

**2138B UNDERAGE SEXUAL ACTIVITY: SEXUAL INTERCOURSE — § 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 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 intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI-Criminal 2101B).<sup>1</sup>

2. The defendant had not attained the age of 19 years at the time of the alleged sexual intercourse.
3. (Name of victim) had attained the age of 15 years but had not attained the age of 18 years<sup>2</sup> 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>

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

### **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 2138B was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI-Criminal 2137A, which addressed both "sexual contact" and "sexual intercourse" in a single instruction. In October 2025, the Committee bifurcated Wis JI-Criminal 2137A to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals' recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.093 involving "sexual intercourse" only. For violations involving "sexual contact," see Wis JI-Criminal 2138A.

This instruction is for criminal violations of § 948.093, underage sexual activity, created by 2017 Wisconsin Act 174 [effective date: March 30, 2018], concerning sexual intercourse with a child who has attained the age of 15 years. For violations of § 948.09, see Wis JI-Criminal 2138.

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. The appropriate definition of "sexual intercourse" should be selected from the alternatives provided in Wis JI-Criminal 2101B, based on the specific facts of the case.
2. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."
3. See § 939.23(6).
4. 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.”

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.