2142A EXPOSING A CHILD TO HARMFUL MATERIAL: FACE-TO-FACE CONTACT AFFIRMATIVE DEFENSE — § 948.11(2)(a)2. and (c)

[USE THIS INSTRUCTION FOR VIOLATIONS OF § 948.11(2)(a)2. IF THERE IS EVIDENCE OF THE DEFENSE UNDER § 948.11(2)(c).][1]

Statutory Definition of the Crime

Exposing a child to harmful material, as defined in § 948.11(2)(a) of the Criminal Code of Wisconsin, is committed by one who, with knowledge of the character and content of the material, sells, rents, exhibits, transfers, or loans to a child any harmful material, with or without monetary consideration and has face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan].[2]

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 (sold) (rented) (exhibited)[3] (played) (distributed) (loaned) harmful material to (name of child) .

   This does not require that the defendant received any monetary consideration.[4]

   "Harmful material"[5] means (identify the type of material) [6] of a person or portion of the human body that depicts nudity, sexually explicit conduct,

sadomasochistic abuse, physical torture, or brutality, and that is harmful to children.

"Harmful to children"[7] means that quality of any description, narrative account, or representation of nudity,[8] sexually explicit conduct,[9] sexual excitement,[10] sadomasochistic abuse,[11] physical torture, or brutality when it

(1) predominantly appeals to the prurient,[12] shameful or morbid interest of children; and

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[13] as a whole with respect to what is suitable material for children; and

(3) lacks serious literary, artistic, political, scientific, or educational value for children of the age of (name of child),[14] when taken as a whole.

2. The defendant had knowledge of the character and content of the material.[15]

This requires that the defendant knew that the material contained a description, narrative account, or representation of nudity, sexually explicit conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality.

3. (Name of child) was under the age of 18 years.[16]

4. The defendant had face-to-face contact with the child before or during the (sale) (rental) (exhibit) (playing) (distribution) (loan).[17]

Consider Whether The Defense Is Proved

Wisconsin law provides that it is a defense to this crime if the defendant had reasonable cause to believe that (name of child) had attained the age of 18 years and that (name of child) exhibited to the defendant (a draft card) (a driver's license) (a birth certificate) (an official or apparently official document) purporting to establish that (name of child) had attained the age of 18 years.[18]

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence that this defense is established.[19]

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.[20]

Jury's Decision

If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, and 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 satisfied beyond a reasonable doubt that all the elements of this offense have been proved, you must find the defendant not guilty.[21]

COMMENT

Wis JI-Criminal 2142A was originally published in 2001 and revised in 2003 and 2006. This revision was approved by the Committee in February 2009.

This instruction is for a violation of § 948.11(2)(a) involving face-to-face contact and where there is evidence of the defense provided in sub. (2)(c) of the same statute. See Wis JI-Criminal 2142 for the instruction intended to be used where there is no evidence of the affirmative defense. See the Comment to that instruction for general information about the statute.

Where the offense involves material on a videotape, producing evidence sufficient to establish that the material is "harmful to children" is likely to require that the jury view the videotape. See State v. Booker, 2005 WI App 182, 286 Wis.2d 747, 704 N.W.2d 336, discussed in note 7, below.

Section 948.11 has been described as a "variable obscenity statute" – "a law which prohibits a person from exhibiting to children materials determined to be obscene to children, though not obscene to adults." State v. Kevin L.C., 216 Wis.2d 166, 185, 576 N.W.2d 62 (Ct. App. 1997).

In State v. Weidner, 2000 WI 52, ¶1, 235 Wis.2d 306, 611 N.W.2d 684, the Wisconsin Supreme Court held that "§ 948.11(2) is unconstitutional in the context of the internet and other situations that do not involve face-to-face contact between the minor and the accused." The defect was that the statute eliminated a mental state regarding the age of the child while imposing a burden on the defendant to establish lack of knowledge as an affirmative defense. The defense would be extremely difficult, if not impossible, to establish in a case that does not involve face-to-face confrontation. Apparently the statute remained constitutional for situations that do involve face-to-face contact between the defendant and the child. See State v. Kevin L.C., 216 Wis.2d 166, 576 N.W.2d 62 (Ct. App. 1997), upholding the constitutionality of the statute where there was face-to-face interaction.

The statute was amended by 2001 Wisconsin Act 16 to remedy the defect identified in Weidner by adding the requirement reflected in the new fourth element of the instruction: that the defendant knew or reasonably should have known that the child was under the age of 18 years or had face-to-face contact with the child before or during the sale, rental, exhibit, playing, distribution, or loan.

In State v. Trochinski, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, the court affirmed a court of appeals decision denying withdrawal of a no contest plea and upholding the constitutionality of § 948.11(2). The defendant gave nude pictures of himself to a 17 year old female clerk at a convenience store, along with letters saying his pictures had been accepted for publication in Playgirl magazine. He sought to withdraw his plea on the ground that he did not understand the "harmful to children" element of the crime. The court found his understanding was adequately demonstrated by the plea form and the plea colloquy. His constitutional claim was also rejected: prior decisions (Thiel and Kevin L.C.) have established that § 948.11(2) is constitutional as applied to situations involving face-to-face interaction. The "personal contact between the perpetrator and the child-victim is what allows the State to impose on the defendant the risk that the victim is a minor." 2002 WI 56, ¶39.

1. This instruction is intended to be used for cases involving violations of § 948.11(2)(a)2. where there is evidence of the defense provided in § 948.11(2)(c). The defense applies to cases where there has been face-to-face contact if the defendant "had reasonable cause to believe that the child had attained the

age of 18 years" and the child has exhibited documentary evidence purporting to establish that age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

2. The statement of the offense reflects changes in § 948.11(2)(a) made by 2001 Wisconsin Act 16: substituting knowledge of the "character and content" of the material for knowledge of the "nature" of the material; adding "rents," "plays," and "distributes" to the list of prohibited acts and striking "transfers" from that list; and, adding the requirement that the defendant have face-to-face contact with the child.

3. See note 3, Wis JI-Criminal 2142.

4. See note 4, Wis JI-Criminal 2142.

5. See note 5, Wis JI-Criminal 2142.

6. Here identify the type of material involved: picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image. See sub. (1)(ar)1. of § 948.11. Subdivision 2. of that subsection extends coverage to "any book, pamphlet, magazine, printed matter or recording that contains any matter enumerated in subd. 1."

7. See note 7, Wis JI-Criminal 2142.

8. See note 8, Wis JI-Criminal 2142.

9. See note 9, Wis JI-Criminal 2142.

10. See note 10, Wis JI-Criminal 2142.

11. See note 11, Wis JI-Criminal 2142.

12. See note 12, Wis JI-Criminal 2142.

13. See note 13, Wis JI-Criminal 2142.

14. See State v. Thiel, 183 Wis.2d 505, 536, 515 N.W.2d 847 (1994) and State v. Trochinski, 2002 WI 56, ¶32, 253 Wis.2d 38, 644 N.W.2d 891, which hold that whether the material is "harmful to children" is to be judged by reference to a reasonable minor "of like age" with the child in the case, at least as to the issue of literary, artistic, political, scientific, or educational value under § 948.11(1)(b)3.

15. See note 14, Wis JI-Criminal 2142.

16. See note 15, Wis JI-Criminal 2142.

17. This element was added in response to changes made in the statute by 2001 Wisconsin Act 16, specifically, adding subsec. (2)(a)2.

18. This is the full statement of the defense found in sub. (2)(c).

19. The statute provides that the defendant "has the burden of proving this defense by a preponderance of the evidence." The statement used in the instruction is the description typically used to explain the civil burden of persuasion.

20. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

21. This statement is included to assure that both options for a not guilty verdict are clearly presented:

1) not guilty because the elements are not proven [regardless of the conclusion about the defense]; and,

2) not guilty even though the elements are proven, because the defense has been established.

