2170A CONTRIBUTING TO THE DELINQUENCY OF A CHILD: DEATH AS A CONSEQUENCE — § 948.40(1), (4)(a)

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(1) of the Criminal Code of Wisconsin, is committed by any person who intentionally encourages or contributes to the delinquency of a child where death is a consequence.

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. (Name of child) was under the age of 18 years.[1]

   Knowledge of (name of child)'s age by the defendant is not required[2] and mistake regarding (name of child)'s age is not a defense.[3]

2. The defendant intentionally encouraged or contributed to the delinquency of (name of child).

3. Death of (name of child)[4] was a consequence of intentionally encouraging or contributing to the delinquency of (name of child).

   This requires that the defendant's contributing to the delinquency of (name of child) was a substantial factor in producing the death of (name of child).[5]

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.

Meaning of "Intentionally Encourage or Contribute"

The term "intentionally encourages or contributes" means that the defendant either had a purpose to encourage or contribute to delinquency or was aware that (his) (her) conduct was practically certain to cause that result.[6]

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.[7]

Committing (name crime) violates state criminal law.

The crime of (name crime) is committed by one who

> LIST THE ELEMENTS OF THE INTENDED CRIME AS DEFINED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[8]

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.

[It is not required that the child actually commit a delinquent act. A defendant's conduct contributes to the delinquency of a child if the natural and probable consequences of that conduct would be to cause the child to commit a delinquent act.][9]

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.

COMMENT

This instruction was originally published in 1989 and was revised in 1997, 2001, 2009, 2010, and 2011. This revision was approved by the Committee in October 2022; it removed a reporter's note from the comment concerning "embedded crimes."

This instruction is for a violation of § 948.40, 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, and replaces the delinquency portion of Wis JI-Criminal 1960 which has been withdrawn.

Section 948.40 addresses the delinquency portion of the crime covered by former sec. 947.15, Contributing To The Delinquency Or Neglect Of A Child. The neglect portion is addressed by a separate statute, sec. 948.20.

The basic penalty is that of a Class A misdemeanor. "If the child's act which is encouraged or contributed to is a violation of a state or federal criminal law which is punishable as a felony, the person is guilty of a Class H felony." Section 948.40(4)(b). If death is a consequence, the penalty is that of a Class D felony. Section 948.40(4)(a).

This instruction is for an offense based on subsection (1) of § 948.40, where the defendant may be any person. Subsection (2) applies where a person responsible for the welfare of a child is alleged to have contributed to the delinquency of a child by disregard of the welfare of the child. See Wis JI-Criminal 2171.

Charging a defendant with violating § 948.40(4)(a) and with first degree reckless homicide under § 940.02(2) is not multiplicitous. The offenses each require proof of a fact that the other does not and there is no evidence that the legislature did not intend multiple punishments. Further, a violation of § 948.40(4)(a) is not "a less serious type of criminal homicide" under § 939.66(2) and thus is not a lesser included offense of first degree reckless homicide. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

1. A seventeen-year-old is a "child" for purposes of this offense, even though a person of that age would not be a juvenile for purposes of prosecuting the child. State v. Patterson, 2010 WI 130, 329 Wis.2d 599, 790 N.W.2d 909.

2. This is the rule provided in § 939.23(6).

3. This is the rule provided in § 939.43(2).

4. Section 948.40(4)(a) provides that the penalty for contributing to the delinquency of a child

increases to that of a Class D felony "if death was a consequence." The same phrase was used in prior law, see § 947.15(1), 1985 86 Wis. Stats. The statutory language does not indicate whether the death must be of the child to whose delinquency the defendant contributes or whether it extends to other persons who are harmed by the child's conduct.

5. The Committee has 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 immediately preceding the sentence in the instruction beginning with "before":

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

Section 948.40 does not use the word "cause" but rather refers to death being "a consequence." In this respect, it is like several other criminal statutes using "results in" or "as a result" to establish the causal connection between the actor's conduct and the prohibited result. The Committee has concluded that "as a result" or "results in" should be interpreted to mean "cause," traditionally defined in terms of "substantial factor." This conclusion is supported by State v. Bartlett, 149 Wis.2d 557, 439 N.W.2d 595 (Ct. App. 1989), where the court held that § 346.17(3) was not unconstitutionally vague because "results in" means "cause" and therefore defines the offense with reasonable certainty. The court further held that the evidence was sufficient to support the conviction because it showed that he defendant's conduct was a substantial factor in causing the death. The court noted that more than but for cause is required: "The state must further establish that 'the harmful result in question be the natural and probable consequence of the accused's conduct,' i.e., a substantial factor." 149 Wis.2d 557, 566, citing State v. Serebin, 119 Wis.2d 837, 350 N.W.2d 65 (1984).

6. This is the definition of "intentionally" provided in § 939.23. The "aware that his conduct is practically certain to cause that result" alternative was added by the 1987 revision of the homicide statutes. See Wis JI-Criminal 923A and 923B for further discussion of the definition of "intentionally."

7. Section 948.40(1) formerly referred to § 48.02(3m) for the definition of delinquency. That reference was eliminated by 1995 Wisconsin Act 77. "Delinquent" is defined in § 938.02(3m):

> 938.02(3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law. . .

The instruction is drafted for what is expected to be the most common case: where the basis for delinquency is a violation of Wisconsin criminal law.

Only children over the age of 10 can be considered delinquent if they violate a criminal law. However, it is an offense under § 948.40 if a person intentionally encourages or contributes to an act by a child under the age of 10 if that act would be a delinquent act if committed by a child over the age of 10 (§ 948.40(1)). Therefore, the simple definition of "delinquent" in the instruction should be accurate for purposes of this offense.

8. The Committee recommends that a complete listing of the elements of the "embedded crime" be provided. Decisions of the Wisconsin Court of Appeals have reached this conclusion with respect to bail jumping under § 946.49 [State v. Henning, 2003 WI App 54, ¶25, 261 Wis.2d 664, 660 N.W.2d 698], and intimidation of a victim under § 940.44 [State v. Thomas, 161 Wis.2d 616, 624, 468 N.W.2d 729 (Ct. App.

1991)].

The Committee concluded that the jury need not be instructed that they must reach unanimous agreement as to what delinquent act was encouraged, if evidence has been introduced that tends to show more than one. The Wisconsin Court of Appeals reached the same conclusion in a similar situation, holding that unanimity is not required as to which felony was intended in a prosecution for burglary with intent to commit a felony. State v. Hammer, 216 Wis.2d 213, 576 N.W.2d 285 (Ct. App. 1997). See the Comment to Wis JI-Criminal 517, collecting cases addressing jury unanimity.

9. This is the rule stated in subsection (3) of § 948.40, which includes reference to "failure to take action." The instruction's reference to "the defendant's conduct" is intended to cover affirmative acts and failure to act.