Knowledge and belief 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 approved by the Committee in March 2015.

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 recklessly caused by another person. See Wis JI-Criminal 2108A for offenses involving 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. The definition of "recklessly" is the one provided in § 948.03(1). Note that this definition is different from the definition of "criminal recklessness" in § 939.24. The Wisconsin Court of Appeals has discussed the difference in two cases.

In State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719, the court held that "'recklessly' causing harm to a child under § 948.03(3)(b) is distinguished from 'criminal recklessness,'

because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component." ¶23. Thus, reckless child abuse does not require that the defendant was subjectively aware of the risk to the child's safety.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm. The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11.

5. This paragraph is modeled after the one used for crimes involving recklessness as defined in § 939.24. See, for example, Wis JI-Criminal 1020. It is believed to be appropriate here because, even though "recklessly" is defined differently in § 948.03, the basic concept is the same – all the circumstances relating to the conduct should be considered in considering whether it created an unreasonable risk of harm and whether it showed conscious disregard for safety.

In the Committee's judgment, the purpose of the conduct may also be considered in making this determination. This would include the purpose of parental discipline, even though it is not completely clear whether the privilege as defined in § 939.45(5) would apply. See Wis JI-Criminal 951.

6. 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).

7. 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).

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.