

**2138 SEXUAL INTERCOURSE WITH A CHILD — § 948.09****Statutory Definition of the Crime**

Sexual intercourse with a child, as defined in § 948.09 of the Criminal Code of Wisconsin, is committed by one who has attained the age of 19 years and has sexual intercourse with a child<sup>1</sup> who has not attained the age of 18 years<sup>2</sup> and who is not his or her spouse.

**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 where present.

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

1. The defendant had sexual intercourse with (name of victim).
2. (Name of victim) had not attained the age of age of 18 years at the time of the alleged sexual intercourse.

Knowledge of (name of victim)'s age is not required<sup>3</sup> and mistake regarding (name of victim)'s age is not a defense.<sup>4</sup>

Consent to sexual intercourse is not a defense.<sup>5</sup>

3. Defendant had attained the age of 19 year at the time of the alleged sexual intercourse.<sup>6</sup>

4. (Name of victim) was not the defendant's spouse at the time of the alleged sexual intercourse.

### Meaning of Sexual Intercourse

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

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, then you should find the defendant guilty.

If you are not so satisfied, then you must find the defendant not guilty.

### COMMENT

Wis JI-Criminal 2138 was originally published in 1989 and revised in 1996 and 2009. This revision was approved by the Committee in June 2018 and involved adding element 3 pertaining to the age of the defendant.

This instruction is for a violation of § 948.09, created by 1987 Wisconsin Act 332 as part of the revision of the criminal statutes relating to crimes against children. It applies to offenses committed on or after July 1, 1989.

Section 948.09 replaces sub. (2) of § 944.15 which prohibits sexual intercourse with a minor who is 16 years old or older but younger than 18. It replaces sub. (2)(b) of § 944.17 which prohibited acts of sexual gratification with a minor of the same age. Repeal of the sexual gratification statute was possible because the definition of sexual intercourse covers all of the acts covered by the former statute.

Section 948.09 was amended by 2017 Wisconsin Act 174 to add the following at the end of the offense definition: "If the defendant has attained the age of 19 years when the violation occurs." The effective date of the change is March 30, 2018.

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."
2. The instruction states the age limits "has not attained the age of 18 years" because this is how "child" is defined in § 948.01(1). The Committee believes that is preferable to following the statement in § 948.09 that the victim must be "a child . . . who has attained the age of 16 years." There is no reason to submit the lower age limit (has attained the age of 16 years) to the jury because if the victim is under the age of 16, the offense would be a more serious one: sexual assault of a child defined in § 948.02(1) or (2).

This interpretation comports with the common sense conclusion that a person should not be able to defend against a criminal charge on the grounds that he or she is actually guilty of a more serious offense that in fact includes the one charged. This issue was raised in a number of cases interpreting the state's homicide law at a time when first degree murder required "premeditated design" and second degree murder required "without design to effect death." Defendant's convicted of second degree murder appealed on the ground that they were really guilty of first degree murder because they intended to kill. The Wisconsin Supreme Court rejected this argument on several occasions. See Walsh v. State, 195 Wis. 543-45, 218 N.W. 714 (1928), and cases cited therein. Though the cases involved jury verdicts finding the defendant guilty of lesser included offenses, the logic of the decision applies in the present context.

3. See § 939.23(6).

4. See § 939.43(2).

5. "Without consent" is not an element of this offense, and the Committee concluded that it may be helpful to advise the jury of that fact.

6. This element was added to reflect changes made by 2017 Wisconsin Act 174 [effective date: March 30, 2018].