

2150A NEGLECTING A CHILD: DEATH, GREAT BODILY HARM, OR BODILY HARM AS A CONSEQUENCE — § 948.21(2)**Statutory Definition of the Crime**

Neglecting a child, as defined in Section 948.21(2) of the Criminal Code of Wisconsin is committed by any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so as to seriously endanger the physical, mental, or emotional health of the child: necessary care, necessary food, necessary clothing, necessary medical care, necessary shelter, education in compliance with section 118.15, protection from exposure to the distribution or manufacture of controlled substances, as defined in section 961.01 (4), or controlled substance analogs, as defined in section 961.01 (4m), or to drug abuse, as defined in section 46.973 (1) (b).¹

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 six elements were present.

Elements of the Crime That the State Must Prove

1. (Name of child) had not attained the age of 18 years.

[Knowledge of (name of child)'s age is not required and mistake regarding (name of child)'s age is not a defense.]²

2. The defendant was a person responsible for the welfare of (name of child).

A “person responsible for the welfare of a child” includes (use the appropriate term from § 948.01(3)).³

3. The defendant, through action or failure to take action, and for reasons other than poverty, failed to provide⁴

[necessary (care)⁵ (food) (clothing) (medical care) (shelter).]

[education in compliance with section 118.15.]

[protection from exposure to (the distribution or manufacture of controlled substances, as defined in section 961.01(4), or controlled substance analogs, as defined in section 961.01(4m)) (or) (drug abuse, as defined in section 46.973 (1) (b))].⁶

4. The failure to provide seriously endangered the physical, mental, or emotional health of the child.

To “seriously endanger” means to create a serious risk of harm or injury.⁷

5. The failure to provide was negligent.

“Negligent” means acting, or failing to act, in such a way that a reasonable person would know or should know seriously endangers the physical, mental, or emotional health of a child.⁸

6. (Name of child)

(suffered death as a consequence).⁹

(suffered great bodily harm as a consequence).¹⁰

(suffered bodily harm as a consequence).¹¹

This requires that the defendant's action or failure to take action caused (the death of) (great bodily harm to) (bodily harm to) (name of child).

“Cause” means that the defendant's act was a substantial factor in producing the (death) (great bodily harm) (bodily harm).¹²

[“Great bodily harm” means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.)¹³

[“Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.]¹⁴

IF MORE THAN ONE PENALTY-DETERMINING FACT IS SUPPORTED BY THE EVIDENCE, ADD ONE OR BOTH OF THE FOLLOWING AS APPROPRIATE.¹⁵

If you are not satisfied beyond a reasonable doubt that the defendant's action or failure to take action caused the death of (name of child), you should consider whether the defendant's action or failure to take action caused great bodily harm to (name of child).

If you are not satisfied beyond a reasonable doubt that the defendant's action or failure to take action caused great bodily harm to (name of child), you should consider whether the defendant's action or failure to take action caused bodily harm to (name of child).

Jury's Decision

If you are satisfied beyond a reasonable doubt that all six 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 2150A was approved by the Committee in December 2018.

This is a sample instruction for what may be a common situation under § 948.21 – where more than one penalty option may be submitted. It is based on JI 2150, which is a complete rewrite of the former instruction to reflect the repeal and recreation of § 948.21 by 2017 Wisconsin Act 283 [effective date: April 18, 2018].

The recreated statute provides penalties for eight types of violations – seven felonies and one misdemeanor. This instruction attempts to deal with three situations: where death, great bodily harm, or bodily harm is caused. Because the penalties for these violations bear a lesser included offense-like relationship to one another, the instruction may be used for submitting lesser penalties if the evidence supports it. Transitional text is provided in element 6.

1. This paragraph is the offense definition provided in § 948.21(20) without change. The Committee recommends striking parts of the definition that do not apply. Element 3 illustrates how the alternatives may be broken down.

2. This statement is typically included in all instructions involving offenses against children; it states the general rules set forth in §§ 939.23(6) and 939.43(2).

3. The Committee recommends inserting the appropriate term from § 948.01(3), which defines “person responsible for the child’s welfare” to include the following: the child’s parent; stepparent; guardian; foster parent; treatment foster parent; an employee of a public or private residential home, institution or agency; other person legally responsible for the child’s welfare in a residential setting; or a person employed by one legally responsible for the child’s welfare to exercise temporary control or care for the child.

See Wis JI-Criminal 2106A for discussion of authority relating to “person responsible for the welfare of a child.”

4. The Committee recommends submitting only the alternatives supported by the evidence; more than one alternative may be submitted.

5. Section § 948.21(1)(c) defines “necessary care” as follows: “care that is vital to the needs of a child’s physical, emotional, or mental health based on all of the facts and circumstances bearing on the

child's need for care, including the child's age; the child's physical, mental, or emotional condition; and any special needs of the child."

6. Reference to other uniform instructions may be helpful in further defining this element. Distribution of a controlled substance is addressed by Wis JI-Criminal 6020 Delivery Of A Controlled Substance; see Wis JI-Criminal 6020A for delivery of a controlled substance analog. Manufacture of a controlled substance is addressed by Wis JI-Criminal 6021 Manufacture Of A Controlled Substance. Section 46.973(1)(b) defines "drug abuse" as "the use of a drug in such a manner as to endanger the public health, safety or welfare."

7. The definition of "seriously endanger" is adapted from Wis JI-Children 250.

8. This is based on the definition of "negligently" provided in § 948.21(1)(d). The definition of "criminal negligence" in § 939.25, which ordinarily applies when the word "negligently" is used in the Criminal Code, does not apply here. See § 939.25(3).

9. This makes the offense a Class D felony; see § 948.21(3)(a).

10. This makes the offense a Class F felony; see § 948.21(3)(b)1.

11. This makes the offense a Class H felony; see § 948.21(3)(d).

12. The Committee has concluded that the statutory phrase "suffered . . . as a consequence" is equivalent to requiring "cause" as used in most criminal statutes. Wisconsin courts have reached this conclusion with statutes that use the phrases "as a result" or "results in." See State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), and State v. Wille, 2007 WI App 27, 2999 Wis.2d 531, 798 N.W.2d 343.

The Committee has also concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. Where there is evidence of more than one possible cause, something like the following might be added:

There may be more than one cause of (death) (great bodily harm) (bodily harm). The act of one person alone might produce it, or the acts of two or more persons might jointly produce it.

Also see, Wis JI-Criminal 901 Cause.

13. This is the definition of "great bodily harm" provided in § 939.22(14) should apply. See Wis JI-Criminal 914 for a more complete discussion of issues relating to "great bodily harm."

14. This is the definition of "bodily harm" provided in § 939.22(4).

15. The penalties for violations of § 948.21 causing death, great bodily harm, or bodily harm bear a lesser included offense-like relationship to one another and the Committee concluded that more than one penalty-determining fact could be submitted if the regular lesser included offense evidentiary test is satisfied. The question is, whether the evidence is such that a reasonable jury could find that the fact

supporting the higher penalty is not proved beyond a reasonable doubt but could find that the fact supporting the lesser penalty is.