

70 From the Committee on Model Criminal Jury Instructions

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instruction, effective August 2016.

ADOPTED

The Committee has adopted an amended instruction, M Crim JI 7.11, for use in cases where the defendant has raised an insanity defense. The amended instruction removes repetitive language and over-emphasis of a defendant's duty to prove the defense.

[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/she] was incapable of understanding the wrongfulness of [his/her] conduct, or was unable to conform [his/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 and/or intellectually disabled.¹

(a) "Mental illness" means 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.²

(5) Second, the defendant must prove that, as a result of [his/her] mental illness

and/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

An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances. MCL 768.21a(2).

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

History

M Crim JI 7.11 (formerly CJI2d 7.11) was CJI 7:8:02A–7:8:06, 7:8:13.

The instruction was modified in June 1994 to reflect the effect of 1994 PA 56, amending MCL 768.21a, which changed the burden of proof and requires the defendant to establish legal insanity by a preponderance of the evidence.

The instruction was modified in January 2015 to reflect a statutory change from the phrase "mental retardation" to "intellectual disability," and to conform the definitional language to that used in the statute.

The instruction was modified in August 2016 to remove repetitive language and over-emphasis of a defendant's duty to prove the defense.

Reference Guide

Statutes

MCL 330.1100a(3), 330.1100b(15), .1400(g), 768.20a, .21, .21a.

Caselaw

People v McRunels, 237 Mich App 168; 603 NW2d 95 (1999); *People v Munn*, 25 Mich App 165; 181 NW2d 28 (1970); *People v Deneweth*, 14 Mich App 604; 165 NW2d 910 (1968).

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, effective August 2016.

ADOPTED

The Committee has adopted amended instructions, M Crim JI 12.2, 12.3, and 12.5, for use in cases where the defendant is charged with controlled substances violations under MCL 333.7401 and 333.7403. The amendments correct the final element in each instruction and remove repetitive language.

[AMENDED] M Crim JI 12.2 Unlawful Delivery of a Controlled Substance

(1) The defendant is charged with the crime of illegally delivering [(state weight) of a mixture containing] a controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant delivered [identify controlled substance].

(3) Second, that the defendant knew that [he/she] delivered a controlled substance.

(4) Third, that the controlled substance that the defendant delivered [was in a mixture that] weighed (state weight).¹

(5) [Third/Fourth], that the defendant was not legally authorized to deliver this substance.²

(6) "Delivery" means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was a controlled substance and intending to transfer it to that person. [An attempt has two elements. First, the defendant must have intended to deliver the substance to someone else. Second, the defendant must have taken some action toward delivering the substance, but failed to complete the

delivery. It is not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal.³

Use Notes

Because the statutory definition of delivery includes actual, constructive, or attempted transfer of a substance, attempted delivery is not a lesser included offense. MCL 333.7105(1).

1. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

2. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994).

3. Use bracketed material defining attempt only in cases involving act falling short of completed delivery. Any attempt is a specific intent crime. *People v Joeseyppe Johnson*, 407 Mich 196, 239; 284 NW2d 718 (1979) (opinion of Levin, J.).

McFadden v United States, 576 US ____; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular controlled substance, only that he or she intended to deliver some controlled substance.

History

M Crim JI 12.2 (formerly CJI2d 12.2) was CJI 12:2:00, 12:2:01, 12:2:03; amended October 1993; amended August 2016.

Reference Guide

Statutes

MCL 333.7401, .7105(1), .7214(a)(iv).

Caselaw

People v Mass, 464 Mich 615; 628 NW2d 540 (2001); *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994); *People v Steele*, 429 Mich 13, 26, n 10; 412 NW2d 206 (1987); *People v Joeseyppe Johnson*, 407 Mich 196, 239; 284 NW2d 718 (1979); *People v Delgado*, 404 Mich 76, 86; 273 NW2d 395 (1978); *People v Collins*, 298 Mich App 458; 828 NW2d 392 (2012); *People v Maleski*, 220 Mich App 518, 522; 560 NW2d 71 (1996); *People v Brown*, 163 Mich App 273; 413 NW2d 766 (1987); *People v Tate*, 134 Mich App 682; 352 NW2d 297 (1984); *People v Williams*, 54 Mich App 448, 450; 221 NW2d 204 (1974). *McFadden v United States*, 576 US ____; 135 S Ct 2298 (2015).

[AMENDED] M Crim JI 12.3 Unlawful Possession of a Controlled Substance with Intent to Deliver

(1) The defendant is charged with the crime of illegally possessing with intent to deliver [state weight] of a [mixture containing a] controlled substance. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed¹ [identify controlled substance].

(3) Second, that the defendant knew that [he/she] possessed a controlled substance.

(4) Third, that the defendant intended to deliver the controlled substance to someone else.

(5) Fourth, that the controlled substance that the defendant intended to deliver [was in a mixture that] weighed (state weight).²

[(6) Fifth, that the defendant was not legally authorized to deliver the controlled substance.]³

Use Notes

1. For a definition of possession, see M Crim JI 12.7.

2. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

3. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to deliver the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable

doubt. *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994).

McFadden v United States, 576 US ____; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular controlled substance, only that he or she intended to deliver some controlled substance.

History

M Crim JI 12.3 (formerly CJI2d 12.3) was CJI 12:2:00, 12:2:01, 12:2:04; amended August 2016.

Reference Guide

Statutes

MCL 333.7401, .7105(1), .7214(a)(iv).

Caselaw

People v Konrad, 449 Mich 263, 273; 536 NW2d 517 (1995); *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994); *People v Wolfe*, 440 Mich 508, 519–520; 489 NW2d 748 (1992); *People v Allen*, 390 Mich 383; 212 NW2d 21 (1973); *People v Harper*, 365 Mich 494, 506–507; 113 NW2d 808, 813–814 (1962); cert den, 371 US 930 (1962); *Peterson v Oceana Circuit Judge*, 243 Mich 215; 219 NW2d 934 (1928); *People v Germaine*, 234 Mich 623, 627; 208 NW 705, 706 (1926); *People v Johnson*, 68 Mich App 697; 243 NW2d 715 (1976). *McFadden v United States*, 576 US ____; 135 S Ct 2298 (2015).

[AMENDED] M Crim JI 12.5 Unlawful Possession of a Controlled Substance

(1) The defendant is charged with the crime of knowingly or intentionally possessing [(state weight) of a mixture containing] the controlled substance, [identify controlled substance]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed¹ [identify controlled substance].

(3) Second, that the defendant knew that [he/she] possessed a controlled substance.

[(4) Third, that the substance that the defendant possessed [was in a mixture that] weighed (state weight).]²

[(5) [Third/Fourth], that the substance was not obtained by a valid prescription given to the defendant.]³

[(6) [Third/Fourth/Fifth], that the defendant was not otherwise authorized to possess this substance.]⁴

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Use Notes

1. For a definition of possession, see M Crim JI 12.7.

2. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

3. This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription for the substance. See *People v Little*, 87 Mich App 50, 54–55; 273 NW2d 583 (1978), and Use Note 4 below.

4. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994).

McFadden v United States, 576 US —; 135 S Ct 2298 (2015), held that a prosecutor need not prove that the defendant intended to deliver any particular controlled substance, only that he or she intended to deliver some controlled substance.

History

M Crim JI 12.5 (formerly CJI2d 12.5) was CJI 12:3:00–12:3:01; amended October 1993; amended August 2016.

Reference Guide

Statutes

MCL 333.7403, .7214(a)(iv), .26424, .26427, .26428.

The Committee solicits comment on the following proposal by October 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 an instruction for violations of MCL 333.7401a, delivery of a controlled substance or gamma-butyrolactone (date-rape drugs). The instruction, M Crim JI 12.2b, is entirely new.

[NEW] M Crim JI 12.2b Unlawful Delivery of Controlled Substance or Gamma-butyrolactone to Commit Criminal Sexual Conduct

(1) The defendant is charged with the crime of delivering [a controlled substance/gamma-butyrolactone] with intent to commit criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant delivered [a controlled substance/gamma-butyrolactone] or a mixture or compound containing [a controlled substance/gamma-butyrolactone] to [name complainant] or caused [a controlled substance/gamma-butyrolactone] to be delivered to [him/her]. “Delivery” means that the defendant intentionally transferred or attempted to transfer the substance to another person, or caused that substance to be delivered to another person.

(3) Second, that the defendant knew [he/she] was delivering [a controlled substance/gamma-butyrolactone] or a mixture or compound containing [a controlled substance/gamma-butyrolactone] to [name complainant].

(4) Third, that [name complainant] did not consent to have [a controlled substance/gamma-butyrolactone] delivered to [him/her].

(5) Fourth, that when the defendant delivered the substance or caused it to be delivered to [name complainant], the defendant intended to assault [name complainant] with the intent to sexually penetrate [him/her], with the intent to have sexual contact with [him/her], or with the intent to attempt an act of criminal sexual contact or penetration against [name complainant], as I [have described/will describe] [that offense/those offenses] to you.¹

Use Note

1. Generally, the charge of delivering a controlled substance or gamma-butyrolactone under MCL 333.7401a will accompany a criminal sexual conduct charge or charges, so providing the elements of that charge or those charges will be sufficient to satisfy this element. However, the language of this element may have to be modified in instances where an independent count of criminal sexual conduct has not been charged, and the court may have to provide the elements of one or more criminal sexual conduct offenses.

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, effective August 2016.

ADOPTED

The Committee has adopted an amended instruction, M Crim JI 19.1, for use in cases where the defendant is charged with kidnapping under MCL 750.349 to accommodate a statutory amendment.

[AMENDED] M Crim JI 19.1 Kidnapping

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

(2) First, that the defendant knowingly restrained another person. “Restrained” means to restrict a person’s movements or to confine the person so as to interfere with that person’s liberty without that person’s consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.

(3) Second, when the defendant did so, [he/she] intended to do one or more of the following:

[Select appropriate subparagraph[s] based on the claims and evidence.]

- (a) hold that person for ransom or reward.
- (b) use that person as a shield or hostage.
- (c) engage in criminal sexual penetration or criminal sexual contact with that person.
- (d) take that person outside of this state.
- (e) hold that person in involuntary servitude.

(f) engage that person in child sexually abusive activity when that person was less than 18 years old. Child sexually abusive activity includes sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.¹

Use Note

1. Child sexually abusive activity is defined in MCL 750.145c(1)(n) as a child engaging in a “listed sexual act.” A listed sexual act is defined in MCL 750.145c(1)(i) as “sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive

sexual involvement, sexual excitement, or erotic nudity.” Those terms, in turn, are each defined in MCL 750.145c(1), and the court may provide definitions where appropriate. See also M Crim JI 20.38, which defines these terms.

History

M Crim JI 19.1 (formerly CJ12d 19.1) was adopted in September 2006 and amended to conform with a statutory amendment in August 2016.

Reference Guide

Statute

MCL 750.349(1).

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, effective August 2016.

ADOPTED

The Committee has adopted a new instruction, M Crim JI 23.17, for use in cases where the defendant is charged with defrauding a vulnerable adult under MCL 750.174a. The 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/attempted to obtain or use] the [money/property] of [name complainant].

(3) Second, that the defendant used [fraud/deceit/misrepresentation/coercion/unjust enrichment] to [obtain or use/attempt to obtain or use] the [money/property].

(4) Third, that, at the time, [name complainant] was a vulnerable adult.¹ This 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 [he/she] 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 old or older who is suspected of being abused, neglected, or exploited.

[Use the following where appropriate if (a) applies:]

A person is developmentally disabled if [he/she] has a severe, long-lasting condition that includes all of the following:

(i) The condition is a result of a mental impairment or a physical impairment, or a combination of mental and physical impairments; and

(ii) Symptoms of the impairment[s] appeared before [he/she] was 22 years old; and

(iii) The impairment[s] [is/are] likely to continue indefinitely; and

(iv) the impairment[s] result[s] in substantial limitations in three or more of the following abilities: [self-care/understanding and expressing language/learning/mobility/self-direction/capacity for independent living/economic self-sufficiency]; and

(v) The impairment[s] reflect[s] [his/her] need for any form of special care, treatment or other services for life or for an extended period of time, and are individually planned and coordinated.

A person is mentally ill if [he/she] has a substantial disorder of thought or mood that significantly impairs [his/her] judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.

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

(5) Fifth, that the [amount of money (taken/attempted to be taken was/the fair market value of the property (taken/attempted to be 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 12-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. *Karaus v Bank of New York Mellon*, 300 Mich App 9 (2012).

History

M Crim JI 23.17 was adopted August 2016.

Reference Guide

Statutes

MCL 750.174a, 750.145m, 330.1100a, 330.1400(g)