

2116 CAUSING MENTAL HARM TO A CHILD — § 948.04**Statutory Definition of the Crime**

Causing mental harm to a child, as defined in § 948.04 of the Criminal Code of Wisconsin, is committed by one who is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the 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 five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was exercising temporary or permanent control¹ of (name of victim).
2. (Name of victim) suffered mental harm.

"Mental harm" means substantial harm to a child's psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child, including, but not limited to, anxiety, depression, withdrawal, or outward aggressive behavior. "Mental harm" may be demonstrated by a substantial and observable change in behavior, emotional

response, or cognition that is not within the normal range for the child's age and stage of development.²

3. The defendant caused mental harm to (name of victim).

This requires that the defendant's conduct was a substantial factor in producing the mental harm.³

4. The defendant caused mental harm by conduct which demonstrated substantial disregard for the mental well-being of (name of victim).⁴

5. (Name of victim) had not attained the age of 18 years at the time the alleged harm was caused.⁵

Knowledge of (name of victim)'s age by the defendant is not required⁶ and mistake regarding (name of victim)'s age is not a defense.⁷

Jury's Decision

If you are satisfied beyond a reasonable doubt that all five 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 2116 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.

This instruction is for a violation of § 948.04, 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.

The offense defined by § 948.04 did not exist under prior law, at least to the extent that "cruel maltreatment" under § 940.201, 1985-86 Wis. Stats., did not include "mental harm" as defined for purposes of this offense.

1. "Exercising temporary or permanent control of a child" is not defined in Chapter 948. Compare the definition of "person responsible for the child's welfare" in § 948.01(3). There was nothing in the legislative history that indicated the intended scope of this term, so the Committee concluded that further definition in the instruction could not be provided with substantial assurance of accuracy.

2. This is the definition provided in § 948.01(2). It is comparable to the definition of "emotional damage" in the statute requiring the reporting of child abuse or neglect. See § 48.981(1)(cm). The term "emotional damage" is also used in § 813.122 which provides for child abuse restraining orders and injunctions. The definition provided in § 813.122(1)(e) is similar to the one in § 948.01(2). The Wisconsin Court of Appeals applied the § 813.122(1)(e) definition in In The Interest of H.Q., 152 Wis.2d 701, 449 N.W.2d 75 (Ct. App. 1989), and found that "emotional damage" was not established by evidence showing that children were concerned or upset about their father's drunken behavior:

That a child became upset and cried twice in six months because of a parent's acts and dislikes being with the parent is insufficient for a finding of emotional damage, in the absence of expert testimony.

152 Wis.2d 701, 709.

3. The Committee has concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added immediately preceding the sentence in the instruction beginning with "before":

There may be more than one cause of mental harm. The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

4. "Demonstrates substantial disregard for the mental well-being" appears to state a standard related to "recklessness." It is similar to the definition of recklessness used in § 948.03 – "demonstrates a conscious disregard for the safety of the child." The Wisconsin Court of Appeals has held that the § 948.03 definition states a different standard than the one provided by the definition of "criminal recklessness" in § 939.24 which requires a substantial and unreasonable risk and awareness of that risk. Those cases have made it clear that a subjective awareness of the risk is not required. See State v. Williams, 2006 WI App 212, 296 Wis.2d 834, 723 N.W.2d 719 and State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393.

5. The crime is defined as causing mental harm "to a child," that is, to someone who has not attained the age of 18 years. Thus, the victim must have suffered mental harm before reaching the age of 18, even though the expanded statute of limitations would allow prosecution after the victim's 18th birthday. See § 939.74(2)(c).

6. Section 939.23(6).

7. Section 939.43(2).