

2134A CHILD ENTICEMENT: ATTEMPT: ACTUAL CHILD — § 948.07**Statutory Definition of the Crime**

Child enticement, as defined in § 948.07 of the Criminal Code of Wisconsin, is committed by one who with intent to _____¹ attempts to cause any child who has not attained the age of 18 years² to go into any vehicle, building, room, or secluded place.

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 attempted to cause³ (name of victim) to go into a (vehicle) (building) (room) (secluded place).
2. The defendant attempted to cause (name of victim) to go into a (vehicle) (building) (room) (secluded place) with intent to _____.⁴

The phrase "with intent to" means that the defendant must have had the mental purpose⁵ to _____.⁶

3. (Name of victim) was under the age of 18 years.⁷

Knowledge of (name of victim)'s age by the defendant is not required⁸ and mistake regarding (name of victim)'s age is not a defense.⁹

Definition of Attempt

Attempt requires that the defendant intended to cause (name of victim) to go into a (vehicle) (building) (room) (secluded place) for the purpose of _____¹⁰ and that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.¹¹

Meaning of "Unequivocally"

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Meaning of "Another Person"

"Another person" means anyone but the defendant and may include the intended victim.

Meaning of "Extraneous Factor"

An "extraneous factor" is something outside the knowledge of the defendant or outside the defendant's control.

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.

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 2134A was originally published in 2003 and revised in 2007 and 2015. This revision was approved by the Committee in June 2018; it added to footnote 4.

Section 948.07 prohibits "causing or attempting to cause" a child to go into designated places for one of several prohibited purposes. Thus, it punishes the completed crime and the attempt equally. This instruction is drafted for the enticement case based on an attempt to entice an actual child. A separate instruction is provided for enticement cases based on an attempt to entice what turns out to be a fictitious child. See Wis JI-Criminal 2134B.

When an enticement charge is based on an attempt, it incorporates attempt as defined in § 939.32. State v. Koencik, 2001 WI App 93, ¶20, 242 Wis.2d 693, 626 N.W.2d 359; State v. Robins, 2002 WI 65, ¶28, 253 Wis.2d 298, 646 N.W.2d 287. This instruction incorporates the definition of attempt provided in § 939.32 as interpreted by Wis JI-Criminal 580.

See the Comment to Wis JI-Criminal 2134 for a general discussion of § 948.07 and the crime of child enticement.

1. In this blank, insert a statement identifying one or more of the prohibited acts specified in § 948.07(1)-(6):

- (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.
- (2) Causing the child to engage in prostitution.
- (3) Exposing genitals, pubic area, or intimate parts to the child or causing the child to expose genitals, pubic area, or intimate parts in violation of s. 948.10.
- (4) Recording the child engaging in sexually explicit conduct.
- (5) Causing bodily or mental harm to the child.
- (6) Giving or selling to the child a controlled substance or controlled substance analog in violation of ch. 961.

Subsection (3) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to delete "sex organ" and to substitute "genitals, pubic area, or intimate parts."

Subsection (4) was amended by 2001 Wisconsin Act 16 (effective date: September 1, 2001) to refer to "recording." Recording is defined in § 948.01(3r).

Some of the acts listed are crimes defined in a specified statute: sexual assault in violation of § 948.02, § 948.085, or § 948.095 (see subsec. (1), supra), and exposing genitals, pubic area, or intimate parts in violation of § 948.10 (see subsec. (3), supra). The acts specified in subsecs. (2), (4), (5), and (6) have identifiable counterparts in other criminal statutes found in chapter 948, but those statutes are not specifically identified. When the second element of this offense is explained, all the aspects of the underlying conduct should be identified. See note 4, below.

Specifying these acts is a change from prior § 944.12, which referred to "crimes against sexual morality." The Note to 1987 Senate Bill 203, which was enacted as 1987 Wisconsin Act 332, explains the change as follows:

[This section] . . . enumerates specific intended purposes as those for which enticing a child would be a criminal act (e.g., having sexual contact, including sexual intercourse, with the child). These enumerated purposes are substituted for the current language requiring an intent to commit "a crime against sexual morality."

2. The age reference should be changed to "has not attained the age of 16 years" if the case involves a charge of enticement with intent to have sexual contact or sexual intercourse in violation of § 948.02. See subsec. (1) of § 948.07. Section 948.02 defines offenses against children who have not attained the age of 16 years.

3. Section 948.07 uses "causes or attempts to cause" in place of "persuades or entices" found in former § 944.12. The Note to 1987 Senate Bill 203 (enacted as 1987 Wisconsin Act 332) explained the change as follows:

Note: This Section:

1. Deletes the words "persuades or entices" contained in the current child enticement statute [s. 944.12] and, instead, characterizes the crime of child enticement as "causing or attempting to cause" a child to go into any vehicle, building, room or secluded place with the intent to commit a criminal act or acts. The substitution of "causes" for "persuades or entices," eliminates as an element of the crime the state of mind of the child being enticed. The language "attempts to cause" is added to further clarify that the crime of child enticement includes the attempted act of enticement, consistent with s. 939.32(1)(d), as created by this bill.

This instruction is drafted for enticements based on attempt to entice an actual child. For enticements based on attempt to entice a fictitious child, see Wis JI-Criminal 2134B. For enticements based on completed acts, see Wis JI-Criminal 2134.

4. Here identify the conduct specified in subsecs. (1) to (6) of § 948.07. Care should be taken to provide a complete description of what the conduct requires, including definition of terms where necessary. The Committee suggests the following:

Under subsec. (1), for violations based on § 948.02:

". . . have sexual intercourse with (name of victim). Sexual intercourse means any intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required."

or

". . . have sexual contact with (name of victim). Sexual contact is an intentional touching by the defendant of an intimate part of another, done for the purpose of (sexual arousal or gratification) (sexually degrading or humiliating that person)."

See Wis JI-Criminal 2101B for discussion of the definition of sexual intercourse. See Wis JI-Criminal 2101A for discussion of the definition of sexual contact. Note that for violations of subsection (1), the victim must be under the age of 16 years. See note 2, supra.

Under subsec. (1), for violations based on § 948.085(1):

". . . have sexual (contact) (intercourse) in violation of § 948.085(1). Section 948.085(1) is violated by a person who has sexual [contact] [intercourse] with a child for whom the person is a (foster parent) (treatment foster parent).

Under subsec. (1), for violations based on § 948.085(2):

". . . have sexual (contact) (intercourse) in violation of § 948.085(2). Section 948.085(2) is violated by a person who has sexual [contact] [intercourse] with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible for managing the facility).

Under subsec. (1), for violations based on § 948.095(2):

". . . have sexual (contact) (intercourse) in violation of § 948.095(2). Section 948.095(2) is violated by a person who has sexual [contact] [intercourse] with a child who has attained the age of 16 years and who is not the person's spouse, if the child is enrolled as a student in a school or a school district and the person is a member of the school staff of the school or school district in which the child is enrolled as a student."

[See Wis JI-Criminal 2139 for a complete description of the offense defined in § 948.095(2).]

Under subsec. (1), for violations based on § 948.095(3):

". . . have sexual (contact) (intercourse) in violation of § 948.095(3). Section 948.095(3) is violated by a person who has attained the age of 21 years, who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with

children, who has sexual [contact] [intercourse] with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.

Under subsec. (2):

". . . engage in an act with (name of victim), that, if engaged in between adults, would be an act of prostitution. An act of prostitution is an act of sexual intercourse or sexual contact engaged in for something of value."

Under subsec. (3):

". . . expose genitals, pubic area, or intimate parts to (name of victim) for the purpose of sexual arousal or gratification."

See Wis JI-Criminal 2140 and 2141 for descriptions of two offenses defined by § 948.10.

Under subsec. (4):

". . . recording (name of victim) engaging in sexually explicit conduct. Sexually explicit conduct means actual or simulated (see § 948.01(7))."

The appropriate part of the definition of "sexually explicit conduct" provided in § 948.01(7) should be included.

Under subsec. (5):

". . . cause bodily harm to (name of victim). Bodily harm means physical pain or injury, illness, or any impairment of physical condition."

The definition of "bodily harm" is from § 939.22(4).

A violation involving subsec. (5) may also be based on intent to cause mental harm, a term defined in § 948.01(2).

Under subsec. (6):

". . . give or sell a controlled substance to (name of victim)."

Subsection (6) refers to giving or selling a controlled substance or controlled substance analog "in violation of Chapter 961." It is unclear what that reference adds, since any delivery to a child would appear to be in violation of Chapter 961.

In any case, the facts may require elaborating on the brief statements suggested above. The key is to assure that the jury is told of all the aspects of the underlying conduct that the defendant must intend to perform to make the enticement a violation of § 948.07.

In State v. Hendricks, 2018 WI 15, 379 Wis.2d 549, 906 N.W.2d 666, the Wisconsin Supreme Court reviewed a guilty plea acceptance colloquy for a child enticement charge based on "intent to have sexual contact." The court held that the colloquy was sufficient despite the court's failure to explain the definition of "sexual contact." The decision makes several references to sexual contact not being an "element" of the crime of child enticement. See, for example, ¶33. The Committee concluded that these statements do not affect the approach reflected in the instruction which calls for fully defining the crime the defendant intended to commit by the act of enticement. The purpose with which the defendant acted – e.g., with intent to have sexual contact – is a fact necessary to constitute the crime and must be proved beyond a reasonable doubt. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

5. "With intent to" is defined in § 939.23(4). The definition changed, effective January 1, 1989, though both the old and new version have "mental purpose" as one definition of "with intent to." It is the other alternative that changes from "reasonably believes his act, if successful, will cause that result" to "is aware that his conduct is practically certain to cause that result." See Wis JI-Criminal 923A and 923B. The Committee concluded that the "mental purpose" part of the definition is most likely to apply in the context of this offense.

6. Use the same statement used at note 4, supra.

7. See note 2, supra.

8. Section 939.23(6).

9. Section 939.43(2).

10. Use same statement used at note 4, supra.

11. The definition of attempt is based on § 939.32 and Wis JI-Criminal 580. For explanation of the definitions of "unequivocally," "another person," and "extraneous factor," see the footnotes to Wis JI-Criminal 580.