2143 EXPOSING A CHILD TO HARMFUL MATERIAL: VERBALLY COMMUNICATING A HARMFUL DESCRIPTION OR NARRATIVE ACCOUNT — § 948.11(2)(am)

[USE THIS INSTRUCTION IF THERE IS NO 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)(am) of the Criminal Code of Wisconsin, is committed by a person who has attained the age of 17 and who, with knowledge of the character and content of the material, verbally communicates, by any means, a harmful description or narrative account to a child, with or without monetary consideration and [knows or reasonably should know that the child has not attained the age of 18 years] [has face-to-face contact with the child before or during the communication].[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 five elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had attained the age of 17 at the time of the alleged offense.
2. The defendant verbally communicated,[3] by any means, a harmful description or narrative account to (name of child).

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

"Harmful description or narrative account" means any explicit and detailed description or narrative account of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture, or brutality that, taken as a whole, is harmful to children.[5]

"Harmful to children"[6] means that quality of any description, narrative account, or representation of nudity,[7] sexually explicit conduct,[8] sexual excitement,[9] sadomasochistic abuse,[10] physical torture, or brutality when it

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

(2) is patently offensive to prevailing standards in the adult community of Wisconsin[11] 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),[12] when taken as a whole.[13]

3. The defendant had knowledge of the character and content of the material.[14]

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.

4. (Name of child) was under the age of 18 years.[15]

5. The defendant [knew or reasonably should have known that (name of child) was under the age of 18 years] [had face-to-face contact with (name of child) before or during the communication].[16]

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 2143 was originally published in 2008 and revised in 2009. This revision was approved by the Committee in October 2018.

Section 948.11 was 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. A similar offense was defined by § 944.25 under prior law. That statute was repealed and replaced by § 948.11. There was no uniform instruction for violations of § 944.25.

This instruction is for a violation of § 948.11(2)(am), which prohibits verbally communicating a harmful description or narrative to a child.

In State v. Thiel, 183 Wis.2d 505, 515 N.W.2d 847 (1994), the court held that § 948.11 was not unconstitutionally overbroad.

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 fifth 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 communication.

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 all cases involving violations of § 948.11(2)(am)1. and for cases involving violations of § 948.11(2)(am)2. where there is not evidence of the defense provided in § 948.11(2)(c). As amended by 2001 Wisconsin Act 16, the defense applies to violations of subsec. (2)(am)2. – those involving violations 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 presented documentary evidence of age. The statute further provides that the defendant "has the burden of proving this defense by a preponderance of the evidence."

For cases involving the affirmative defense, see Wis JI-Criminal 2142A, which can be used as model for adapting this instruction.

2. Choose the applicable alternative. See, § 948.11(2)(am)1. and 2.

3. In State v. Ebersold, 2007 WI App 232, ¶14, 306 Wis.2d 371, 742 N.W.2d 876, the court held that "'verbally' is most reasonably read here as proscribing communication to children of harmful matter in words, whether oral or written, and to distinguish § 948.22(2)(am) from § 948.22(2)(a), which primarily proscribes visual representations." Thus, the court held that the statute applied to Ebersold's message sent via an Internet chat room.

4. The statutory definition of this offense provides that it applies to transfers of material, "with or without monetary consideration." § 948.11(2)(am). The Committee interprets this provision as one that makes proof of consideration unnecessary, as opposed to one that creates alternative means of proving a required fact. The Committee recommends telling the jury that proof of consideration is not required if the issue has been raised in the case. No further mention of consideration is made.

5. This is the definition provided in § 948.11(1)(ag).

6. This is the definition provided in § 948.11(1)(b).

7. "Nudity" is defined in § 948.11(1)(d).

8. "Sexually explicit conduct" is defined in § 948.01(7).

9. "Sexual excitement" is defined in § 948.11(1)(f).

10. "Sadomasochistic abuse" is defined in § 948.01(4).

11. The reference to the "adult community of Wisconsin" was added in 2009 in response to an unpublished decision of the Wisconsin Court of Appeals that suggested the failure to include that reference "invites error." See, State v. McCoy, 2008 AP 1512-CR, December 23, 2008.

12. 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.

13. The definition of "harmful to children" is based in part on the three-part test used to define obscenity. One part of that definition refers to "prurient interest." Jury instructions defining "prurient interest" in a proceeding under § 944.21, Obscene material or performance, were reviewed in County of Kenosha v. C&S Management, 223 Wis.2d 373, 588 N.W.2d 236 (1999). The court held that the following instruction complied with the constitutional test based on Miller v. California, 413 U.S. 15 (1973):

> 'Appealing to the prurient interest' does not encompass normal healthy sexual desires but means the material appeals generally to a shameful, unhealthy, unwholesome, degrading or morbid interest in sex, nudity, or excretion.

A second part of the definition refers to "prevailing standards in the adult community as a whole." In State v. Tee & Bee, Inc., 229 Wis.2d 446, 600 N.W.2d 230 (Ct. App. 1999), the court found three errors in a jury instruction under § 944.21. Two of those errors related to the relevant "community standard" used to determine whether material is obscene: contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community (229 Wis.2d 446, 452); and, statewide community standards must be used, not standards of a smaller geographic area (229 Wis.2d 446, 454).

In Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), the court held that reliance on "community standards" to determine whether material is "harmful to minors" under the federal Child Online Protection Act does not by itself make that statute unconstitutionally overbroad. The court did find the statute unconstitutionally overbroad on other grounds.

14. This knowledge element is stated in these terms by § 948.11(2)(am).

The Committee concluded that "knowledge of the character and content" of the material refers to knowledge that the material contains "any description or representation of nudity, sexually explicit

conduct, sexual excitement, sadomasochistic abuse, physical torture, or brutality." The quoted material is from the first part of the definition of "harmful to children" in § 948.11(1)(b). The balance of that definition describes the attributes of the material that makes it the equivalent of "obscene." As is the case with criminal prohibition of obscenity, knowledge of those attributes, which are essentially legal issues, is not required. See Hamling v. United States, 418 U.S. 121, 123 (1974):

> . . . . It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

15. "Child" is defined in § 948.01(1) as "a person who has not attained the age of 18 years."

16. The alternative supported by the evidence should be selected. If the second alternative is used – face-to-face contact – and there is evidence of the affirmative defense defined in sub. (2)(c), see Wis JI-Criminal 2142A for a model incorporating the affirmative defense.

