

**2171 CONTRIBUTING TO THE DELINQUENCY OF A CHILD BY A
PERSON RESPONSIBLE FOR THE CHILD'S WELFARE — § 948.40(2)**

Statutory Definition of the Crime

Contributing to the delinquency of a child, as defined in § 948.40(2) of the Criminal Code of Wisconsin, is committed by any person who is responsible for the child's welfare and who contributes to the delinquency of a child by disregard of the welfare of the child.

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 required² and mistake regarding (name of child)'s age is not a defense.³

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

A "person responsible for the child's welfare" includes (use the appropriate term from § 948.01(3)).⁴

3. The defendant contributed to the delinquency of (name of child) by disregard of the child's welfare.

Meaning of "Delinquency"

Delinquency is any violation of state criminal law by a child.⁵

Committing (name crime) violates state criminal law.

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

LIST THE ELEMENTS OF THE ALLEGED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.⁶

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.]⁷

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

Wis JI-Criminal 2171 was originally published in 1989 and revised in 1997, 2001, 2009, and 2010. This revision was approved by the Committee in December 2010; it involved updating footnote 1.

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). See Wis JI-Criminal 2170A.

This instruction is for an offense under subsection (2) of § 948.40, where the defendant must be a person responsible for the welfare of a child. Subsection (1) applies to any person. See Wis JI-Criminal 2170. This instruction replaces Wis JI-Criminal 1961 which has been withdrawn.

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. 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 authorities relating to "person responsible for the child's welfare."

5. 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 . . .

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.

6. 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)]. [**Reporter's Note:** Issues relating to instructing the jury on "embedded crimes" will be discussed in a Law Note that will be published in the future.]

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. However, the jury must

unanimously agree that the child's act was a felony if the felony violation of § 948.40 is charged.

Violations of § 948.40 are punished as a Class A misdemeanor unless either death results [see Wis JI-Criminal 2170A] or the child's act encouraged or contributed to is punishable as a felony. The Committee concluded that a jury determination on the felony issue is required because that fact increases the maximum sentence for the crime. See, Apprendi v. New Jersey, 530 U.S. 466 (2000). By specifying a crime in the definition of "delinquency," the instruction assures that a jury verdict of guilty will include a finding that the crime was the felony or misdemeanor specified.

It could be possible that reasonable views of the evidence could differ as to the felony status of the delinquent act. For example, a case could involve a dispute over the value of stolen property; giving the standard theft instruction, including the special question regarding value, would allow the jury to make the required finding. See Wis JI-Criminal 1441.

7. 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.