

2139 SEXUAL ASSAULT OF A CHILD BY A SCHOOL STAFF PERSON — § 948.095(2)**Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.095(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student.

State's Burden of Proof

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present at the time of the offense.

Elements of the Crime That the State Must Prove

1. The defendant had sexual [contact] [intercourse] with (name of victim), who was not the defendant's spouse.

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.]

2. (Name of victim) had attained the age of 16 years and had not attained the age of 18 years.¹

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

3. (Name of victim) was enrolled as a student in a school or a school district.

["School" means a public or private elementary or secondary school.]⁵

4. The defendant was a member of the school staff of the school or school district in which (name of victim) was enrolled as a student.

["School staff" means any person who provides services to a school or a school board, including an employee of a school or school board and a person who provides services to a school or a school board under a contract.]⁶

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 2139 was originally published in 1997 and revised in 2004. This revision was approved by the Committee in October 2006; it reflects changes made by 2005 Wisconsin Act 274.

This instruction is for violations of § 948.095, which was created by 1995 Wisconsin Act 456 (effective date: July 11, 1996). 2005 Wisconsin Act 274 amended the title of the statute to read as follows: "Sexual assault of a child by a school staff person or a person who works or volunteers with children." Act 274 also created sub. (3), which defines a new offense addressed by Wis JI-Criminal 2139A.

Before being amended by Act 274, the title of the statute referred to "instructional staff" but the text referred simply to "staff." The definition of "school staff" in sub. (1)(b) extends to anyone who provides "services" – it is not limited to "instructional services." In State v. Kaster, 2003 WI App 105, 264 Wis.2d

751, 663 N.W.2d 390, the court of appeals noted the potentially broad application of the statutory definition but concluded that it did not make the statute unconstitutional or ambiguous. The statute does not require that a person be "under contract" and can apply to volunteers. The court also concluded that Wis JI-Criminal 2139 adequately instructs the jury on § 948.095. 2003 WI App 105, ¶16. Kaster returned to the appellate courts, claiming that the court of appeals had added a new element to the statute and that he was denied the opportunity to present a defense to that element. The court of appeals held that the first decision "did not create an additional element but instead provided a description of Kaster's relationship with the school for the purpose of analyzing whether Kaster was school staff. . . . Thus, we reject Kaster's argument that he was denied the right to present a defense . . ." State v. Kaster, 2006 WI App 72, ¶8, 292 Wis.2d 252, 714 N.W.2d 238.

The instruction provides for inserting definitions of "sexual contact" and "sexual intercourse" provided in Wis JI-Criminal 2101A and 2101B. That definitional material was formerly included in the text of each instruction for sexual assault offenses. When a new alternative was added to the statutory definition of sexual contact by 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 instruction that is tailored to the facts of the case.

1. The statute requires that the victim be "a child who has attained the age of 16 years." "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years." Thus, the victim must have attained the age of 16 but not 18. Sexual contact or intercourse with a child under the age of 16 is made criminal by § 948.02.

2. Section 939.23(6).

3. Section 939.43(2).

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

5. This is the definition provided in § 948.095(1)(a).

6. This is the definition provided in § 948.095(1)(b). See the discussion of State v. Kaster in the Comment preceding footnote 1.