2146A CHILD PORNOGRAPHY: POSSESSION OF OR ACCESSING A RECORDING — § 948.12(1m)

Statutory Definition of the Crime

Possession of child pornography, as defined in § 948.12(1m) of the Criminal Code of Wisconsin, is committed by one who knowingly possesses[1] or accesses in any way with intent to view any undeveloped film, photographic negative, photograph, motion picture, videotape, or other recording of a child engaged in sexually explicit conduct, knows or reasonably should know that the recording contained depictions of sexually explicit conduct, and knows or reasonably should know that the child depicted in the material has not attained the age of 18 years.

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 knowingly (possessed a recording) (accessed a recording in any way with intent to view it).[2]

   [“Possessed” means that the defendant knowingly[3] had actual physical control of the recording.][4]

   ADD THE FOLLOWING PARAGRAPHS IN POSSESSION CASES WHEN THEY ARE SUPPORTED BY THE EVIDENCE:

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[A recording is (also) in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the recording.]

[It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording.]

[Possession may be shared with another person. If a person exercises control over a recording, the recording is in that person's possession, even though another person may also have similar control.]

"Recording" means a reproduction of an image or a sound or the storage of data representing an image or a sound.[5]

2. The recording showed a child engaged in sexually explicit conduct.

   A child is a person who is under the age of 18 years.[6]

   "Sexually explicit conduct" means[7] actual or simulated [sexual intercourse] [bestiality] [masturbation] [sexual sadism or sexual masochistic abuse] [lewd exhibition of <u>(name intimate part)</u>].[8]

3. The defendant knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated _________.[9]

4. The defendant knew or reasonably should have known[10] that the person [shown in the recording] [depicted in the material] engaged in sexually explicit conduct was under the age of 18 years.

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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.

ADD THE FOLLOWING IF THE OFFENSE WAS CHARGED AS A CLASS D FELONY AND THERE IS EVIDENCE THAT THE DEFENDANT WAS 18 YEARS OF AGE OR OLDER AT THE TIME OF THE OFFENSE.[11]

If you find the defendant guilty, you must answer the following question:

"Had the defendant attained the age of 18 years at the time of the offense?"

Before you may answer the question "yes," you must be satisfied beyond a reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

COMMENT

This instruction was originally published as Wis JI-Criminal 2146 in 1992 and revised in 1998, 2002, 2003, 2006, 2007, and 2011, and 2012. The 2002 revision involved renumbering as Wis JI-Criminal 2146A, adopting a new format, and updating the instruction to reflect changes made in the statute by 2001 Wisconsin Act 16. The 2006 revision added a definition of "possession" to element 1. The February 2007 revision involved adding a special question at the end of the instruction and updating the Comment. The 2011 revision added to footnote 4. The 2012 revision reflected changes made by 2011 Wisconsin Acts 271 and 272. This revision was approved by the Committee in July 2019 and reflects changes to the Comment made by 2019 Wisconsin Act 16 [effective date: July 12, 2019].

This instruction is for a violation of § 948.12(1m), as amended by 2011 Wisconsin Act 271, effective date: April 24, 2012. For a violation of § 948.12(2m), created by 2001 Wisconsin Act 16, see Wis JI-Criminal 2146B.

The United States Supreme Court upheld the constitutionality of a New York statute prohibiting persons from distributing child pornography in New York v. Ferber, 458 U.S. 747 (1982). The statute before the court differed from § 948.12, but some of the decision's discussion of constitutional issues implicated by prohibiting child pornography may be relevant to questions arising under the Wisconsin statute.

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In State v. Whistleman, 2001 WI App 189, 247 Wis.2d 337, 633 N.W.2d 249, the court held that "pictorial reproductions" as used in § 948.12, 1999-2000 Wis. Stats., included computer disks that store images of child pornography. 2001 Wisconsin Act 16 amended § 948.12 by replacing "pictorial reproduction" with "recording," defining the latter in § 948.01(3r) to include "storage of data representing an image. . ."

In State v. Multaler, 2002 WI 35, 252 Wis.2d 54, 643 N.W.2d 437, the court held that charging a separate count under § 948.12, 1997-98 Wis. Stats., for each of 28 files containing pornographic images on two computer diskettes did not violate the rule prohibiting multiplicitous charges. Also see State v. Schaefer, 2003 WI App 164, 266 Wis.2d 719, 668 N.W.2d 760.

Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

NOTE: 2005 Wisconsin Act 433 created § 939.617 Minimum sentence for certain child sex offenses. It provides for a minimum sentence of 3 years for violations of § 948.12. Section 939.617 was amended by 2011 Wisconsin Act 272 [effective date: April 24, 2012] to limit the exception to the minimum sentence for violations of § 948.12 to those where the defendant "is no more than 48 months older than the child who engaged in the sexually explicit conduct." See § 939.617(2)(b).

1. Section 948.12(1m)(a) requires that "the person knows that he or she possesses the material." Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase "knowing possession."

2. Section 948.12(1m) was amended by 2011 Wisconsin Act 271 [effective date: April 24, 2012] to add "or accesses in any way with intent to view" as an alternative to possession. This change may address some of the difficulties presented by trying to apply "possession" to certain fact situations. See footnote 4, below, and State v. Mercer, cited therein.

The statute prohibits possession or accessing of undeveloped film, a photographic negative, a photograph, a motion picture, a videotape, or a recording. The statute was revised by 2001 Wisconsin Act 16 [effective date: September 1, 2001] to delete reference to "pictorial reproduction" and "audio recording" and replace them with "recording." "Recording" is defined in § 948.01(3r) as follows: "'Recording' includes the creation of a reproduction of an image or a sound or the storage of data representing an image or a sound." The Committee concluded that the new term "recording" is defined to include all the specific items listed in the statute. That is, undeveloped film, or a photographic negative, or a photograph, etc., is a "recording" as that term is defined in § 948.01(3r). The Committee further concluded that it is permissible to instruct the jury that, for example, "A photographic negative is a recording." This applies only to items listed in the statute; whether other items qualify as a "recording" is a factual issue for the jury to resolve.

3. Inherent in the legal definition of "possession" is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414-18, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927). For a case finding circumstantial evidence to be sufficient to show knowing possession, see State v. Poellinger, 153 Wis.2d 394, 508-09, 451 N.W.2d 752 (1990).

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4. The definition of "possess" is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the item is arguably under the defendant's control but not directly in the physical possession of the defendant.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to "possession" in criminal cases, including so-called constructive possession.

Questions about "knowing possession" and "control" of a recording arise in cases involving images on a computer hard drive. In State v. Lindgren, 2004 WI App 159, 275 Wis.2d 851, N.W.2d, the court of appeals found that the evidence was sufficient to show "possession" where images were "cached" on the hard drive and there was evidence that the defendant knew that would happen when he accessed pornographic material. Lindgren adopted the rationale of U.S. v. Tucker, 305 F.3d. 1193 (10th Cir. 2002).

In State v. Mercer, 2010 WI App 47, 324 Wis.2d 506, 782 N.W.2d 125, the court held that possession of images of child pornography in violation of § 948.12(1m) can be proved by evidence from computer monitoring software showing that the defendant searched for and obtained access to web sites and viewed the images. It is not required that the defendant retained control of the images after viewing them by, for example, storing them on the computer or allowing them to remain in the computer's cache. The court's conclusion:

> . . . an individual knowingly possesses child pornography when he or she affirmatively pulls up images of child pornography on the Internet and views those images knowing that they contain child pornography. Whether the proof is hard drive evidence or something else, such as the monitoring software here, should not matter because both capture a "videotape" of the same behavior. And images in either place can be controlled by taking actions like printing or copying the images. ¶31.

The trial court in the Mercer case had added to the standard definition of "possession" in the instruction, giving examples of what could constitute possession:

> [p]ossessed means that the defendant knowingly had actual physical control of the recording, or that the recording is in an area over which the person has control and the person intends to exercise control over the recording.
>
> In cases involving digital images, if you are satisfied that the defendant intentionally visited child pornography websites when [sic] contained child pornography images; and (a) acted on or manipulated the child pornography image; or (b) viewed the child pornography image knowing that his web browser automatically saved the image in the temporary Internet cache file; you may find knowing possession of such images.
>
> It is not required that a person own a recording in order to possess it. What is required is that the person exercise control over the recording. Recording means a reproduction of an image or a sound or the storage of data representing an image or a sound, including a digital image.

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The court of appeals commented that this instruction "actually inured to Mercer's benefit because it gave an example fitting his theory of defense, a defense to which he was not entitled." ¶36.

For two articles providing helpful information about basic computer functioning and analysis of the "possession" of material viewed via computer see: Ty E. Howard, Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files, 19 Berkeley Tech. L.J. 1227, 1267-68 (2004); Giannina Marin, Possesson of Child Pornography: Should You Be Convicted When the Computer Cache Does the Saving for You?, 60 Fla. L. Rev. 1205, 1213-14 (2008).

5. This is based on the definition provided in § 948.01(3r), created by 2001 Wisconsin Act 16, effective date: September 1, 2001. See note 2, supra. "Means" was substituted for the phrase "includes the creation of" used in the statutory definition. No change in substance was intended.

6. Section 948.01(1) defines "child" as "a person who has not attained the age of 18 years."

7. Section 948.01(7) defines "sexually explicit conduct" as follows:

"Sexually explicit conduct" means actual or simulated:
(a) Sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
(b) Bestiality;
(c) Masturbation;
(d) Sexual sadism or sexual masochistic abuse including, but not limited to, flagellation, torture or bondage; or
(e) Lewd exhibition of intimate parts.

8. The definition of "sexually explicit conduct" was amended by 1995 Wisconsin Act 67, which substituted "intimate parts" for "the genitals or pubic area" in sub. (7)(e). Effective date: Dec. 2, 1995. "Intimate parts" is defined as follows in § 939.22(19):

"Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being.

The definition of "lewd exhibition of intimate part" was created by 2019 Wisconsin Act 16 [effective date: July 12, 2019], which states: "'Lewd exhibition of intimate parts' means the display of less than fully and opaquely covered intimate parts of a person who is posed as a sex object or in a way that places an unnatural or unusual focus on the intimate parts." Wis. Stat. 948.01(1t).

In State v. Petrone, 161 Wis.2d 530, 468 N.W.2d 676 (1991), the Wisconsin Supreme Court reviewed a trial court's instruction defining "lewd" in a case prosecuted under § 940.203, 1987 Wis. Stats. The court concluded that "[t]hree concepts are generally included in defining 'lewd' and sexually explicit. . . [M]ere nudity is not enough – the pictures must display the child's genital area . . . the photographs must be sexually suggestive; and . . . the jurors may use common sense to determine whether the photographs were lewd." 161 Wis.2d 530, 561.

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9. The statement of the third element reflects changes made by 2011 Wisconsin Act 271 [effective date: April 24, 2012]. The change added "or reasonably should know" as an alternative to "know." It also deleted the reference to "the character and content" of the conduct and replaced it with "material that contains depictions of" sexually explicit conduct. The Committee concluded that the best way to describe this requirement to the jury is to insert the name of the type of conduct used in the preceding element.

10. The "knew or reasonably should have known" requirement is set forth in § 948.12(1m)c. This is contrary to the general rule in the Criminal Code that knowledge of the age of a minor victim is not required and mistake about age is not a defense. See §§ 939.23(6) and 939.43(2). This element satisfies the requirement that pornography statutes include "scienter." State v. Schaefer, 2003 WI App 164, ¶36, 266 Wis.2d 719, 668 N.W.2d 760.

11. Section 948.12 was amended by 2005 Wisconsin Act 433, effective date: June 6, 2006. Act 433 changed the penalty structure: the offense is a Class D felony if the defendant was over the age of 18 years at the time of the offense; it is a Class I felony if the defendant was under the age of 18. The instruction reflects this change by adding a special question to be used where the Class D felony is charged. If the Class I felony is charged, the instruction should be used without the special question.

As with similar penalty-increasing facts, the Committee believes this issue is best handled by submitting it to the jury as a special question. The following form is suggested for the verdict:

> We, the jury, find the defendant guilty of child pornography: possession of a recording, under sec. 948.12(1m), at the time and place charged in the information.
>
> We, the jury, find the defendant not guilty.
>
> If you find the defendant guilty, answer the following question "yes" or "no."
>
> "Had the defendant attained the age of 18 years at the time of the offense?"

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