

2139A SEXUAL ASSAULT OF A CHILD BY A PERSON WHO WORKS OR VOLUNTEERS WITH CHILDREN — § 948.095(3)**Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.095(3) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

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 five elements were present at the time of the offense.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 21 years.
2. The defendant (engaged in an occupation) (participated in a volunteer position) that required (him) (her) to work or interact directly with children.
3. 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.]

4. (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

5. (Name of victim) was a person with whom the defendant worked or interacted through (his) (her) (occupation) (volunteer position).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all 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 2139A was approved by the Committee in October 2006.

This instruction is for violations of § 948.095(3)(a), which was created by 2005 Wisconsin Act 274 (effective date: April 20, 2006). For violations of § 948.095(2), see Wis JI-Criminal 2139.

Act 274 also changed the title of § 948.095 to refer to "school staff person or a person who works or volunteers with children." This, with the addition of sub. (3), arguably makes it more clear that the statute applies to a broad category of individuals. See State v. Kaster, 2003 WI App 105, 264 Wis.2d 751, 663 N.W.2d 390, where the court of appeals noted the potentially broad application of the statute before the changes made by Act 274 and concluded that it did not make the statute unconstitutional or ambiguous. See the discussion in the Comment, Wis JI-Criminal 2139.

Subsection (3)(d) of § 948.095 provides that evidence that a person engages in any of several listed occupations or positions is "prima facie evidence that the occupation or position requires him or her to work or interact directly with children . . ." The instruction does not address this provision. See Wis JI-Criminal 225 for a general model for instructing on "prima facie cases."

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.