

2113 PHYSICAL ABUSE OF A CHILD: RECKLESSLY CAUSING BODILY HARM BY CONDUCT WHICH CREATES A HIGH PROBABILITY OF GREAT BODILY HARM — § 948.03(3)(c)

Statutory Definition of the Crime

Physical abuse of a child, as defined in § 948.03(3)(c) of the Criminal Code of Wisconsin, is committed by one who recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm.

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 four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant caused bodily harm to (name of victim).

Bodily harm means physical pain or injury, illness, or any impairment of physical condition.¹

2. The defendant recklessly caused bodily harm.

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).²

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).³

3. The defendant's conduct created a high probability of great bodily harm.

"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.⁴

4. (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 required⁵ and mistake regarding (name of victim)'s age is not a defense.⁶

Jury's Decision

If you are satisfied beyond a reasonable doubt that all four 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 2113 was originally published in 1989. This revision was approved by the Committee in December 2008 and 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.

This instruction is for a violation of § 948.03(3)(c), created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

1. This is the definition of "bodily harm" provided in § 939.22(4).
2. 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.

3. 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.

4. 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).
5. Section 939.23(6).
6. Section 939.43(2).