2121 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1)(b)

[USE THIS INSTRUCTION IF THERE IS NO EVIDENCE OF THE DEFENSE UNDER § 948.05(3).][1]

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1)(b) of the Criminal Code of Wisconsin, is committed by one who records[2] or displays in any way a child engaged in sexually explicit conduct with knowledge of the character and content of the sexually explicit conduct involving the child.[3]

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 (recorded) (displayed in any way) (name of child).[4]

   "Record" means to reproduce an image or a sound or to store data representing an image or a sound.[5]

   [Consent by (name of child) is not a defense.][6]

2. (Name of child) had not attained the age of 18 years.

   [Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.][7]

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3. The defendant (recorded) (displayed in any way) (name of child) while (name of child) was engaged in sexually explicit conduct.

   "Sexually explicit conduct" means[8] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).[9]

4. The defendant knew that the person in the (recording) (display) was engaged in sexually explicit conduct.[10]

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.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS C FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

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

"Had the defendant attained the age of 18 years at the time of the offense?"

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

This instruction was originally published as Wis JI-Criminal 2120 in 1995 and revised in 2000, 2001, 2003, 2004, 2007, and 2010. The 2010 revision renumbered the instruction as Wis JI-Criminal 2121.

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This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for violations of sub. (1)(b) of § 948.05 where there is no evidence of the affirmative defense defined in sub. (3). Section 948.05 was created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. Section 948.05 was based on § 940.203, 1987 Wis. Stats., for which there had been no published instruction.

Subsection (2) of § 948.05 extends liability to a person responsible for the welfare of a child who "knowingly permits, allows or encourages the child" to engage in conduct prohibited by sub. (1). See Wis JI-Criminal 2123.

Section 948.05 was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. The act recreated what was sub. (1)(c) as new sub. (1m); see Wis JI-Criminal 2122. Act 3 also amended the affirmative defense provided in sub. (3), which can apply to violations addressed by this instruction. For cases involving the affirmative defense, see Wis JI-Criminal 2121A.

Section 948.05 was also amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a presumptive minimum sentence of 5 years for violations of § 948.05.

1. Wis JI-Criminal 2121A provides instruction for violations of § 948.05(1)(b) where there is evidence of the defense provided in § 948.05(3). The defense applies if the defendant is reasonably mistaken about the age of the child.

2. This reflects the change made in § 948.05(1) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to one who "photographs, films, videotapes, records the sound of, or displays in any way . . ."

3. The statement of the facts necessary to constitute the crime is derived by combining the definition of the offense found in sub. (1)(b) of § 948.05 with the introductory statement in that portion of § 948.05(1) which precedes sub. (a).

4. If the name of the child is not known, substitute "the person" wherever the instruction calls for "(name of child)."

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. "Means" was substituted for the phrase "include the creation of" used in the statutory definition. No change in substance was intended.

6. "Without consent" is not an element of this offense and consent is not a defense. The Committee concluded that it may be helpful to so inform the jury.

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7. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2). However, sub. (3) of § 948.05 provides an affirmative defense if the defendant is reasonably mistaken about the age. Do not use this statement where there is evidence of the defense. Instead, use Wis JI-Criminal 2121A.

8. The definition of "sexually explicit conduct" is based on the one provided in § 948.01(7), which provides as follows:

(7) "Sexually explicit conduct" means actual or simulated:
- (a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
- (b) Bestiality;
- (c) Masturbation;
- (d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
- (e) Lewd exhibition of intimate parts.

9. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

10. Subsection 948.05(1) requires that the defendant have "knowledge of the character and content of the sexually explicit conduct. . . ." (Emphasis added.) The Committee concluded that stating this requirement as ". . . the defendant knew that the person in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

11. Section 948.05 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class C felony if the defendant was over the age of 18 years at the time of the offense; it is a Class F felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class C felony is charged. If the Class F felony is charged, the instruction should be used without the special question.

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As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of sexual exploitation of a child, under sec. 948.05(1)(b), 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."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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