

## 56 From the Committee on Model Criminal Jury Instructions

The Committee solicits comment on the following proposals by February 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 a complete redraft of the insanity instruction, M Crim JI 7.11, in order to remove repetitive language and to eliminate language that unfairly over-emphasized a defendant's burden of proving insanity. The current version of the instruction is presented in strikethrough since it will be deleted if the new instruction is adopted. The proposed instruction is entirely underlined since much of its language and organization is new.

### M Crim JI 7.11

#### Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof

(1) The defense of legal insanity has been raised in this case. That is an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. That means the defendant must satisfy you by evidence that outweighs the evidence against it that [he/she] was legally insane when [he/she] committed the [act/acts] constituting the offense. The law excuses a person who is legally insane at the time of a crime; but it is very important for you to remember that [mental illness/intellectual disability] and legal insanity are not the same. A person can be [mentally ill/intellectually disabled] and still not be legally insane.

(2) Before you may consider the legal insanity defense, of course, you must be convinced beyond a reasonable doubt that the defendant committed [the alleged act/each of the alleged acts]. If you are, you should consider the defendant's claim that [he/she] was legally insane at the time.

(3) When you deliberate, you must consider separately whether the defendant was [mentally ill/intellectually disabled] and whether [he/she] was legally insane. You must use the definitions I gave you. I will repeat those definitions and then describe what you should do:

(4) "Mental illness" is defined by law as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

(5) "Intellectual disability" means significantly subaverage intellectual functioning that appeared before the defendant was 18 years old and impaired two or more of [his/her] adaptive skills.<sup>1</sup>

(6) To be legally insane, a person must first be either mentally ill or intellectually disabled, as I have defined those conditions. But that is not enough. To be legally insane, the person must, because of [his/her] mental illness or intellectual disability, lack substantial capacity either to appreciate the nature and quality or the wrongfulness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law.

(7) To decide whether the defendant was legally insane at the time of the crime, you should go through the following two steps:

(8) Step one. Are you satisfied that the defendant has established, by evidence that outweighs the evidence against it, that [he/she] was [mentally ill/intellectually disabled] at the time of the crime? Unless you are so satisfied, [he/she] was not legally insane. On the other hand, if the defendant has proved that [he/she] was [mentally ill/intellectually disabled] you must go on to the next step.

(9) Step two. Are you also satisfied that the defendant has established by evidence that outweighs the evidence against it that [he/she] lacked the substantial ability either to appreciate the nature and quality or the wrongness of [his/her] conduct or to conform [his/her] conduct to the requirements of the law [he/she] is charged with violating?

(10) If the defendant has proven both step one and step two, you must find [him/her] not guilty by reason of insanity. However, if [he/she] has failed to prove either or both steps, [his/her] claim of legal insanity fails.

#### Use Note

1. The court may provide the jury with a definition of "adaptive skills" where appropriate. The phrase is defined in MCL 330.1100a(3), and means skills in 1 or more of the following areas:

- (a) Communication
- (b) Self-care
- (c) Home living
- (d) Social skills

- (e) Community-use
- (f) Self-direction
- (g) Health and safety
- (h) Functional academics
- (i) Leisure
- (j) Work

### [AMENDED] M Crim JI 7.11

#### Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof

(1) The defendant says that [he/she] is not guilty by reason of insanity. A person is legally insane if, as a result of mental illness or intellectual disability, he or she was incapable of understanding the wrongfulness of his or her conduct, or was unable to conform his or her conduct to the requirements of the law. The burden is on the defendant to show that [he/she] was legally insane.

(2) Before considering the insanity defense, you must be convinced beyond a reasonable doubt that the defendant committed the [crime/crimes] charged by the prosecutor. If you are not, your verdict should simply be not guilty of [that/those] offense[s]. If you are convinced that the defendant committed an offense, you should consider the defendant's claim that [he/she] was legally insane.

(3) In order to establish that [he/she] was legally insane, the defendant must prove two elements by a preponderance of the evidence. A preponderance of the evidence means that [he/she] must prove that it is more likely than not that each of the elements is true.

(4) First, the defendant must prove that [he/she] was mentally ill or intellectually disabled.<sup>1</sup>

(a) "Mental illness" is defined by law as a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

(b) "Intellectual disability" means significantly subaverage intellectual functioning that appeared before the defendant was 18 years old and impaired two or more of [his/her] adaptive skills.<sup>2</sup>

(5) Second, the defendant must prove that, as a result of [his/her] mental illness or intellectual disability, [he/she] either lacked substantial capacity to appreciate the nature and wrongfulness of [his/her] act, or lacked substantial capacity to conform [his/her] conduct to the requirements of the law.

(6) You should consider these elements separately. If you find that the defendant has proved both of these elements by a preponderance of the evidence, then you must find [him/her] not guilty by reason of insanity. If the defendant has failed to prove either or both elements [he/she] was not legally insane.

### Use Notes

1. This paragraph may be modified if the defendant is claiming only one aspect of this element.

2. The court may provide the jury with a definition of “adaptive skills” where appropriate. The phrase is defined in MCL 330.1100a(3) and means skills in one or more of the following areas:

- (a) Communication
- (b) Self-care
- (c) Home living
- (d) Social skills
- (e) Community use
- (f) Self-direction
- (g) Health and safety
- (h) Functional academics
- (i) Leisure
- (j) Work

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, effective December 2015.

## ADOPTED

The Committee has adopted new and amended instructions for use in cases where the defendant is charged with operating a vehicle while intoxicated to accommodate “high bodily alcohol content” allegations. Some instructions were added, some were amended, and one re-identified from a verdict form to a substantive instruction. Verdict forms were amended and added, as well. The changes involve M Crim JI 15.1 (amended), 15.1a (new), 15.5 (amended), 15.6 (amended), 15.6a (re-identified and amended), 15.7 (amended), and 15.7a (new).

### 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].<sup>1</sup>

### Use Note

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

### 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.

### 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

(a) 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, you may find that the defendant was operating a motor vehicle with a high bodily alcohol content, whether or not it affected the defendant's ability to operate a motor vehicle.

(b) that there were 0.08 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, 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.

# 58 From the Committee on Model Criminal Jury Instructions

(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."

## M Crim JI 15.6 Possible Verdicts Where OWHBAC Is Not Charged

There are three possible verdicts:

- (1) Not guilty, or
- (2) 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].<sup>1</sup>

[(f) If you all agree that the defendant 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)]<sup>1</sup>, 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.]<sup>2</sup>

[or]

(3) Guilty of operating a motor vehicle while visibly 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 unlawful bodily alcohol level (UBAL) and operating while intoxicated (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 257.625 in at least one fashion. See *People v Nicolaidis*, 148 Mich App 100; 383 NW2d 620 (1985).

## M Crim JI 15.6a Possible Verdicts Where OWHBAC Is Charged

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 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.]

[or]

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

## Use Notes

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

2. Use bracketed paragraph (3)(f) only if the defendant is charged with both unlawful bodily alcohol level (UBAL) and operating while intoxicated (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 257.625 in at least one fashion. See *People v Nicolaidis*, 148 Mich App 100; 383 NW2d 620 (1985).

## M Crim JI 15.7 Verdict Form Where OWHBAC Is Not Charged

Defendant: \_\_\_\_\_

POSSIBLE VERDICTS:

You may return only one verdict on this charge. Mark only (1), (2), or (3).

- (1) Not guilty
- (2) Guilty of Operating While Intoxicated
- (3) Guilty of the less serious offense of Operating While Visibly Impaired

## 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).

- (1) Not guilty
- (2) Guilty of Operating with a High Bodily Alcohol Content
- (3) Guilty of the less serious offense of Operating While Intoxicated
- (4) Guilty of the less serious offense of Operating While Visibly Impaired