

2138A UNDERAGE SEXUAL ACTIVITY — § 948.093**Statutory Definition of the Crime**

Underage sexual activity, as defined in § 948.093 of the Criminal Code of Wisconsin, is committed by one who has not attained the age of 19 years and has [sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years] [sexual intercourse with a child who has attained the age of 15 years] and 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 were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim).
2. The defendant had not attained the age of 19 years at the time of the alleged sexual [contact] [intercourse].
3. (Name of victim) had attained the age of 15 years [but had not attained the age of 16 years at the time of the alleged sexual contact] [but had not attained the age of 18 years¹ at the time of the alleged sexual intercourse].

Knowledge of (name of victim)'s age is not required² and mistake regarding (name of victim)'s age is not a defense.³

Consent to sexual [contact] [intercourse] is not a defense.⁴

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

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.]

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 2138A was approved by the Committee in June 2018.

This instruction is for criminal violations of § 948.093, underage sexual activity, created by 2017 Wisconsin Act 174 [effective date: March 30, 2018]. This instruction provides for two types of underage sexual activity defined by § 948.093: sexual contact with a child who has attained the age of 15 years but has not attained the age of 16 years, or sexual intercourse with a child who has attained the age of 15 years. For violations of § 948.09, see Wis JI-Criminal 2138.

This instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definition material was formerly included in the text of each instructions for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by the 1995 Wisconsin Act 69, the Committee decided to modify its original approach by providing separate instructions for the definitions. The Committee believes that this will be more convenient to the users of the instructions, making it easier to prepare an instructions that is tailored to the facts of the case.

Prohibiting consensual sexual activity with a person under the age of 16 does not violate an adult defendant's alleged "constitutional privacy right to engage in sexual activity and his privacy right to make decisions regarding procreation." State v. Fisher, 211 Wis.2d 665, 668, 565 N.W.2d 565 (Ct. App. 1997).

1. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."
2. See § 939.23(6).
3. See § 939.43(2).

In State v. Jadowski, 2004 WI 68, 272 Wis.2d 418, 680 N.W.2d 810, the court held that "no affirmative defense of the victim's intentional misrepresentation of his or her age exists in a prosecution under § 948.02(2). . . If an accused's reasonable belief about the victim's age, based on the victim's intentional misrepresentation of age, is not a defense, then neither evidence regarding the defendant's belief about the victim's age nor evidence regarding the cause for or reasonableness of that belief is relevant.

4. "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.