

The Committee solicits comment on the following proposal by April 1, 2017. 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 M Crim JI 4.5, the instruction for using prior inconsistent statements to impeach witnesses. The Committee determined that the current instruction was confusing and in need of clarification. The amendment is drawn from a federal court instruction. As the entire instruction is being deleted and replaced, the current instruction is shown with strikethrough; the language in the proposed replacement, being entirely new, is underlined.

M Crim JI 4.5 Prior Inconsistent Statement Used to Impeach Witness

{Use the following paragraph if the statement was admitted only to impeach the witness.}

(1) If you believe that a witness previously made a statement inconsistent with [his/her] testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.

{Use the following paragraph if the statement was admitted both to impeach the witness and as substantive evidence.}

(2) Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at this trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

Use Note

This instruction is intended to explain to the jury in paragraph (1) that prior inconsistent statements are normally admissible only to impeach a testifying witness. Paragraph

(2) addresses those situations in which the out-of-court statement is admissible both to impeach and as substantive evidence because of non-hearsay or admissible hearsay. MRE 801(c)-(d), 803, 803A, 804. If the witness is the defendant, use M Crim JI 4.1.*

[AMENDED] M Crim JI 4.5 Prior Inconsistent Statement Used to Impeach Witness

You have heard evidence that, before the trial, [a witness/witnesses] made [a statement/statements] that may be inconsistent with [his/her/their] testimony here in court.

(1) You may consider an inconsistent statement made before the trial [only]¹ to help you decide how believable the [witness/witnesses'] testimony was when testifying here in court.

(2) If the earlier statement was made under oath, then you can also consider the earlier statement as evidence of the truth of whatever the [witness/witnesses] said in the earlier [statement/statements] when determining the facts of this case.

Use Note

1. If the statement is admissible only as impeachment, use [only], and do not read (2). If the statement is also admissible as substantive evidence under MRE 801(d)(1), do not use [only] and read both (1) and (2).

Other out-of-court statements that are exceptions to the hearsay rule under MRE 803 may also be admissible as substantive evidence. The court may modify the instruction under appropriate circumstances.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, effective February 2017.

ADOPTED

The Committee has adopted a new instruction, M Crim JI 12.2b, for use where a violation of MCL 333.7401a (the statute for the nonconsensual delivery of drugs or gamma-butyrolactone with the intent to commit criminal sexual conduct) is charged, effective February 1, 2017.

[NEW] M Crim JI 12.2b Unlawful Delivery of Controlled Substances 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 or caused to be delivered [a controlled substance/gamma-butyrolactone] or a mixture or compound¹ containing [a controlled substance/gamma-butyrolactone] to [name complainant]. “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.²

(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] or causing the substance to be delivered to [him/her].

(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 commit an act of criminal sexual penetration or sexual contact against [name complainant] or intended to attempt an act of criminal sexual penetration or contact against [name complainant], or intended to assault [name complainant] with the intent to sexually penetrate or have sexual contact with [him/her], as I [have described/will describe] [that offense/those offenses] to you.³

Use Notes

1. Various statutes, including MCL 333.7401b pertaining to gamma-butyrolactone, provide that “any material, compound, mixture, or preparation containing” a controlled substance is included within the scope of the prohibition. The court may opt to use any or all of those terms where appropriate.

2. *Delivery* is generally defined in MCL 333.7105(1), and includes “attempted” transfers of a controlled substance.

3. 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.

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PROPOSED

The Committee proposes amendments to the “operating while intoxicated” instruction, M Crim JI 15.3, for violations of MCL 257.625. The amendments consolidate the instruction, rather than having separate paragraphs for alcohol, controlled substances, or intoxicating substances. Added language is underlined. Deleted language is shown with strikethrough.

M Crim JI 15.3 Specific Elements of Operating While Intoxicated [OWI]

(1) To prove that the defendant operated a motor vehicle while intoxicated, the prosecutor must also prove beyond a reasonable doubt that the defendant [*choose from the following*]:

(a) operated the vehicle with a bodily alcohol level of 0.08 grams or more [per 100 milliliters of blood/210 liters of breath/67 milliliters of urine];¹

(b) was under the influence of alcohol while operating the vehicle;

(c) was under the influence of a controlled substance while operating the vehicle;

(d) was under the influence of an intoxicating substance while operating the vehicle;

(e) was under the influence of a combination of [alcohol/a controlled substance/an intoxicating substance]² while operating the vehicle.

[Choose (i) or (ii) as appropriate:]

(i) [*Name substance*] is a controlled substance.

(ii) An intoxicating substance is a substance in any form, including but not limited to vapors and fumes, other than food, that was taken into the defendant’s body in any manner, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.

[Choose from the following alternatives:]

(2) [~~“Under the influence of alcohol”/“Under the influence of a controlled substance”/“Under the influence of an intoxicating substance”~~] means that because of [~~drinking alcohol/using or consuming a controlled substance/consuming or taking into [his/her] body an intoxicating substance~~], the defendant’s ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be what is called “dead drunk,” that is, falling down or hardly able to stand up. On the other hand, just because a person has [~~drunk alcohol or smells of alcohol/consumed or used a controlled substance/consumed or used an intoxicating substance~~] does not prove, by itself, that the person is under the influence of [~~alcohol/a controlled substance/an intoxicating substance~~]. The test is whether, because of [~~drinking alcohol/using or consuming a controlled substance/consuming or taking into [his/her] body an intoxicating substance~~], the defendant’s mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner.

(3) [~~“Under the influence of a controlled substance”~~] means that because of using or consuming a controlled substance, the defendant’s ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be falling down or hardly able to stand up. On the other hand, just

because a person has consumed or used a controlled substance does not prove, by itself, that the person is under the influence of a controlled substance. The test is whether, because of the use or consumption of a controlled substance, the defendant’s mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner. [*Name substance*] is a controlled substance.

(4) “Under the influence of an intoxicating substance” means that because of consuming or taking into [his/her] body an intoxicating substance, the defendant’s ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be falling down or hardly able to stand up. On the other hand, just because a person has consumed or used an intoxicating substance does not prove, by itself, that the person is under the influence of an intoxicating substance. The test is whether, because of consuming or taking into [his/her] body an intoxicating substance, the defendant’s mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner.

[Choose (a) or (b) as appropriate:]

(a) [*Name substance*] is an intoxicating substance.

(b) An intoxicating substance is a substance in any form, including but not limited to vapors and fumes, other than food, that was taken into the defendant’s body in any manner, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.

PROPOSED

The Committee proposes amendments to the “stalking” instruction, M Crim JI 17.25, for violations of MCL 750.411h and 750.411i. One amendment adds the presumption found in MCL 750.411h(4) and 750.411i(5) that the victim felt terrorized, frightened, intimidated, threatened, harassed, or molested when the defendant has persisted in a course of unconsented contact. The added language is underlined. The fourth and fifth

elements were amended to strike the slashes indicating optional alternative language as unnecessary under the statutory language.

[AMENDED] M Crim JI 17.25 **Stalking**

(1) [The defendant is charged with/You may consider the lesser offense of] stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact with [*name complainant*].

(3) Second, that the contact would cause a reasonable individual to suffer emotional distress.

(4) Third, that the contact caused [*name complainant*] to suffer emotional distress.

(5) Fourth, that the contact would cause a reasonable individual to feel [terrorized,[†]

frightened,[†]intimidated,[†]threatened,[†]harassed,[†]or molested].

(6) Fifth, that the contact caused [*name complainant*] to feel [terrorized,[†]frightened,[†]intimidated,[†]threatened,[†]harassed,[†]or molested].

[*For aggravated stalking, add the following:*]

(7) Sixth, the stalking

[was committed in violation of a court order]

[was committed in violation of a restraining order of which the defendant had actual notice]

[included the defendant making one or more credible threats against [*name complainant*], a member of (his/her) family, or someone living in (his/her) household]

[was a second or subsequent stalking offense].

[*Where appropriate under the evidence, add the following:*]

(8) You have heard evidence that the defendant continued to make repeated unconsented contact with [*name complainant*] after [he/she] requested the defendant to discontinue that conduct or some different form of unconsented contact, and requested the defendant to refrain from any further unconsented contact. If you believe that evidence, you may, but are not required to, infer that the continued course of conduct caused [*name complainant*] to feel terrorized, frightened, intimidated, threatened, harassed, or molested. Even if you make that inference, remember that the prosecutor still bears the burden of proving all of the elements of the offense beyond a reasonable doubt.

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