

66 From the Committee on Model Criminal Jury Instructions

The Committee solicits comment on the following proposals by September 1, 2015. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes amended instructions, M Crim JI 11.16 and 11.30, where a defendant has been charged with a violation of MCL 750.224b, involving the transfer of a short-barreled shotgun and the exemption found in MCL 750.224b(3). There were statutory changes to the actions comprising the offense and to the language involving the exemptions to the statute. M Crim JI 11.16 addresses the exemptions, and was amended to accord with the legislative changes. Likewise, amendments to M Crim JI 11.30 reflect a change in statutory wording, but also remove lesser-offense language that is not apropos. Deletions are in ~~strikeout~~; additions are underlined.

[AMENDED] M Crim JI 11.16 Exemption—Short-barreled Shotgun

(1) This law does not apply to the ~~[sale/offer to sell/possession]~~ of a short-barreled ~~[shotgun/rifle]~~ as a collector's item if the defendant has followed the purchase permit and safety requirements of Michigan law a short-barreled shotgun or short-barreled rifle that is lawfully made, manufactured, transferred, or possessed under federal law. The prosecutor has the burden of proving beyond a reasonable doubt that this exception does not apply.

Use Note

This instruction is to be given only when the trial court determines that ~~some~~ evidence sufficient to satisfy MCL 776.20 ~~relating to this exemption was admitted at trial~~ that the firearm is exempt from the statutory prohibition was admitted at trial. Antique firearms or replicas of antique firearms, as defined under federal law in 18 USC § 921(a)(16), are exempt. A "curio" or "relic" firearm listed by the United States Attorney General is also exempt; those are

listed by the Bureau of Alcohol, Tobacco and Firearms. See <http://www.atf.gov/files/publications/firearms/curios-relics/p-5300-11-firearms-curios-or-relics-list.pdf>. If it is claimed that the firearm is an antique, a replica of an antique, a curio, or a relic listed by the United States Attorney General, the court may wish to reference the applicable content of those materials when instructing the jury.

1. The statute, MCL 750.224b(3), lists, in addition to collector's item, "curio, relic, antique, ~~for~~ museum piece."[•]

2. The purchase permit requirements are found at MCL 28.422.

[AMENDED] M Crim JI 11.30 Manufacture, Sale, or Possession of Short-barreled Shotgun

(1) ~~[The defendant is charged with the crime of/You may also consider the lesser charge of]~~ [making/manufacturing/selling/offering for sale/transferring/(or) possessing] a short-barreled ~~[shotgun/rifle]~~. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [made/manufactured/sold/offered for sale/transferred/(or) possessed] a ~~[shotgun/rifle]~~.

(3) Second, that the ~~[shotgun/rifle]~~ was short-barreled, that is

[Choose (a) or (b):]

(a) the shotgun had one or more barrels less than 18 inches long or the shotgun was less than 26 inches long overall.

(b) the rifle had one or more barrels less than 16 inches long or the rifle was less than 26 inches long overall.

Use Note

[•]Use when instructing on the crime as a lesser offense.

The Committee solicits comment on the following proposal by September 1, 2015. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes amending one instruction and adding three new instructions to accommodate statutory amendments to the discharging of firearms from vehicles, or at or in occupied buildings: MCL 750.234a and MCL 750.234b. While MCL 750.234c remains the same, the amendments for the other two statutes required a different instruction for that crime. The changes in the instructions will result in elimination of M Crim JI 11.26a and 11.26b, which were repetitive of the instructions presently found in 11.37. Proposed amended M Crim JI 11.37 will be devoted to MCL 750.234a, discharging a firearm from a motor vehicle. Deletions are in ~~strikeout~~; additions are underlined. Proposed new instructions M Crim JI 11.37a and 11.37b instruct on discharging a firearm at or in a building, respectively—MCL 750.234b. Two instructions were needed because discharging a firearm in a building has an element not found in discharging a firearm at a building (acting in reckless disregard). New M Crim JI 11.37c is required where discharging a firearm at a police or emergency vehicle under MCL 750.234c is charged. Since the last three instructions, M Crim JI 11.37a, 11.37b, and 11.37c, are entirely new, they are underlined throughout.

[AMENDED] M Crim JI 11.37 Firearm Discharge of a Firearm from Motor Vehicle (Felony)

(1) The defendant is charged with intentionally discharging a firearm ~~[from a motor vehicle/at a dwelling or occupied structure/in an occupied structure/at a law enforcement vehicle]~~. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant discharged a firearm.¹

(3) Second, that ~~[he/she]~~ did so intentionally, that is, on purpose.

[Use (4) and (5) for a section 234a violation—from a motor vehicle:]

(4) Third, that ~~[he/she]~~ did so from a ~~[mo-~~tor vehicle/snowmobile/off-road vehicle].²

(5) Fourth, that ~~[he/she]~~ ~~did so~~ discharged the firearm in a way that endangered someone else/caused physical injury to (name

complainant)/caused serious impairment of a body function to (name complainant)/caused the death of (name complainant)].

[Use (6) where it is alleged that the complainant suffered serious impairment of a body function:]³

(6) Serious impairment of a body function includes, but is not limited to, one or more of the following:

(a) Loss of a limb or loss of use of a limb.

(b) Loss of a foot, hand, finger, or thumb or loss of the use of a foot, hand, finger, or thumb.

(c) Loss of an eye or ear or loss of the use of an eye or ear.

(d) Loss or substantial impairment of a bodily function.

(e) Serious visible disfigurement.

(f) A comatose state that lasts for more than three days.

(g) Measurable brain or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or subdural hematoma.

(j) Loss of an organ.

[Use (6) for a section 234b(1) violation—
at a facility:]

(6) Third, that [he/she] did so at a facility that [he/she] knew or had reason to believe was a dwelling or occupied structure:

[Use (7) and (8) for a section 234b(2) violation—in a facility:]

(7) Third, that [he/she] did so in a facility that [he/she] knew or had reason to believe was an occupied structure:

(8) Fourth, that [he/she] did so in reckless disregard for the safety of someone else:

[Use (9) for a section 234c(1) violation—
at law enforcement vehicle:]

(9) Third, that [he/she] did so at a motor vehicle that [he/she] knew or had reason to believe was an emergency or law enforcement vehicle:

Use Notes

1. *Firearm* is defined in MCL 28.421(1)(b) and MCL 750.222(d).

2. The definition of *motor vehicle* may be found at MCL 257.33.

3. MCL 750.234a(5)(b) references MCL 257.58c for the definition of *serious impairment of a body function*.

This charge does not apply to a peace officer in the performance of the officer's duties, whether the officer was on or off his or her scheduled work shift. MCL 750.234a(2)(a).

Self-defense or defense of others is a defense to this charge. MCL 750.234a(2)(b). Appropriate instructions from M Crim JI 7.15 through 7.24 must be given where such a defense is raised.

1. Select charged offense:

2. Where the character of the facility as a dwelling or occupied structure is in question, use statutory definitions:

(a) “Dwelling” means a facility habitually used by 1 or more individuals as a place of abode, whether or not an individual is present in the facility:

(b) “Occupied structure” means a facility in which 1 or more individuals are present. MCL 750.234b(3).

3. Where the character of the vehicle as an emergency or law enforcement vehicle is in question, use statutory definitions found in MCL 750.234c(2)(a)–(e).

[NEW] M Crim JI 11.37a Discharge of a Firearm at a Building

(1) The defendant is charged with intentionally discharging a firearm at a dwelling or potentially occupied structure. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant discharged a firearm.¹

(3) Second, that [he/she] did so intentionally, that is, on purpose.

(4) Third, that [he/she] discharged the firearm at a building that [he/she] had reason to believe was either a dwelling or a potentially occupied structure.

A dwelling is a building where people usually live. It does not matter whether or not someone was actually in the building at the time.

A potentially occupied structure is a building that a reasonable person knows or should know was likely to be occupied by one or more persons due to its nature, function, or location. It does not matter whether a person was actually present in the structure.

(5) Fourth, that when the defendant discharged the firearm [he/she] [caused physi-

cal injury to/caused serious body injury to/caused the death of] (name complainant).

[Use (6) where it is alleged that the complainant suffered serious body injury:]²

(6) Serious impairment of a body function includes, but is not limited to, one or more of the following:

(a) Loss of a limb or loss of use of a limb.

(b) Loss of a foot, hand, finger, or thumb or loss of the use of a foot, hand, finger, or thumb.

(c) Loss of an eye or ear or loss of the use of an eye or ear.

(d) Loss or substantial impairment of a bodily function.

(e) Serious visible disfigurement.

(f) A comatose state that lasts for more than three days.

(g) Measurable brain or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or subdural hematoma.

(j) Loss of an organ.

Use Notes

1. *Firearm* is defined in MCL 28.421(1)(b) and MCL 750.222(d).

2. MCL 750.234b(10)(d) references MCL 257.58c for the definition of *serious impairment of a body function*.

This charge does not apply to a peace officer in the performance of his or her duties. MCL 750.234b(6).

Self-defense or defense of others is a defense to this charge. MCL 750.234b(7). Appropriate instructions from M Crim JI 7.15 through 7.24 must be given where such a defense is raised.

[NEW] M Crim JI 11.37b Discharge of a Firearm in a Building

(1) The defendant is charged with intentionally discharging a firearm in a dwelling or potentially occupied structure. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant discharged a firearm.¹

(3) Second, that [he/she] did so intentionally, that is, on purpose.

(4) Third, that [he/she] discharged the firearm in a building that [he/she] had reason to believe was either a dwelling or a potentially occupied structure.

A dwelling is a building where people usually live. It does not matter whether or not someone was actually in the building at the time.

A potentially occupied structure is a building that a reasonable person knows or should know was likely to be occupied by one or more persons due to its nature, function, or location. It does not matter whether a person was actually present in the structure.

(5) Fourth, that the defendant acted with reckless disregard for the safety of other persons

(6) Fifth, that when the defendant discharged the firearm, [he/she] [caused physical injury to/caused serious body injury to/caused the death of] (*name complainant*).

*[Use (7) where it is alleged that the complainant suffered serious body injury:]*²

(7) Serious impairment of a body function includes, but is not limited to, one or more of the following:

- (a) Loss of a limb or loss of use of a limb.
- (b) Loss of a foot, hand, finger, or thumb or loss of the use of a foot, hand, finger, or thumb.
- (c) Loss of an eye or ear or loss of the use of an eye or ear.
- (d) Loss or substantial impairment of a bodily function.
- (e) Serious visible disfigurement.
- (f) A comatose state that lasts for more than three days.
- (g) Measurable brain or mental impairment.
- (h) A skull fracture or other serious bone fracture.
- (i) Subdural hemorrhage or subdural hematoma.
- (j) Loss of an organ.

Use Notes

1. *Firearm* is defined in MCL 28.421(1)(b) and MCL 750.222(d).

2. MCL 750.234b(10)(d) references MCL 257.58c for the definition of *serious impairment of a body function*.

This charge does not apply to a peace officer in the performance of his or her duties. MCL 750.234b(6).

Self-defense or defense of others is a defense to this charge. MCL 750.234b(7). Appropriate instructions from M Crim JI 7.15 through 7.24 must be given where such a defense is raised.

[NEW] M Crim JI 11.37c **Discharge of a Firearm at a Police or Emergency Vehicle**

(1) The defendant is charged with intentionally discharging a firearm at an emergency or law enforcement vehicle. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant discharged a firearm.¹

(3) Second, that [he/she] did so intentionally, that is, on purpose.

(4) Third, that [he/she] discharged the firearm at a motor vehicle that [he/she] knew or had reason to believe was an emergency or law enforcement vehicle.²

Use Notes

1. *Firearm* is defined in MCL 28.421(1)(b) and MCL 750.222(d).

2. The definition of *emergency or law enforcement vehicle* can be found in MCL 750.234c(2).

The Committee solicits comment on the following proposals by September 1, 2015. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes amended and new instructions where a defendant has been charged with operating a motor vehicle with a bodily alcohol content of 0.17% or more. M Crim JI 15.1, 15.5, and 15.6 have been amended to accommodate that charge, M Crim JI 15.1a has been added, M Crim JI

15.6a has been changed from a verdict form to a substantive instruction on possible verdicts, and M Crim JI 15.7a has been added as a verdict form for use where the defendant is charged with a high bodily alcohol content. Deletions are in strikeout; additions are underlined.

[AMENDED] M Crim JI 15.1 **Operating While Intoxicated [OWI]**

[The defendant is charged with/You may also consider the less serious charge of] operating a motor vehicle [*Choose from the following:*]

(1) with an unlawful bodily alcohol level; [and/or]

(2) while under the influence of alcohol; [or]

(3) while under the influence of a controlled substance; [or]

(4) while under the influence of an intoxicating substance; [or]

(5) while under the influence of a combination of [alcohol/a controlled substance/an intoxicating substance].¹

Use Note

1. Select the appropriate combination of alcohol/substances based on the evidence presented.

[NEW] M Crim JI 15.1a **Operating With High Bodily Alcohol Content [OWHBAC]**

(1) The defendant is charged with operating a motor vehicle with a high bodily alcohol content. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.

(2) First, that the defendant was operating a motor vehicle on or about [*state date*]. Operating means driving or having actual physical control of the vehicle.

(3) Second, that the defendant was operating a vehicle on a highway or other place open to the public or generally accessible to motor vehicles [, including an area designated for parking vehicles].

(4) Third, that the defendant operated the vehicle with a bodily alcohol content of 0.17 grams or more per [100 milliliters of blood/210 liters of breath/67 milliliters of urine].

Use Note

Lesser offense instructions for the offenses of operating while intoxicated and operating while visibly impaired involving the consumption of alcohol must be given. See appropriate provisions of M Crim JI 15.1, 15.2, 15.3, and 15.4.

**[AMENDED] M Crim JI 15.5
Factors in Considering Operating
While Intoxicated [OWI] and
Operating While Visibly
Impaired [OWVI]**

As you consider the possible verdicts, you should think about the following:

[Choose appropriate paragraphs:]

(1) What was the mental and physical condition of the defendant at the time that [he/she] was operating the motor vehicle? Were the defendant's reflexes, ability to see, way of walking and talking, manner of driving, and judgment normal? If there was evidence that any of these things seemed abnormal, was this caused by [drinking alcohol/using or consuming a controlled substance/using or consuming an intoxicating substance/using or consuming a combination of (alcohol/a controlled substance/an intoxicating substance)]?

(2) You may also consider bodily alcohol content in reaching your verdict. In that regard, [was/were] the test(s) technically accurate? Was the equipment properly assembled and maintained and in good working order when the test(s) [was/were] given?

(3) Were the test results reliable? Was the test given correctly? Was the person who gave it properly trained? Did the circumstances under which the test was given affect the accuracy of the results?

(4) One way to determine whether a person is intoxicated is to measure how much alcohol is in [his/her] [blood/breath/urine]. There was evidence in this trial that a test was given to the defendant. The purpose of this test is to measure the amount of alcohol in a person's [blood/breath/urine].

[Choose (5)(a) or (5)(b):]

(5) If you find

(b) that there were 0.17 grams or more of alcohol [per 100 milliliters of blood/per 210 liters of breath/per 67 milliliters of urine]

when [he/she] operated the vehicle, whether or not this alcohol content affected the defendant's ability to operate a motor vehicle, you may also find that the defendant was operating a motor vehicle with a high bodily alcohol content of 0.17 grams or more, whether or not it affected the defendant's ability to operate a motor vehicle.

(a) that there were 0.08 grams or more of alcohol [per 100 milliliters of the defendant's blood/per 210 liters of the defendant's breath/per 67 milliliters of the defendant's urine] when [he/she] operated the vehicle, you may find the defendant guilty of operating a motor vehicle with an unlawful bodily alcohol content, whether or not this alcohol content affected the defendant's ability to operate a motor vehicle.

(6) You may infer that the defendant's bodily alcohol content at the time of the test was the same as [his/her] bodily alcohol content at the time [he/she] operated the motor vehicle.

(7) In considering the evidence and arriving at your verdict, you may give the test whatever weight you believe that it deserves. The results of a test are just one factor you may consider, along with all other evidence about the condition of the defendant at the time [he/she] was operating the motor vehicle.

Use Notes

Read both (5)(a) and (5)(b) if operating with a high bodily alcohol content is charged. Otherwise, read only (5)(b).

1. Where a combination of alcohol and other controlled or intoxicating substances is shown, select the appropriate combination of alcohol/substances based on the evidence presented.

2. If the evidence warrants, the following can be added to this paragraph (6): "However, you have heard evidence that the defendant consumed alcohol after driving but before the [blood/breath/urine] test was administered. You may consider this evidence in determining whether to infer that the defendant's bodily alcohol content at the time of the test was the same as [his/her] bodily alcohol content at the time that [he/she] operated the motor vehicle."

**[AMENDED] M Crim JI 15.6
Possible Verdicts Where OWHBAC
Is Not Charged**

There are three possible verdicts:

(1) not guilty, or

(2) guilty of violating section 625 of the Michigan Vehicle Code [ordinance] by *[Choose appropriate paragraphs:]*

(a) operating a motor vehicle with an unlawful bodily alcohol level; [and/or]

[Use for acts occurring on or after October 31, 2010:] If you all agree that the defendant violated section 625, do you find the defendant had a level of 0.17 grams or more of alcohol [per 100 milliliters of blood/per 210 liters of breath/per 67 milliliters of urine]?

☐ Yes

☐ No

(b) operating a motor vehicle while under the influence of alcohol; [or]

(c) operating a motor vehicle while under the influence of a controlled substance; [or]

(d) operating a motor vehicle while under the influence of an intoxicating substance; [or]

(e) operating a motor vehicle while under the influence of a combination of [alcohol/a controlled substance/an intoxicating substance].¹

[(f) If you all agree that the defendant either operated a motor vehicle either with an unlawful bodily alcohol level or while under the influence of [alcohol/a controlled substance/an intoxicating substance/a combination of (alcohol/a controlled substance/an intoxicating substance)], it is not necessary that you agree on which of these violations occurred. However, in order to return a verdict of guilty, you must all agree that one of those violations did occur.]²

[or]

(3) guilty of operating a motor vehicle while impaired.

Use Notes

1. Select the appropriate combination of alcohol/substances based on the evidence presented.

2. Use bracketed paragraph (2)(f) only if the defendant is charged with both UBAL and or OWI. This paragraph specifically

states that the jury need not be unanimous on which theory applies as long as all jurors agree that the defendant violated MCL 256.625 in at least one fashion. See *People v Nicolaidis*, 148 Mich App 100; 383 NW2d 620 (1985).

[AMENDED] M Crim JI 15.6a
Verdict Form—Operating While Intoxicated/Operating While Visibly Impaired Possible Verdicts Where OWHBAC Is Charged

Check only one of the following verdicts:

- (1) Not guilty
- (2) Guilty of Operating While Intoxicated [OWI]
- (3) Guilty of the less serious offense of Operating While Visibly Impaired [OWVI];
 There are four possible verdicts:
 (1) Not guilty, or
 (2) Guilty of operating a vehicle with a high bodily alcohol content, or

(3) Guilty of

[Choose appropriate paragraphs:]

- (a) operating a motor vehicle with an unlawful bodily alcohol level; [or]
- (b) operating a motor vehicle while under the influence of alcohol; [or]

(c) operating a motor vehicle while under the influence of a controlled substance; [or]

(d) operating a motor vehicle while under the influence of an intoxicating substance; [or]

(e) operating a motor vehicle while under the influence of a combination of [alcohol/a controlled substance/an intoxicating substance].

[(f) If you all agree that the defendant either operated a motor vehicle with an unlawful bodily alcohol level or while under the influence of [alcohol/a controlled substance/an intoxicating substance/a combination of (alcohol/a controlled substance/an intoxicating substance)], it is not necessary that you agree on which of these violations occurred. However, in order to return a verdict of guilty, you must all agree that one of those violations did occur.]

[or]

(4) Guilty of operating a motor vehicle while impaired.

[NEW] M Crim JI 15.7a
Verdict Form Where OWHBAC Is Charged

Defendant: _____

POSSIBLE VERDICTS:

You may return only one verdict on this charge. Mark only (1), (2), (3), or (4). But, if you mark (3) or (4), you must also mark the appropriate box under (3) or (4) that reflects your verdict.

(1) Not guilty

(2) Guilty of Operating with a High Bodily Alcohol Content

(3) Guilty of Operating While Intoxicated because:

(A) operating under the influence of:
 alcohol

a controlled substance

an intoxicating substance

a combination of alcohol, a controlled substance, or an intoxicating substance

(B) operating with a bodily alcohol content of 0.08% or more

(4) Guilty of the less serious offense of Operating While Visibly Impaired due to the consumption or use of

alcohol

a controlled substance

an intoxicating substance

a combination of alcohol, a controlled substance, an intoxicating substance

SBM

OUT OF SYNC?

Career

Self-Care

Recreation

Relationships

Community

Sometimes
 it's hard
 to keep all
 the balls in the air.

LJAP can help (800) 996-5522

STATE BAR OF MICHIGAN
 LAWYERS AND JUDGES ASSISTANCE PROGRAM (800) 996-5522

Build on your strengths and support your successes.

State Bar of Michigan
 Lawyers & Judges
 ASSISTANCE
 PROGRAM

(800) 996-5522