

2115 SEXUAL ASSAULT OR PHYSICAL ABUSE OF A CHILD BY A CHILD CARE PROVIDER — § 939.635

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED ON OR AFTER DECEMBER 9, 2011.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON OFFENSES CHARGED UNDER §§ 948.02, 948.025, 948.03(2) and (3), AND 948.03(5)(a)1., 2., 3., and 4.¹

The information alleges not only that the defendant committed the crime of _____ but also that the defendant did so against a child for whom the defendant was providing child care for compensation.

If you find the defendant guilty, you must answer the following question:²

“Did the defendant commit the crime of _____ against a child for whom the defendant was providing child care for compensation?”³

Before you may answer this question “yes,” you must be satisfied beyond a reasonable doubt that the defendant committed the crime against a child for whom the defendant was providing child care for compensation.

If you are not so satisfied, you must answer the question “no.”

COMMENT

Wis JI-Criminal 2115 was approved by the Committee in August 2017. This revision was approved in December 2018; it updated the list of statutes to which it applies.

This instruction is drafted for the penalty enhancer found in § 939.635, which was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011.] It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. The reference to offenses under § 948.03(5), Engaging In Repeated Acts Of Physical Abuse Of A Child, was added by 2015 Wisconsin Act 366 [effective date: April 21, 2016] to include the Class A, B, C, and

D felony violations of that statute. The prosecutor’s intention to seek the enhanced penalty authorized by § 939.635 should be disclosed by alleging in the charging document that the defendant committed the crime against a child for whom the defendant was providing child care for compensation. This instruction should be added to the instruction for the crime charged if the evidence would support a finding that the penalty-increasing facts are established.

Until repealed by 2001 Wisconsin Act 109 (TIS II), a set of penalty enhancers existed for violations of §§ 948.02, 948.025, and 948.03 committed by a “person responsible for the welfare of the child.” See Wis JI-Criminal 2114. Act 109 eliminated many penalty enhancers in the view that penalties had increased for most offenses and the new maximums provided sufficient sentencing authority. Act 109 recast them as aggravating circumstances to be considered in imposing a bifurcated sentence. The enhancers formerly found in §§ 948.02, 948.025, and 948.03 were recognized as aggravating factors in § 973.017(6) AGGRAVATING FACTORS; CHILD SEXUAL ASSAULT OR CHILD ABUSE.

1. The relevant instructions are:

- for violations of §§ 948.02: JI 2102A through 2102E; JI 2104; JI 2105A and B; 2106, and 2107.
- for violations of § 948.03(2): JI 2107; JI 2108; and JI 2109.
- for violations of § 948.03(3): JI 2111; JI 2112; and JI 2113.
- for violations of § 948.03(5)(a)1., 2., 3., and 4.: JI 2114.

2. The Committee recommends that the penalty enhancing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of _____, under Wis. Stat. § _____, at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question “yes” or “no”:

“Did the defendant commit the crime of _____ against a child for whom the defendant was providing child care for compensation?”

3. Section 939.635 does not define “for compensation.” The bill creating the statute originally specified that it applied only to persons licensed under certain statutes relating to providers of child care. [See 2011 Assembly Bill 102.] Senate Amendment 1 to AB 102 was adopted and changed the specific statutory references to the more general “child care for compensation.”