

## 72 From the Committee on Model Criminal Jury Instructions

The Committee solicits comment on the following proposals by November 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 amendments to M Crim JI 15.11a and 15.12a, the instructions for driving with Schedule 1 or 2 substances causing death or serious injury under MCL 257.625(4), (5), and (8). The amendments are intended to correct overbroad language in paragraph (4) that included all Schedule 2 substances, where only certain of those substances are included within the purview of the statute. Deletions are in strike-through; new language is underlined.

### [AMENDED] M Crim JI 15.11a Operating with Any Amount of Schedule 1 or 2 Controlled Substance Causing Death

(1) The defendant is charged with the crime of operating a motor vehicle with a controlled substance in [his/her] body causing the death of another person. 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] in the [county/city] of [state jurisdiction]. Operating means driving or having actual physical control of the vehicle.

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

(4) Third, that while operating the vehicle, the defendant had any amount of [state specific schedule 1 or 2 controlled substance alleged or controlled substance in MCL 333.7214(a)(iv) alleged by the prosecutor] in [his/her] body.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he/she] had consumed or used a controlled substance.

(6) Fifth, that the defendant's operation of the vehicle caused the victim's death. To "cause" the victim's death, the defendant's operation of the vehicle must have been a factual cause of the death, that is, but for the defendant's operation of the vehicle the death would not have occurred. In addition, operation of the vehicle must have been a proximate cause of death, that is, death or serious injury must have been a direct and natural result of operating the vehicle.

#### Use Note

This instruction is intended to state the elements of the offense found at MCL 257.625(4) and (8).

### [AMENDED] M Crim JI 15.12a Operating With Any Amount of Schedule 1 or 2 Controlled Substance Causing Serious Impairment of a Body Function

(1) The defendant is charged with the crime of operating a motor vehicle with any amount of a controlled substance causing serious impairment of a body function to another person. 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] in the [county/city] of [state jurisdiction]. Operating means driving or having actual physical control of the vehicle.

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

(4) Third, that while operating the vehicle, the defendant had any amount of [state specific schedule 1 or 2 controlled substance alleged or controlled substance in MCL 333.7214(a)(iv) alleged by the prosecutor] in [his/her] body.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he/she] had consumed or used a controlled substance.

(6) Fifth, that the defendant's operation of the vehicle caused a serious impairment of a body function to [name victim]. To "cause" such injury, the defendant's operation of the vehicle must have been a factual cause of the injury, that is, but for the defendant's operation of the vehicle the injury would not have occurred. In addition, operation of the vehicle must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of operating the vehicle.

#### Use Note

This instruction is intended to state the elements of the offense found at MCL 257.625(5) and (8).

## PROPOSED

The Committee proposes an amendment to M Crim JI 17.20 and a new instruction, M Crim JI 17.20c, instructions for violations of MCL 750.136b(3), second-degree child abuse. The amendment to M Crim JI 17.20 is intended to conform the instruction to statutory language that was omitted in the original instruction and to make technical corrections; deletions are in strike-through; new language is underlined. The new instruction, M Crim JI 17.20c, is for second-degree child abuse charges that were committed by a child care organization where there has been a violation of MCL 722.111 *et seq.*

### [AMENDED] M Crim JI 17.20 Child Abuse, Second Degree (Reckless Act or Omission Causing Serious Injury)

(1) The defendant is charged with second-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

[Choose (2) or (3):]

(2) First, that [name defendant] the defendant is the [parent/guardian] of [name child].

(3) First, that [name defendant] the defendant had care or custody of or authority over [name child] when the abuse allegedly happened.

[Choose (4) or (5):]

(4) Second, that the defendant did some reckless act.

(5) Second, that the defendant willfully [failed to provide food, clothing, or shelter necessary for [name child]'s welfare/abandoned [name child]].

(6) Third, that as a result, [name child] suffered serious physical harm. By “serious physical harm,” I mean any physical injury to a child that seriously impairs the child’s health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

(7) Fourth, that [name child] was at the time under the age of 18.

#### Use Note

The statutory language indicates this is a general intent crime. The jury should be instructed on parental discipline, M Crim JI 17.24, when this is raised as a defense.

#### [NEW] M Crim JI 17.20c Child Abuse, Second Degree (Child Care Provider)

(1) The defendant is charged with second-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was [a licensed child care organization or agency/ a representative or officer of a licensed corporation, association, or organization providing care, maintenance, training, or supervision of persons less than 18 years of age].<sup>1</sup>

(3) Second, that [name defendant] had care or custody of or authority over [name child] when the abuse allegedly occurred.

(4) Third, that the defendant violated a rule for family and group homes, in particular that defendant: *[provide alleged statutory violation in the Child Care Organizations Act, MCL 722.111 et seq.]*.

(5) Fourth, that as a result of violating the rule, [name child] died.

(6) Fifth, that [name child] was at the time under the age of 18.

#### Use Note

1. See MCL 722.111 *et seq.*

## PROPOSED

The Committee proposes an amendment to M Crim JI 17.33, the instruction for violations of MCL 750.145n, which was amended to expand the scope of the statute, and to make technical corrections to the first and third paragraphs. Deletions are in strike-through; new language is underlined.

#### [AMENDED] M Crim JI 17.33 Vulnerable Adult Abuse, Fourth Degree

(1) The defendant is charged with vulnerable adult abuse in the fourth degree. To prove this charge, the prosecutor must prove the following elements beyond a reasonable doubt:

(2) First, that ~~[name defendant]~~ defendant was a caregiver<sup>1</sup> or other person with authority over [name complainant].

[Select from (3) or (4):]

(3) Second, that the defendant by [his/her] reckless act or reckless failure to act caused physical harm to [name complainant].<sup>2</sup>

(4) a) By “reckless act or reckless failure to act” I mean that the defendant’s conduct demonstrates a deliberate disregard of the likelihood that the natural tendency of the act or failure to act is to cause serious physical harm or serious mental harm.

(5) b) By “physical harm” I mean any injury to a vulnerable adult’s physical condition.

(4) Second, that the defendant intentionally committed an act that, under the circumstances, posed an unreasonable risk of harm or injury to a vulnerable adult, regardless of whether [he/she] actually sustained a physical injury.

(5) Third, that [name complainant] was at the time a “vulnerable adult.” The term *vulnerable adult* means

[Choose (a), (b), or (c) or any combination of the three:]<sup>3</sup>

(a) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical handicap requires supervision or personal care or lacks the personal and social skills required to live independently.

(b) A person 18 years of age or older who is placed in an adult foster care family home or an adult foster care small group home.

(c) A person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.

#### Use Notes

1. *Caregiver* is defined by the statute as an individual who directly cares for or has physical custody of a vulnerable adult. MCL 750.145m(c).

2. The statutory language indicates that this is a general intent crime.

3. The statute sets forth three separate definitions for the term *vulnerable adult*, which, in a particular case, may be limited to one or may include one or more of such definitions. MCL 750.145m(u).

## PROPOSED

The Committee proposes an amendment to M Crim JI 36.5, the instruction that provides the aggravating factors found in MCL 750.462f that apply to the human trafficking instructions. The amendment accommodates an amendment to that statute. The new language is underlined.

#### [AMENDED] M Crim JI 36.5 Aggravating Factors

(1) If you find that the defendant is guilty of [obtaining a person for forced labor or services/holding a person in debt bondage/ knowingly subjecting a person to forced labor or services or debt bondage/participating in an enterprise involving forced labor, debt bondage, or commercial sex for financial gain], then you must decide whether the prosecutor has proved the following aggravating element[s] beyond a reasonable doubt:

[Select from the following. Proving a bodily injury under (5) below may be a lesser offense where serious bodily injury has been charged under (4).]

(2) That the violation involved

[Select one or more as warranted by the evidence:]

(a) kidnapping or attempted kidnapping of [name complainant]. Kidnapping means

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restraining someone for ransom, to use as a shield, to engage in criminal sexual conduct, to take out of the state, or to hold in involuntary servitude.

(b) first-degree criminal sexual conduct or attempted first-degree criminal sexual conduct of [name complainant]. First-degree criminal sexual conduct is sexual penetration of a person [provide particular elements that may apply from M Crim JI 20.3 through 20.11].

(c) an attempt to kill [name complainant].

(d) the death of [name complainant].

(3) That the violation resulted in serious bodily injury to [name complainant]. A serious bodily injury is any physical injury that requires medical treatment. It does not matter whether [name complainant] tried to get medical treatment.

(4) That the violation resulted in [name complainant] being engaged in commercial sexual activity. "Commercial sexual activity"<sup>1</sup> means performing acts of sexual penetration or contact,<sup>2</sup> child sexually abusive activity,<sup>3</sup> or a sexually explicit performance.<sup>4</sup>

(5) [That the violation/You may also consider the less serious offense that the violation<sup>5</sup> resulted in bodily injury to [name complainant]. Bodily injury is any physical injury.

#### Use Notes

1. Definitions of *commercial sexual activity* are found in MCL 750.462a.

2. Definitions of *sexual penetration* and *sexual contact* are found in MCL 750.520a.

3. *Child sexually abusive activity* is defined in MCL 750.145c(1)(n) as a child engaging in a "listed sexual act."

*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.

4. *Sexually explicit performance* is defined in MCL 722.673(g) as "a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse."

5. The lesser offense language only applies where "serious bodily injury" is charged and paragraph (3) is read to the jury.

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