

60 From the Committee on Model Criminal Jury Instructions

The Committee solicits comment on the following proposals by January 1, 2016. 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 the following instructions where a defendant has been charged under MCL 750.145c with engaging a minor in child sexually abusive acts or with producing child sexually abusive materials. These instructions are entirely new.

[NEW] M Crim JI 20.38 **Child Sexually Abusive Activity—** **Causing or Allowing**

(1) The defendant is charged with the crime of causing or allowing a child to engage in sexually abusive activity in order to create or produce child sexually abusive material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [persuaded/induced/enticed/coerced/caused/knowingly allowed] a child under 18 years old to engage in child sexually abusive activity.

(3) Child sexually abusive activity includes: *[Choose any of the following that apply:]*¹

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, [and/or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and/or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and/or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and/or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and/or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and/or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

(4) Second, that the defendant caused or allowed the person to engage in child sexually abusive activity for the purpose of producing or making child sexually abusive material. Child sexually abusive materials are pictures, movies, or illustrations, made or produced by any means,² of [a person under 18 years old/the representation of a person under 18 years old] engaged in sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, and/or erotic nudity.²

(5) Third, that the defendant knew or reasonably should have known that the person was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.³

Use Notes

1. The statute prohibits both real and simulated sexual acts. Where the acts are simulated, or simulated acts are included, the instructions should be modified accordingly.

2. The statute, MCL 750.145c(1)(o), provides a list of forms that child sexually abusive materials can take:

...any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide,

video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

The Committee believes that the phrase, "pictures, movies, or illustrations, made or produced by any means," will generally suffice to describe such materials. However, the court may prefer to select a more specific term or phrase from the statutory list.

3. The statute lists several alternatives for this element of the offense in MCL 750.145c(2), (3), and (4):

...if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Generally, the language of the instruction will suffice. However, in appropriate cases, the court may select other statutory language for this element.

Reference Guide

Statutes

MCL 750.145c.

[NEW] M Crim JI 20.38a **Child Sexually Abusive** **Activity—Producing**

(1) The defendant is charged with the crime of producing child sexually abusive

material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [arranged for/produced/made¹/copied/reproduced/financed/(attempted/prepared/conspired) to (arrange for/produce/make/copy/reproduce/finance)] child sexually abusive [activity/material].

(3) Child sexually abusive materials are pictures, movies, or illustrations, made or produced by any means,² of [a person under 18 years old/the representation of a person under 18 years old] engaged in one or more of the following sexual acts:

[Choose any of the following that apply:]³

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, [and/or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and/or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and/or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and/or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and/or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and/or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

[Choose either (4) or (5), depending on whether the depiction is an actual person or is a created representation of a person under the age of 18:]

(4) Second, that the defendant knew or should reasonably have known that the person shown in the sexually abusive material was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.⁴

(5) Second, that the defendant produced a portrayal of a person appearing to be less than 18 years old, knowing that the person portrayed appeared to be less than 18 years old, and all of the following conditions apply:⁴

(a) An average person, applying current community standards, would find that the material appealed to an unhealthy or shameful interest in nudity, sex, or excretion.⁵

(b) A reasonable person would not find any serious literary, artistic, political, or scientific value in the material.

(c) The material shows or describes sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity, as previously described for you.

Use Notes

1. *Make* is defined in MCL 750.145c(1)(j) as:

...to bring into existence by copying, shaping, changing, or combining material, and specifically includes, but is not limited to, intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part. Make does not include the creation of an identical reproduction or copy of child sexually abusive material within the same digital storage device or the same piece of digital storage media.

2. The statute, MCL 750.145c(1)(o), provides a list of forms that child sexually abusive materials can take:

...any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide

video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

The Committee believes that the phrase, "pictures, movies, or illustrations, made or produced by any means," will generally suffice to describe such materials. However, the court may prefer to select a more specific term or phrase from the statutory list.

3. The statute prohibits both real and simulated sexual acts. Where the acts are simulated, the instructions should be modified accordingly.

4. The statute lists several alternatives for this element of the offense in MCL 750.145c(2), (3), and (4):

...if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Generally, the language of the instruction will suffice. However, in appropriate cases, the court may select other statutory language for this element.

5. If necessary, *excretion* may be defined as the act or product of urinating or defecating.

Reference Guide

Statutes

MCL 750.145c.

[NEW] M Crim JI 20.38b **Child Sexually Abusive** **Activity—Distributing**

(1) The defendant is charged with the crime of distributing child sexually abusive material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [distributed/promoted/financed the (distribution/promotion) of/received for the purpose of (distributing/promoting)/(conspired/attempted/prepared) to (distribute/receive/finance/promote)] child sexually abusive [material/activity].

(3) Child sexually abusive materials are pictures, movies, or illustrations¹ of [a person under 18 years old/the representation of a person under 18 years old] engaged in one or more of the following sexual acts:

*[Choose any of the following that apply:]*²

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, [and/or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and/or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and/or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and/or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratifica-

tion or stimulation of any person involved, [and/or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and/or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

[Choose either (4) or (5), depending on whether the depiction is an actual person or is a created representation of a person under the age of 18:]

(4) Second, that the defendant knew or should reasonably have known³ that the person shown in the sexually abusive material was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.

(5) Second, that the defendant distributed a portrayal of a person appearing to be less than 18 years old, knowing that the person portrayed appeared to be less than 18 years old, and all of the following conditions apply:

(a) An average person, applying current community standards, would find that the material appealed to an unhealthy or shameful interest in nudity, sex, or excretion.⁴

(b) A reasonable person would not find any serious literary, artistic, political, or scientific value in the material.

(c) The material shows or describes sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity, as previously described for you.

Use Notes

1. The statute, MCL 750.145c(1)(o), provides a list of forms that child sexually abusive materials can take:

...any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable

medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording.

The Committee believes that the phrase, "pictures, movies, or illustrations, made or produced by any means," will generally suffice to describe such materials. However, the court may prefer to select a more specific term or phrase from the statutory list.

2. The statute prohibits both real and simulated sexual acts. Where the acts are simulated or simulated acts are included, the instructions should be modified accordingly.

3. The statute lists several alternatives for this element of the offense in MCL 750.145c(2), (3), and (4):

...if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Generally, the language of the instruction will suffice. However, in appropriate cases, the court may select other statutory language for this element.

4. If necessary, *excretion* may be defined as the act or product of urinating or defecating.

Reference Guide

Statutes

MCL 750.145c.

[NEW] M Crim JI 20.38c **Child Sexually Abusive Activity—** **Possessing or Accessing**

(1) The defendant is charged with the crime of possessing or accessing child sexually abusive material. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [possessed child sexually abusive material/looked for child sexually abusive material and intentionally caused it to be sent to or seen by another person].

(3) Child sexually abusive materials are pictures, movies, or illustrations¹ of [a person under 18 years of age/the representation of a person under 18 years of age] engaged in one or more of the following sexual acts:

*[Choose any of the following that apply:]*²

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, [and/or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and/or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and/or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and/or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and/or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and/or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

[Choose either (4) or (5), depending on whether the depiction is an actual person or is a created representation of a person under the age of 18:]

(4) Second, that the defendant knew or should reasonably have known³ that the person shown in the sexually abusive material was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.

(5) Second, that the defendant possessed or accessed a portrayal of a person appearing to be under the age of 18, knowing that the person portrayed appeared to be under the age of 18, and all of the following conditions apply:

(a) An average person, applying current community standards, would find that the material appealed to an unhealthy or shameful interest in nudity, sex, or excretion.⁴

(b) A reasonable person would not find any serious literary, artistic, political, or scientific value in the material.

(c) The material shows or describes sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity, as previously described for you.

(6) Third, that the defendant [knew that (he/she) possessed/knowingly looked for] the material.

Use Notes

1. The statute, MCL 750.145c(1)(o), provides a list of forms that child sexually abusive materials can take:

...any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book,



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The Committee believes that the phrase, “pictures, movies, or illustrations, made or produced by any means,” will generally suffice to describe such materials. However, the court may prefer to select a more specific term or phrase from the statutory list.

2. The statute prohibits both real and simulated sexual acts. Where the acts are simulated, the instructions should be modified accordingly.

3. The statute lists several alternatives for this element of the offense in MCL 750.145c(2), (3), and (4):

...if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child.

Generally, the language of the instruction will suffice. However, in appropriate cases, the court may select other statutory language for this element.

4. If necessary, *excretion* may be defined as the act or product of urinating or defecating.

Reference Guide

Statutes

MCL 750.145c.

PROPOSED

The Committee proposes an instruction where the defendant has been charged with defrauding a vulnerable adult under MCL 750.174a. This instruction is entirely new.

[NEW] M Crim JI 23.17 Defrauding a Vulnerable Adult

(1) The defendant is charged with obtaining or using the money or property of a vulnerable adult through fraud or deceit. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [obtained or used/or tried to obtain or use] [money/property] that belong to [name complainant].

(3) Second, that, at the time, [name complainant] was a vulnerable adult.¹ That means that [name complainant] was:

[Choose appropriate designation and applicable provisions]

(a) 18 years old or older and was [aged/developmentally disabled/mentally ill/physically disabled]² such that [he/she] required supervision or personal care or lacked personal and social skills required to live independently;

(b) a person placed in an adult foster care home by a state licensed agency.

(c) a person 18 years or older who is suspected of being abused, neglected, or exploited.

(4) Third, that the defendant knew or should have known that [name complainant] was a vulnerable adult.

(5) Fourth, that the defendant [obtained or used/tried to obtain or use] the [money/property] from [name complainant] through [fraud/deceit/misrepresentation/coercion/unjust enrichment].

(6) Fifth, that the [amount of money taken was/the fair market value of the property taken was]

[Choose only one of the following unless instructing on lesser offenses:]

(a) \$100,000 or more.

(b) \$50,000 or more but less than \$100,000.

(c) \$20,000 or more but less than \$50,000.

(d) \$1,000 or more but less than \$20,000.

(e) \$200 or more but less than \$1,000.

(f) some amount less than \$200.

[Use the following paragraph only if applicable:]

(7) [You may add together all money or property obtained or used or attempted to be obtained or used [in a twelve-month period³] when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.]

(8) Sixth, that the property was taken for the direct benefit of the defendant, or to indirectly benefit [him/her]. An indirect benefit means that the defendant gained some advantage or value other than possession or use of the money or property, itself.

Use Notes

1. The definition of *vulnerable adult* is found in MCL 750.145m(u), whether or not a court has determined that the person is incapacitated. See MCL 750.174a(15)(c).

2. The terms “developmental disability” and “mental illness” are referenced in MCL 750.145m(d) and (i), respectively. *Developmental disability* is defined in MCL 330.1100a(25); *mental illness* is defined in MCL 330.1400(g).

3. This time limitation only applies if the defendant’s scheme or conduct was directed against more than one person. MCL 750.174a(8).

Staff Comment

The statute does not define the terms *fraud*, *deceit*, *misrepresentation*, *coercion*, or *unjust enrichment*. Where the jury has a question about the meaning of terms, a party requests a definition, or the court decides that providing a definition is appropriate, the Committee suggests the following (but the court may opt to use other definitions). *Fraud* means using falsehoods, trickery, or concealment to mislead someone in order to cause or induce that person to perform an act or not to act. *Deceit* means doing something to give a false impression in order to cause or induce someone to perform an act or not to act. *Misrepresentation* means a false or misleading statement. *Coercion* means inducing another person to act against his or her will by the use of physical force, intimidation, threats, or some other form of pressure. *Unjust enrichment* requires the receipt of a benefit by the defendant from the victim and an inequity resulting to the victim because of the retention of the benefit by the defendant. *Karass v Bank of New York Mellon*, 300 Mich App 9 (2012).

Reference Guide

Statutes

MCL 750.174a