2122 SEXUAL EXPLOITATION OF A CHILD — § 948.05(1m)

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(1m) of the Criminal Code of Wisconsin, is committed by one who distributes[1] any recording[2] of a child engaged in sexually explicit conduct, knows the character and content of the sexually explicit conduct involving the child and knows or reasonably should know that the child engaged in the sexually explicit conduct has not attained the age of 18 years.[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 distributed a recording of [a child] [(name of child)][4] engaged in sexually explicit conduct.

   "Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

   "Sexually explicit conduct" means[6] actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate parts)).[7]

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2. The defendant knew that [the person] [(name of child)] in the recording was engaged in sexually explicit conduct.[8]

   [Consent by (name of child) is not a defense.][9]

3. [The person] [(Name of child)] had not attained the age of 18 years.

4. The defendant knew or reasonably should have known that [the person] [(name of child)] had not attained the age of 18 years.[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

Wis JI-Criminal 2122 was originally published in 2000 and revised in 2001, 2003, 2004, and 2007. The 2007 revision involved adding a special question at the end of the instruction. 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].

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This instruction is for a violation of sub. (1m) of § 948.05, which was created as sub. (1)(c) 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.

The statute was amended by 1999 Wisconsin Act 3, effective date: May 13, 1999. That amendment renumbered sub. (1)(c) as sub. (1m) and added a mental element relating to the child's age. The latter change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999). See note 10, below.

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)(a) or (b) or (1m).

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. "Distributes" refers to just one of the activities proscribed by § 948.05(1m) and was selected for use in the instruction because it appears to be an alternative likely to be used. The other alternatives are: produces; performs in; profits from; promotes; imports into the state; reproduces; advertises; sells; or, possesses with intent to sell or distribute. For cases involving one of those alternatives, the applicable term would, of course, have to be substituted for "distributes" throughout the instruction.

2. This reflects the change made in § 948.05(1m) by 2001 Wisconsin Act 16, effective date: September 1, 2001. Before the amendment, the statute applied to "any undeveloped film, photographic negative, motion picture, videotape, sound recording, or other reproduction . . ."

3. The requirement that the defendant knew or reasonably should have known the age of the child was added to the statute by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370, (1999). See note 10, below.

4. One of the alternatives should be selected: using the name of the child if known, or just referring to "a child" if the name of the child is not known.

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

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(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.

7. 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.

8. 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 child in the photograph was engaged in sexually explicit conduct" adequately covers the "knowledge of the character and content" aspect.

9. "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.

10. The knowledge element was extended to the age of the child by 1999 Wisconsin Act 3, effective date: May 13, 1999. The change was intended to remedy the constitutional defect noted in State v. Zarnke, 224 Wis.2d 116, 589 N.W.2d 370 (1999) [reversing 215 Wis.2d 71, 572 N.W.2d 491 (Ct. App. 1997)]. The defendant in Zarnke was charged with distributing pictures of children engaged in sexually explicit conduct in violation of sub. (1)(c) of § 948.05, 1997-98 Wis. Stats. In rejecting Zarnke's constitutional challenges to the statute, the court of appeals interpreted it to require the state to prove the defendant's knowledge of the child being under age. The court concluded that the legislature did not intend to treat the knowledge issue as an affirmative defense "where the illegal conduct occurs outside of the child's presence." 215 Wis.2d 71, 82-83.

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The supreme court held that sub. (1)(c) of § 948.05 was "unconstitutional as it applies to the distribution of sexually explicit material depicting minors, as well as to the other prohibited conduct which does not entail a personal interaction between the accused and the child-victim." 224 Wis.2d 116, 124. The defect is the statute's "failing to require that the State prove that a distributor of sexually explicit materials had knowledge of the minority of person(s) depicted in the materials." 224 Wis.2d 116, 120-21. Act 3 renumbered sub. (1)(c) to sub. (1m) and revised it to include an element requiring that the defendant knew, or reasonably should have known, the age of the child. It also revised the affirmative defense provision in § 948.05(3) so that it does not apply to violations of sub. (1m).

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.

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(1m), 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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