2135 USE OF A COMPUTER TO FACILITATE A CHILD SEX CRIME — § 948.075

Statutory Definition of the Crime

Section 948.075 is violated by a person who uses a computerized communication system to communicate with an individual who the person believes or has reason to believe has not attained the age of 16 years with intent to have sexual contact or sexual intercourse with the individual.[1]

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) (five)[2] elements were present.

Elements of the Crime That the State Must Prove

1. The defendant used a computerized communication system[3] to communicate with an individual.
2. The defendant believed or had reason to believe that the individual was under the age of 16 years.
3. The defendant used a computerized communication system to communicate with the individual with intent to have sexual (contact) (intercourse) with the individual.
4. The defendant did an act, in addition to using a computerized communication system, to carry out the intent to have sexual (contact) (intercourse).[4]

ADD THE FOLLOWING AS A FIFTH ELEMENT IF SUPPORTED BY THE EVIDENCE[5]

[5. At the time of the communication, the defendant did not reasonably believe that the age of the individual to whom the communication was sent was no more than 24 months less than the age of the defendant.][6]

Meaning of [Sexual Contact] [Sexual Intercourse]

[REFER TO WIS JI-CRIMINAL 2101A FOR DEFINITION OF "SEXUAL CONTACT" AND WIS JI-CRIMINAL 2101B FOR DEFINITION OF "SEXUAL INTERCOURSE" AND INSERT THE APPROPRIATE DEFINITION HERE.]

Deciding About Intent and Belief

You cannot look into a person's mind to find intent and belief. Intent and belief 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 and belief.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all (four) (five) 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 2135 was originally published in 2003 and revised in 2007, 2009 and 2013. The 2009 revision updated footnote 4 and the 2013 revision updated the Comment. This revision was approved by the Committee in July 2016; it added to the Comment and to footnote 3.

This instruction is for violations of § 948.075, which was created by 2001 Wisconsin Act 109 [effective date: July 30, 2002.]

2011 Wisconsin Act 284 [effective date: April 27, 2012] created § 939.32(1)(de), which provides: "Whoever attempts to commit a crime under s. 948.075(1r) is subject to the penalty provided in that section for the completed act."

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. As amended by 2011 Wisconsin Act 272, it provides for a minimum sentence of 5 years for violations of § 948.075. In State v. Heidke, 2016 WI App 55, 370 Wis.2d 771, 883 N.W.2d 162, the court of appeals addressed the constitutionality of § 939.617. Heidke argued that the mandatory penalty was irrational and unconstitutional because it doesn't apply to the completed sex crimes that he allegedly intended to facilitate by his computer use. The court of appeals rejected the claim, finding that the legislature had a rational basis for the distinction.

Conduct that may violate § 948.075 may also constitute enticement of a child under § 948.07 or attempted sexual assault of a child. See State v. Robins, 2002 WI 65, 253 Wis.2d 298, 646 N.W.2d 287; State v. Koenck, 2002 WI App 93, 242 Wis.2d 693, 626 N.W.2d 359; and, State v. Grimm, 2002 WI App 242, 258 Wis.2d 166, 653 N.W.2d 284. Also see, Wis JI-Criminal 2134B Child Enticement: Attempt: Fictitious Child.

1. The statutory definition of the crime refers to "sexual contact or sexual intercourse in violation of s. 948.02(1) or (2)." The reference to the statute numbers was not included in the instruction because the Committee concluded that it was not necessary. Any sexual contact or sexual intercourse with a person under the age of 16 is a violation of § 948.02(1) or (2).

2. The instruction will contain five elements if there is evidence of the defense recognized in sub. (2) of § 948.75. See note 5, below.

3. "Computerized communication system" is not defined in § 948.075. Section 943.70, Computer crimes, provides definitions of "computer" and "computer system." See § 943.70(1)(am) and (e).

In State v. McKellips, 2016 WI 51, 369 Wis.2d 437, 881 N.W.2d 258, the trial court may have followed these references in adding the following to the standard instruction:

> Evidence has been received that the defendant communicated with a child under the age of 16 via a mobile or cellphone. You must determine whether the phone described in the evidence constitutes a computerized communication system. To aid you in that determination, you are instructed that under Wisconsin law, a computer is defined as – computer is defined as computer, which means an electronic device that performs logical, arithmetic, and memory functions by manipulating electronic or magnetic impulses, and includes all input, output, processing, storage, computer software and communication facilities that are connected or related to a computer in a computer system or computer network. Computer system is defined as a set of related computer equipment, hardware, or software.

The Wisconsin Supreme Court found that this instruction, "while not perfect," accurately stated the law. The court also provided its own definition, based on the plain meaning of the terms used: "A group of interacting, interrelated, or interdependent elements forming a complex whole used to exchange thoughts or messages through a computer." 2016 WI 51, ¶34.

4. This element is intended to reflect sub. (3) of § 948.075, which provides:

> Proof that the actor did an act, other than use a computerized communication system to communicate with the individual, to effect the actor's intent under sub. (1) shall be necessary to prove that intent.

The instruction departs from the statutory language in two respects: it uses "in addition to" in place of the statute's "other than"; and, it uses "to carry out" in place of the statute's "to effect." Both changes are intended to make the instruction clearer for the jury; no substantive change is intended. The conclusion that "carry out" has the same meaning as "effect" was cited with apparent approval in State v. Olson, 2008 WI App 171, 314 Wis.2d 630, 762 N.W.2d 393 at footnote 6.

In State v. Schulpius, 2006 WI App 263, 298 Wis.2d 155, 726 N.W.2d 706, the court found the evidence sufficient to prove that the defendant did something "other than use a computerized communication system to communicate with" the person he believed to be a fourteen-year old girl. The defendant drove through the victim's neighborhood for the purpose of meeting her and purchased condoms, which he referred to in his computer communication.

In State v. Olson, 2008 WI App 171, 314 Wis.2d 630, 762 N.W.2d 393, the court found there was not sufficient evidence to satisfy the "act" requirement. The defendant's use of a webcam to transmit video of himself was nothing more than using his computer to communicate. The court noted, however, that in other situations, "it may be possible to use a communication function of a computer to engage in an 'act' within the meaning of the statute." 2008 WI App 171, ¶16.

5. The fifth element should be added if there is evidence of the defense recognized by § 948.075(2). That subsection provides:

> This section does not apply if, at the time of the communication, the actor reasonably believed that the age of the person to whom the communication was sent was no more than 24 months less than the age of the actor.

The Committee concluded that this provision should be handled like other statutory exceptions: when the evidence supports the exception, the state must prove that the exception does not apply. For example, this is the way the exception for peace officers is handled with regard to charges of carrying a concealed weapon. See Wis JI-Criminal 1335 and State v. Williamson, 58 Wis.2d 514, 206 N.W.2d 613 (1973).

6. This statement takes the statement of the exception in sub. (2) and phrases it so the state has to prove the exception does not apply.

