

**2146C CHILD PORNOGRAPHY: POSSESSION OF VIRTUAL CHILD
PORNOGRAPHY — § 948.125****Statutory Definition of the Crime**

Possession of virtual child pornography, as defined in Section 948.125 of the Criminal Code of Wisconsin, is committed by one who knowingly (receives) (distributes) (produces) (possesses)¹ or accesses with intent to view obscene material that he or she knows or reasonably should have known contains a depiction of a purported child engaging in sexually explicit conduct.

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 elements were present.

Elements of the Crime That the State Must Prove

1. The defendant knowingly (received) (distributed) (produced) (possessed)² (accessed with the intent to view) obscene material.

“Obscene material” means a photograph, film, motion picture, or digital or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, that satisfies all of the following:

- The average person, applying contemporary community standards, would find appeals to the prurient interest if taken as a whole.

- Under contemporary community standards, describes or shows sexually explicit conduct in a patently offensive way.
- Lacks serious literary, artistic, political, educational, or scientific value, if taken as a whole.³

IF “ACCESSING WITH THE INTENT TO VIEW” OBSCENE MATERIAL IS ALLEGED, ADD THE FOLLOWING:

[Meaning of “Intent to View”

“Intent” means that the defendant acted with the mental purpose to view the obscene material or was aware that (his) (her) conduct was practically certain to result in viewing the obscene material.⁴

Deciding About Intent

You cannot look into a person’s mind to find intent. Intent must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.^{5]}

2. The obscene material contained a depiction of a purported child engaging in sexually explicit conduct.

“Depiction of a purported child” means a visual representation that appears to depict an actual child but may or may not depict an actual child.⁶

3. The defendant knew or reasonably should have known that the obscene material contained a depiction of a purported child engaging in sexually explicit conduct.

Meaning of “Sexually Explicit Conduct”

“Sexually explicit conduct” means⁷ actual or simulated (sexual intercourse) (bestiality) (masturbation) (sexual sadism or sexual masochistic abuse) (lewd exhibition of (name intimate part)).⁸

Deciding About Knowledge

You cannot look into a person’s mind to find out knowledge. Knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all three 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 UNDER 18 YEARS OF AGE AT THE TIME OF THE OFFENSE.⁹

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

Was the defendant under 18 years of age when the offense occurred?

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

Wis JI-Criminal 2146C was approved by the Committee in April 2024.

This instruction is for a violation of sub. (2) of § 948.125, which was created by 2023 Wisconsin Act 224 [effective date: March 29, 2024]. A violation of § 948.125 is a Class D felony. The penalty decreases to a Class I felony if the offense occurs when the actor is under 18 years of age. § 948.125(2)(b). The instruction provides a special question to be added if the Class I felony is charged.

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 2023 Wisconsin Act 224 [effective date: March 29, 2024] to add violations of § 948.125(2) to the list of certain child sex offenses.

1. Section 948.125(2) requires that “the person knows that he or she received, distributed, produced, possessed, or accessed the material.” Rather than state this as a separate element, the Committee concluded it was clearer to use the phrase “knowing (reception) (distribution) (production) (possession).”

2. “Possessed” means that the defendant knowingly had actual physical control of the obscene material. See Wis JI-Criminal 920.

Also, 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.

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 493, 508 09, 451 N.W.2d 752 (1990).

The following paragraphs may be necessary in possession cases when they are supported by the evidence:

[Obscene material 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 obscene material.]

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

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

3. This is the definition of “obscene material” provided § 948.125(1)(b).

4. This applies the common definition of criminal intent – mental purpose to cause the result.

5. This is the shorter version used to describe the process of finding intent. The Committee has concluded that it is suitable for use in most cases. For a longer description of the intent-finding process, see Wis JI-Criminal 923A.

6. This is the definition of “depiction of a purported child” provided § 948.125(1)(a).

7. The definition of “sexually explicit conduct” is based on the one provided in § 948.01(7), which provides as follows:

(7) “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: December 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.

9. Subsection (2)(b) of § 948.125 provides that the penalty for violations of § 948.125 decreases to a Class I felony if “the actor is under 18 years of age when the offense occurs.” If the offense is charged as a Class D felony, the special question should be added to assure a jury finding on the penalty decreasing fact. If a 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 virtual child pornography, under sec. 948.125(2), 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?”