

2140 EXPOSING GENITALS, PUBIC AREA, OR INTIMATE PARTS TO A CHILD — § 948.10**Statutory Definition of the Crime**

Section 948.10 of the Criminal Code of Wisconsin, is violated by one who exposes genitals, pubic area, or intimate parts to a child for the purpose of sexual arousal or sexual gratification.

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 [three] [four]¹ elements were present.

Elements of the Crime That the State Must Prove

1. The defendant exposed (genitals) (pubic area) (name intimate part)² to (name of child).

"Expose" means to exhibit to the view of another person.

2. The defendant exposed (genitals) (pubic area) (name intimate part) for the purpose of the defendant's sexual arousal or sexual gratification.³
3. (Name of child) was under the age of 18 years at the time of the alleged offense.

Knowledge of (name of child)'s age by the defendant is not required⁴ and mistake regarding (name of child)'s age is not a defense.⁵

ADD ONE OF THE FOLLOWING IF THE FELONY OFFENSE IS CHARGED.⁶

[4. The defendant had attained the age of 17 years when the alleged offense occurred.⁷]

[4. The defendant had attained the age of 17 years but not the age of 19 years at the time of the alleged offense and was more than 4 years older⁸ than (name of child).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all [three] [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 2140 was originally published in 1989 and revised in 1998, 2007, and 2011. The 2011 revision modified the instruction to reflect the penalty structure created by 2009 Wisconsin Act 202. This revision was approved by the Committee in October 2014; it modified the instruction to reflect changes made by 2013 Wisconsin Act 362.

This instruction is for a violation of § 948.10, 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. The offense is similar to the crime defined in § 944.20(2): lewd and lascivious behavior by publicly and indecently exposing a sex organ. (See Wis JI-Criminal 1544.)

Section 948.10 was amended by 2009 Wisconsin Act 202 to create a new penalty structure. [Effective date: May 6, 2010.] Violations are Class I felonies unless conditions specified in sub. (1)(b)1. or 2. are present, in which case violations are Class A misdemeanors. The Committee concluded that the facts determining which penalty applies are best addressed by adding a fourth element for cases where felony violations are charged.

2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.]

There are two different offenses under § 948.10: exposing genitals, pubic area, or intimate parts to a child (this instruction); and, causing a child to expose genitals, pubic area, or intimate parts (see Wis JI-Criminal 2141).

Subsection (2) of § 948.10 provides that "Subsection (1) does not apply under any of the following circumstances:

- (a) The child is the defendant's spouse.
- (b) A mother's breast-feeding of her child."

The breast-feeding exclusion was created by 1995 Wisconsin Act 165. [Effective date: April 6, 1996.].

1. Use three elements if the misdemeanor offense is charged; use four elements if the felony offense is charged.

2. 2013 Wisconsin Act 362 amended § 948.10 to add "intimate parts" to the title and the offense definition [effective date: April 25, 2014.] "Intimate part" is defined in § 939.22(19): "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being." The Committee suggests naming the specific intimate part involved.

3. Section 948.10 avoids one of the problems with traditional indecent exposure statutes in that it does not use words like "indecently" or "lewd." Rather, the "purpose of sexual arousal or sexual gratification" is required. This is the phrase used in the definition of "sexual contact" in §§ 940.225(5)(b) and 948.01(5).

4. Section 939.23(6).

5. Section 939.43(2).

6. Section 948.10(1)(a) provides that the penalty for violations of § 948.10 is a Class I felony, "except as provided in par. (b)." Paragraph (b) provides that the penalty is a Class A misdemeanor "if any of the following applies:

1. The actor is a child when the violation occurs.
2. At the time of the violation, the actor had not attained the age of 19 years and was not more than 4 years older than the child."

The Committee concluded that the preferred way to deal with this penalty structure was to treat the absence of the penalty-reducing facts in sub. (b)1. and 2. as elements of the felony offense. Thus, the instruction provides two alternatives for element 4: that the defendant was not a child (i.e., that the defendant had not attained the age of 17 years); or, that the defendant had attained the age of 17 but not 19 years and was more than 4 years older than the child.

7. For the purposes of prosecuting a person for violating provisions of Chapter 948, the person is a "child" if under the age of 17. Section 948.01(1) provides:

"Child" means a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the aged of 17 years.

8. A similar four-year age gap is included in § 301.45(1m), the sex offender registration law. In

State v. Parmley, 2010 WI App 79, 325 Wis.2d 769, 785 N.W.2d 655, the court held that determining whether the actor is "not more than 4 years older," is determined by calculating the time between the birthday of the actor and the birthday of the victim. . . [I]t was error . . . to only compare calendar year ages." ¶28.