

**2123 SEXUAL EXPLOITATION OF A CHILD: BY A PERSON
RESPONSIBLE FOR THE CHILD’S WELFARE — § 948.05(2)**

Statutory Definition of the Crime

Sexual exploitation of a child, as defined in § 948.05(2) of the Criminal Code of Wisconsin, is committed by a person responsible for the welfare of a child who knowingly permits, allows, or encourages the child to engage in sexually explicit conduct for the purpose of recording¹ or displaying it in any way.

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 was a person responsible for the welfare of a child, (name of victim).

A “person responsible for the welfare of a child” includes (use the appropriate term from § 948.01(3)).²

2. The defendant knowingly permitted, allowed, or encouraged (name of victim) to engage in sexually explicit conduct.

“Sexually explicit conduct” means³ actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).⁴

3. The defendant intended that the sexually explicit conduct be recorded or displayed in any way.⁵

[“Record” means to reproduce an image or a sound or to store data representing an image or a sound.]⁶

4. (Name of child) had not attained the age of 18 years.⁷

[Knowledge of (name of child)’s age is not required and mistake regarding (name of child)’s age is not a defense.]⁸

Deciding About Knowledge

You cannot look into a person’s mind to find knowledge. Knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

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.

COMMENT

Wis JI-Criminal 2123 was approved by the Committee in June 2007. 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. (2) of § 948.05 which applies only to “a person responsible for a child’s welfare.” Violations of sub. (1)(b) are addressed by Wis JI-Criminal 2120 and 2120A; violations of sub. (1m) are addressed by Wis JI-Criminal 2122.

Subsection (3) of § 948.05 provides that it is an affirmative defense if a defendant “has reasonable cause to believe that the child had attained the age of 18 years.” It may be unlikely that the defense

would apply to violations of sub. (2), where the defendant must be a person responsible for the child's welfare. If the defense does apply, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).

1. 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 . . .”

2. The Committee recommends inserting the appropriate term from § 948.01(3), which defines “person responsible for the child's welfare” to include the following: the child's parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child's welfare in a residential setting; or a person employed by one legally responsible for the child's welfare to exercise temporary control or care for the child.

A biological father, who has admitted paternity in writing, is a “parent” and thus a “person responsible for the child's welfare” under § 948.21. State v. Evans, 171 Wis.2d 471, 391 N.W.2d 141 (1992).

See the Comment to Wis JI-Criminal 2114 for discussion of case law interpreting this term.

3. 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.

4. 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.

5. 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 . . .”

The statute requires that the defendant “knowingly permit, allow or encourage the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1)(a) or(b) or (1m) . . .” In the Committee’s judgment, the “purpose proscribed” in the cross-referenced sections boil down to “recording or displaying” sexually explicit conduct. The element uses the more direct requirement that the defendant “intend” that the conduct be recorded or displayed as the equivalent of permitting, allowing or encouraging for that purpose. No change of meaning is intended.

6. 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.

7. See s. 948.01(1).

8. 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, see Wis JI-Criminal 2120A for a model that could be adapted for use for violations of sub. (2).