# 2114A REPEATED ACTS OF PHYSICAL ABUSE OF A CHILD — § 948.03(5)

## Statutory Definition of the Crime

Section 948.03(5) of the Criminal Code of Wisconsin is violated by one who, within a specified period of time,[1] commits three or more acts of physical abuse 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 acts of physical abuse of (name of victim).

   In this case, the defendant is alleged to have committed physical abuse of a child by violating (identify the subsection of § 948.03 that defines the physical abuse alleged).[2]

   Section _____ requires the State to prove that:[3]

   LIST THE ELEMENTS OF THE CRIME AS IDENTIFIED IN THE APPLICABLE INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.[4]

2. At least three acts of physical abuse 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).[5]

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 acts of physical abuse 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.][6]

**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.

ADD ONE OF THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS A, B, C, OR D FELONY AND THERE IS EVIDENCE THAT THE PENALTY-INCREASING FACT IS PRESENT.[7]

[If you find the defendant guilty, you must answer the following question:

(Did at least one violation cause the death of the child? You must all agree on the violation that caused death.)

(Did at least two violations involve intentionally causing great bodily harm to the child? You must all agree on the violations that caused great bodily harm.)

 

(Did at least one violation cause great bodily harm to the child? You must all agree on the violation that caused[8] great bodily harm.)

(Did at least one violation create a high probability of great bodily harm to the child?

You must all agree on the violation that created a high probability of great bodily harm.)

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."]

**COMMENT**

Wis JI-Criminal 2114A was originally published in 2017. This revision was approved by the Committee in February 2019; it updated footnote 5.

This instruction is for a violation of § 948.03(5), which was created by 2015 Wisconsin Act 366 [effective date: April 21, 2016].

NOTE: This instruction is drafted for a case where the predicate acts alleged are all violations of the same subsection of § 948.03. See Wis JI-Criminal 2114A EXAMPLE for a case where all predicates are violations of § 948.03(2)(a). If the charge alleges violations of different subsections of § 948.03, considerable complexity could result and great care should be taken in drafting the instruction. Issues of concern include:

- determining whether less serious violations of § 948.03(5) are lesser included offenses – there is no special rule for § 948.03(5) 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 § 948.03(5)(b); and,
- potential confusion if evidence of other similar acts is submitted under § 904.04(2).

There are five possible penalties for convictions under § 948.03(5):

- § 948.03(5)(a)1. provides that it is a Class A felony "if at least one violation caused the death of the child."

 

• § 948.03(5)(a)2. provides that it is a Class B felony "if at least 2 violations were violations of sub. (2)(a)" – referring to intentionally causing great bodily harm to a child.

• § 948.03(5)(a)3. provides that it is a Class C felony "if at least one violation resulted in great bodily harm to the child."

• § 948.03(5)(a)4. provides that it is a Class D felony "if at least one violation created a high probability of great bodily harm to the child."

• § 948.03(5)(a)5. states: "A Class E felony." The Committee concluded that this applies where none of the facts addressed by the other penalty provisions are alleged.

If the offense is charged as a Class E felony, nothing need be added to the text of the instruction. If the offense is charged as a Class A, B, C, or D felony, a special question should be added to assure a jury finding on the penalty-increasing fact. See footnote 7, below.

Section 939.635, as amended by 2015 Wisconsin Act 366, provides that the maximum penalty for violations of § 948.03(5)(a)1., 2., or 3. "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.

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 § 948.03. Refer to the standard instruction for that subsection and insert it here, using bullet points in place of numbers for each element. For an illustration, see Wis JI-Criminal 2114A EXAMPLE.

3. To avoid a second reference to "elements" in defining the predicate crimes, the Committee decided that a bullet-point 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 2114A EXAMPLE.

4. The Committee recommends that a complete listing of the elements of the crime be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion in similar situations: bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698] and 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 July 1, 2016, through October 1, 2016."

 

Section 948.025 Engaging in repeated acts of sexual assault of the same child, also requires specifying the time period. 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 § 948.03(5)(b).

7. The penalties for convictions under § 948.03(5) range from a Class A to a Class E felony – see the Comment preceding footnote 1, above. If the offense is charged as a Class E felony, nothing need be added to the text of the instruction. If the offense is charged as a Class A, B, C, or D felony, a special question should be added to assure a jury finding on the penalty-increasing fact. While the jury need not agree on which acts constitute the required three for conviction under § 948.03(5) if more than three acts were alleged, see § 948.03(5)(b), the Committee concluded that the jury must unanimously agree on the on the facts that increase the penalty. Those facts are the equivalent of elements of the Class A, B, C, or D felony.

If the facts may support submitting more than one question, the situation is essentially the same as one involving lesser included offenses. SM-6 Instructing On Lesser Included Offenses provides a review of the law relating to lesser included offenses, including the recommended way to instruct on the transition between greater and lesser offenses.

8. Section 948.03 (5)(a)3. uses "resulted in" rather than "caused." The instruction uses "cause;" Wisconsin case law holds that the two terms have the same meaning. See State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989) and State v. Wille, 2007 WI App 27, 299 Wis.2d 531, 798 N.W.2d 343.

 