

**2125 CAUSING A CHILD TO VIEW OR LISTEN TO SEXUAL ACTIVITY —  
§ 948.055****Statutory Definition of the Crime**

Section 948.055 of the Criminal Code of Wisconsin is violated by a person who intentionally causes [a child] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct for the purpose of sexually arousing or gratifying the person or humiliating or degrading 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 four elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age]<sup>1</sup> to view or listen to sexually explicit conduct.

“Sexually explicit conduct”<sup>2</sup> means actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of (name intimate part)].<sup>3</sup>

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

2. The defendant intentionally caused [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age] to view or listen to sexually explicit conduct.

“Intentionally” requires that the defendant acted with the purpose to cause [(name of child)] [the individual] to view or listen to sexually explicit conduct.<sup>4</sup>

[SELECT THE THIRD ELEMENT THAT FITS THE FACTS OF THE CASE.]

- [3. (Name of child) had not attained the age of (13) (18) years.<sup>5</sup>

Knowledge of (name of child)’s age is not required and mistake regarding (name of child)’s age is not a defense.<sup>6</sup>]

- [3. The defendant believed or had reason to believe that the individual had not attained the age of (13) (18) years.<sup>7</sup>]

4. The defendant acted with the purpose of sexually arousing or gratifying the defendant or humiliating or degrading [(name of child)] [an individual who the actor believes or has reason to believe has not attained 18 years of age].

### **Deciding About Intent**

You cannot look into a person’s mind to find intent. Intent 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 intent.

### **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 2125 was originally published in 1996 and was revised in 2004 and 2011. The 2011 revision reflected changes made by 2011 Wisconsin Act 284. 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].

Section 948.055 was originally enacted as § 940.227 by 1987 Wisconsin Act 334. It was renumbered § 948.055 by 1993 Wisconsin Act 218 and amended by 1995 Wisconsin Act 67.

The 1995 amendment made three changes in the text of § 948.055:

- 1) deleted the requirement that the defendant act “by use or threat of force or violence,” replacing it with “intentionally”;
- 2) added “or listen to”; and,
- 3) added “if the viewing or listening is for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.”

The statute was amended by 2011 Wisconsin Act 284 [effective date: April 27, 2012] to extend its coverage to situations where “the actor believes or has reason to believe [the individual] has not attained 18 years of age.” Act 284 also created § 939.32(1)(cr) to read: “Whoever attempts to commit a crime under s. 948.055(1) is subject to the penalty for the completed act, as provided in s. 948.055(2).”

Violations of § 948.055 are punished as a Class F felony if the child has not attained the age of 13 years [or if the defendant believes or has reason to believe the person has not attained the age of 13 years] and as a Class H felony if the child has not attained the age of 18 years [or if the defendant believes or has reason to believe the person has not attained the age of 18 years]. See § 948.055(2). The Committee recommends inserting the appropriate age limit as part of the third element.

1. 2011 Wisconsin Act 284 amended § 948.055 to apply to causing “an individual who the actor believes or has reason to believe has not attained 18 years of age” to view or listen to sexually explicit conduct, in addition to causing a child to do the same. This is apparently intended to address the “internet sting” situation, where the actor believes he or she is communicating with a child but the supposed child is in fact a government investigator. For cases involving this situation, the Committee recommends using the entire phrase “an individual who the actor believes or has reason to believe has not attained 18 years of age” where the name of the child would otherwise be used.
2. The definition of “sexually explicit conduct” is based on the one provided in § 948.01(7).
3. The definition of “sexually explicit conduct” was amended by 1995 Wisconsin Act 67, which substituted “intimate parts” for “the genitals or pubic area” in § 948.01(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.

4. The instruction uses the common “mental purpose” definition of intent. Intent is also present where a defendant “is practically certain that his or her conduct” will have the prohibited result. See § 939.23(3) and Wis JI-Criminal 923A and 923B.

5. Violations of this statute are punished as a Class F felony if the child has not attained the age of 13 years and as a Class H felony if the child has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.

6. 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).

7. This is the alternative added to the statute by 2011 Wisconsin Act 284. Violations of this statute are punished as a Class F felony if the defendant believes or has reason to believe the individual has not attained the age of 13 years and as a Class H felony if the defendant believes or has reason to believe the individual has not attained the age of 18 years. The Committee recommends inserting the appropriate age limit as part of the third element.