

2134B CHILD ENTICEMENT: ATTEMPT: FICTITIOUS CHILD — § 948.07**Statutory Definition of the Crime**

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who, with intent to have sexual contact with a child,¹ attempts to cause a person (he) (she) believed to be a child who has not attained the age of 16 years² to go into any vehicle, building, room, or secluded place.

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 three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant attempted to cause a person to go into a (vehicle) (building) (room) (secluded place).
2. The defendant attempted to cause a person to go into a (vehicle) (building) (room) (secluded place) with intent to have sexual contact.

The phrase "with intent to" means that the defendant must have had the mental purpose³ to engage in sexual contact.

3. The defendant believed that the person was under the age of 16 years.⁴

Definition of Attempt

Attempt requires that the defendant intended to cause a person the defendant believed to be a child who was under 16 years of age⁵ to go into a (vehicle) (building) (room)

(secluded place) for the purpose of having sexual contact and that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.⁶

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

That the victim was fictitious can constitute an extraneous factor. What is required is that the defendant believed the person (he) (she) was dealing with was a child who was under the age of 16 years and that the defendant intended to have sexual contact with that person.⁷

Meaning of Sexual Contact

REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND INSERT THE APPROPRIATE DEFINITION HERE

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 three 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 2134B was originally published in 2003 and revised in 2007, 2014, and 2016. This revision was approved by the Committee in June 2018; it added to footnote 2.

Section 948.07 prohibits "causing or attempting to cause" a child to go into designated places for one of several prohibited purposes. Thus, it punishes the completed crime and the attempt equally. This instruction is drafted for the enticement case based on an attempt to entice what turns out to be a fictitious child. A separate instruction is provided for enticement cases based on an attempt to entice an actual child. See Wis JI-Criminal 2134A.

When an enticement charge is based on an attempt, it incorporates attempt as defined in § 939.32. State v. Koenck, 2001 WI App 93, ¶20, 242 Wis.2d 693, 626 N.W.2d 359; State v. Robins, 2002 WI 65, ¶28, 253 Wis.2d 298, 646 N.W.2d 287. This instruction incorporates the definition of attempt provided in § 939.32 as interpreted by Wis JI-Criminal 580.

In State v. Robins, 2002 WI 65, the Wisconsin Supreme Court upheld the application of the child enticement statute to a defendant charged with arranging, over the internet, a meeting in a motel with a boy he believed to be 13 years old. In fact, the boy was the fictitious creation of a government agent. The court held:

... attempted child enticement ... can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious. 2002 WI 65, ¶34.

Robins upheld State v. Koenck, 2001 WI App 93, where the court of appeals reached the same conclusion: "the fictitiousness of the girls constituted an extraneous factor beyond Koenck's control that prevented him from successfully enticing a child for the express purpose of sexual intercourse or contact." 2001 WI App 93, ¶28.

Both Robins and Koenck stop short of expressly holding that the defendant must believe that the person with whom he or she is dealing is a child. The Committee concluded that the statement in Robins that the fact that the victim is a fictitious child must be "unbeknownst" to the defendant is the equivalent of requiring that the defendant believe the victim is a child. This requirement is reflected in the instruction's definition of attempt.

The court of appeals interpreted Robins and Koenck in this manner in State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Grimm held that "the state may properly charge attempted child enticement . . . when the intended victim is actually an adult whom the defendant believes to be a child." ¶2.

Robins also rejected claims that applying § 948.07 based on communications over the internet violated the First Amendment:

The child enticement statute regulates conduct, not speech. . . That an act of child enticement is initiated or carried out in part by means of language does not make the child enticement statute susceptible of First Amendment scrutiny. 2002 WI 65, ¶43.

See the Comment to Wis JI-Criminal 2134 for a general discussion of § 948.07 and the crime of child enticement.

1. This instruction is drafted for a case involving intent to have sexual contact with a child. Other types of prohibited conduct are specified in § 948.07(1)-(6):

- (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.
- (2) Causing the child to engage in prostitution.
- (3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.
- (4) Recording the child engaging in sexually explicit conduct.
- (5) Causing bodily or mental harm to the child.
- (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer

to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. See footnote 4, Wis JI-Criminal 2134A for suggested summaries of the elements of the other predicate crimes.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

[This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The instruction is drafted for a case alleged to involve intent to have "sexual contact with a child under § 948.02," as prohibited in § 948.07(1). Sexual contact [or sexual intercourse] with a child in violation of § 948.02 requires that the victim be under the age of 16 years. The other prohibited conduct specified in subs. (2) through (6) of § 948.07 apply when the victim is under the age of 18 years.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

3. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

4. The Committee concluded that where the case involves a fictitious victim, that is, where a government agent poses as a child, the state must prove that the defendant believed that the person with whom he or she was dealing was a child. In a case involving intent to engage in sexual contact with a child in violation of § 948.02, for which this instruction is drafted, the victim must be under the age of 16, so the defendant's belief must match that element of the crime.

The Committee concluded that requiring that the defendant believe the victim was a child is the equivalent of the requirement stated in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287: "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the 'child' is fictitious." 2002 WI 65, ¶34.

The court of appeals interpreted Robins and Koenck in this manner in State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Grimm held that "the state may properly charge attempted child enticement . . . when the intended victim is actually an adult whom the defendant believes to be a child." ¶2.

5. See note 4, supra.

6. The definition of attempt is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.

7. This is based on the statement in State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287, that "attempted child enticement . . . can be charged where the extraneous factor that intervenes to make the crime an attempted rather than completed child enticement, is the fact that, unbeknownst to the defendant, the "child" is fictitious." 2002 WI 65, ¶34.