

The Committee solicits comment on the following proposal by January 1, 2018. 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 several controlled substances instructions, M Crim JI 12.2, 12.3, 12.5 and 12.6, and adding a new instruction, M Crim JI 12.4a, to accommodate a change in the law announced in *People v Robar*, ___ Mich App ___ (2017), holding that the burden of burden of persuasion was on a defendant to prove an exemption to the Controlled Substances Act. Deletions from the current instructions are struck-through; additional language is underlined.

[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.]-²

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).

If the defense presents competent evidence that the defendant was authorized to deliver the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ___ Mich App ___; ___ NW2d ___ (August 24, 2017).

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 Pegenatt*, 447 Mich 278; 523 NW2d 325 (1994).~~

32. Use bracketed material defining attempt only in cases involving act falling short of completed delivery. Any attempt is a specific intent crime. *People v Joeseype 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.

[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

If the defense presents competent evidence that the defendant was authorized to deliver the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ___ Mich App ___; ___ NW2d ___ (August 24, 2017).

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 Pegenatt*, 447 Mich 278; 523 NW2d 325 (1994).~~

[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 possessed *[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

Use Notes

If the defense presents competent evidence that the defendant had a valid prescription or was otherwise authorized to possess the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ___ Mich App ___, ___ NW2d ___ (August 24, 2017).

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 Pegenaut*, 447 Mich 278; 523 NW2d 325 (1994).

[AMENDED] M Crim JI 12.6 Unlawful Use of a Controlled Substance

(1) The defendant is charged with the crime of illegally using 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 used a controlled substance.

(3) Second, that the substance used was _____.

(4) Third, that at the time [he/she] used it, the defendant knew the substance was _____.

[(5) Fourth, that the substance was not obtained by a valid prescription given to the defendant.]¹

[(6) Fifth, that the defendant was not otherwise authorized by law to use this substance.]²

Use Note

If the defense presents competent evidence that the defendant had a valid prescription or was otherwise authorized to use the substance, the court should read M Crim JI 12.4a. See *People v Robar*, ___ Mich App ___, ___ NW2d ___ (August 24, 2017).

1. This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription. See *People v Little*, 87 Mich App 50, 54-55; 273 NW2d 583 (1978), and Use Note 2 below.

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 possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenaut*, 447 Mich 278; 523 NW2d 325 (1994).

[NEW] M Crim JI 12.4a Exception to or Exemption from Controlled Substances Act

(1) The defendant has offered evidence that [he/she] [had a valid prescription for/ was authorized to (manufacture/deliver/possess/use)] *[identify the controlled substance charged]*. *[Describe evidence.]*

(2) The defendant has the burden of proving [he/she] [had a valid prescription for/ was authorized to (manufacture/deliver/possess/use)] *[identify the controlled substance charged]* by a preponderance of the evidence. This means that the evidence must persuade you that it is more likely than

not that [he/she] [had a valid prescription for/was authorized to (manufacture/deliver/possess/use)] *[identify the controlled substance charged]*.

(3) If you find that the defendant [had a valid prescription for/was authorized to (manufacture/deliver/possess/use)] *[identify the controlled substance charged]*, you must find [him/her] not guilty.

(4) If you find that the defendant [did not have a valid prescription for/was not authorized to (manufacture/deliver/possess/use)] *[identify the controlled substance charged]*, you must still determine whether the prosecutor has proved the elements of the charge beyond a reasonable doubt.

Use Notes

This instruction must be used if the defense presents competent evidence that the defendant had a valid prescription for, or was otherwise authorized to manufacture, possess, or use, the controlled substances. See *People v Robar*, ___ Mich App ___, ___ NW2d ___ (August 24, 2017).

Prescription possession or use of a controlled substance is excepted from a criminal violation of the Controlled Substances Act under MCL 333.7403(1) or MCL 333.7404(1), respectively. Exemptions to manufacturing or delivering controlled substances are found in MCL 333.7303 and 333.7304.

The Committee solicits comment on the following proposal by January 1, 2018. 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 the resisting arrest instructions, M Crim JI 13.1, 13.2, and 13.5, to accommodate changes in the law announced in *People v Moreno*, 491 Mich 38 (2012), *People v Quinn*, 305 Mich App 484 (2014), and *People v Vandenberg*, 307 Mich App 57 (2014), regarding resistance to unlawful police conduct, and to improve the instructions' readability. Deletions

from the current instructions are struck-through; additional language is underlined.

[AMENDED] M Crim JI 13.1

Assaulting, Resisting, or Obstructing a Police Officer or Person Performing Duties

(1) The defendant is charged with the crime of ~~[assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]~~¹ a [police officer/(state authorized person)]² who was performing [his/her] duties.³ To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant ~~[assaulted, battered, wounded, resisted, obstructed, opposed, or endangered]~~¹ [name complainant], who was a [police officer/(state authorized person)].² [“Obstruct” includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.]^{2,3} [The defendant must have actually resisted by what (he/she) said or did, but physical violence is not necessary.]³

(3) Second, that the defendant knew or had reason to know that ~~the person the defendant [assaulted/battered/wounded/resisted/obstructed/opposed/endangered]~~ [name complainant] was a [police officer/(state authorized person)] performing [his/her] duties at the time.

(4) Third, that [name complainant] gave the defendant a lawful command, was making a lawful arrest, or was otherwise performing a lawful act.⁴

[Use the following paragraphs as warranted by the charge and proofs.]

(4 5) ~~Third~~ Fourth, that the defendant's act in such ~~[assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]~~¹ caused the death of ~~the officer~~ [name complainant].

(5 6) ~~Third~~ Fourth, that ~~such the defendant's act in~~ [assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]¹ caused serious impairment of a body function ~~the officer~~ [name complainant].^{2,3}

(6 7) ~~Third~~ Fourth, that ~~such the defendant's act in~~ [assaulting, battering, wounding, resisting, obstructing, opposing, or en-

dangering]¹ caused a bodily injury requiring medical attention or medical care to ~~the of-~~ feer [name complainant].

Use Notes

¹ This instruction is to be used when the defendant is charged with violating MCL 750.81d. A defendant could be charged with assaulting or obstructing an officer performing duties under MCL 750.479. In that case, see M Crim JI 13.2.

1. MCL 750.81d prohibits “assaulting, battering, wounding, resisting, obstructing, opposing, or endangering” certain officers or officials. The court may read all of that phrase or may read whatever portions it finds appropriate according to the charge and the evidence.

^{2,2} “Person” for purposes of this statute is defined to include police officers, deputy sheriffs, firefighters, and emergency medical service personnel, among others. MCL 750.81d(7)(b).

3. The court may include this sentence where necessary.

4. The court should provide detailed legal instructions regarding the applicable law governing the officer's legal authority to act.

5. MCL 750.479(8)(b) defines “Serious impairment of a body function” according to MCL 257.58c in the Michigan vehicle code. See M Crim JI 15.12.

[AMENDED] M Crim JI 13.2

Assaulting or Obstructing Officer or Official Performing Duties

(1) The defendant is charged with the crime of ~~[assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]~~¹ a [state authorized person]² who was acting in the performance of [his/her] duties.³ To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant ~~[assaulted, battered, wounded, resisted, obstructed, opposed, or endangered]~~¹ [name complainant], who was a [state authorized person]² ~~who was~~ performing [his/her] duties. [“Obstruct” includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.]³

(3) Second, that the defendant knew or had reason to know that ~~the person the defendant [assaulted/battered/wounded/resisted/obstructed/opposed/endangered]~~ [name complainant] was then a [state authorized person] performing [his/her] duties at the time.

(4) Third, that [name complainant] gave the defendant a lawful command, was making a lawful arrest, or was otherwise performing a lawful act.⁴

(5) ~~Third~~ Fourth, that the defendant's actions were intended by the defendant, that is, not accidental.

[Use the following paragraphs when warranted by the charge and proofs:]

(5 6) ~~Fourth~~ Fifth, that the defendant's act in such ~~[assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]~~¹ caused the death of ~~[state authorized person]~~ [name complainant].

(6 7) ~~Fourth~~ Fifth, that ~~such the defendant's act in~~ such ~~[assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]~~¹ caused serious impairment of a body function² to ~~[state authorized person]~~ [name complainant].

(7 8) ~~Fourth~~ Fifth, that ~~such the defendant's act in~~ such ~~[assaulting, battering, wounding, resisting, obstructing, opposing, or endangering]~~¹ caused a bodily injury requiring medical attention or medical care to ~~[state authorized person]~~ [name complainant].^{5,6}

Use Notes

¹ This instruction should be used when the defendant is charged with violating MCL 750.479. A defendant could be charged under MCL 750.81d with assaulting, resisting, or obstructing an officer. In that event, see M Crim JI 13.1.

1. MCL 750.479 prohibits “assaulting, battering, wounding, resisting, obstructing, opposing, or endangering” certain officers or officials. The court may read all of that phrase or may read whatever portions it finds appropriate according to the charge and the evidence.

^{2,2} The statute lists authorized persons as medical examiner, township treasurer, judge, magistrate, probation officer, parole

officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person. MCL 750.479(1)(a).

³3. “Obstruct” is defined in MCL 750.479 (8)(a), as amended in 2002.

⁴4. The court should provide detailed legal instructions regarding the applicable law governing the official's legal authority to act.

⁵5. MCL 750.479(8)(b) defines “Serious impairment of a body function” according to MCL 257.58c in the Michigan vehicle code. See M Crim JI 15.12.

6. This aggravating circumstance could be the charged offense or a lesser offense, if warranted by the evidence.

[AMENDED] M Crim JI 13.5 Legal Duties

(1) An arrest is legal if it is:

[Choose one of the following (1) or (2):]

(2) Made by an officer relying on an arrest warrant for the defendant issued by a court.

(3) Made by an officer for a crime that [(he/she) reasonably believed] was committed in [his/her] presence, if it was made as soon as reasonably possible afterward.

(4) Made by an officer who had reasonable cause to believe that the crime of _____ was committed by the defendant. “Reasonable cause” means having enough information to lead an ordinarily careful person to believe that the defendant had committed the crime of _____.

(5) Made by an officer for [state other basis]:

Use Note

This instruction should be used only when the legality of the arrest resisted is in dispute. The committee believes that the legality of the arrest is no longer an element of the offenses found at MCL 750.81d and MCL 750.479. However, the committee retained this instruction since it may prove useful in other circumstances. The trial court should select the appropriate paragraph and tailor paragraph (5), if used, for arrests in those special statutory circumstances not covered by the other paragraphs:

(1) An arrest is legal if it is [made by an officer relying on an arrest warrant for the defendant issued by a court./made by an

officer for a crime that (he/she) reasonably believed was committed in (his/her) presence, if it was made as soon as reasonably possible afterward./made by an officer who had probable cause to believe that a crime was committed by the defendant. “Probable cause” means having enough information to lead an ordinarily careful person to believe that the defendant had committed a crime./made by an officer for (state other basis).] It is not necessary for you to find the defendant guilty of that crime in order to find that the arrest is legal.

[In determining whether an officer had probable cause to believe that the defendant committed a crime, you should consider all information known to police officers or law enforcement personnel involved in this case. It is not necessary that the arresting officer had probable cause based on [his/her] own knowledge if law enforcement personnel collectively had probable cause to believe that a crime was committed by the defendant. You are only required to find that police had probable cause to find that the arrest is legal.]¹

(2) A [police officer/(state authorized person)] may [provide detailed legal instructions regarding the applicable law governing the officer's or official's legal authority to act].

(3) The prosecutor must prove beyond a reasonable doubt that the [arrest was legal/the (officer/(state authorized person) was acting within (his/her) legal authority]. It is up to you to determine whether the (officer/(state authorized person)'s actions were legal according to the law as I have just described it to you.

Use Notes

In *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), the Michigan Supreme Court held that a defendant may resist unlawful police conduct. *People v Quinn*, 305 Mich App 484, 491–492; 853 NW2d 383 (2014), and *People v Vandenberg*, 307 Mich App 57, 68–69; 859 NW2d (2014), state the legality of the arrest or the officer's conduct is an element of the offense. This instruction should be given where the illegality of the arrest or the officer's conduct is offered as a defense.

The court may also decide that the police conduct is illegal as a matter of law, treating the legality of the conduct like any other element where a defendant makes such a challenge in a motion to quash, to dismiss, or for a directed verdict. See *People v Moreno*, 491 Mich 38, 58; 814 NW2d 624 (2012).

1. This paragraph may be given where appropriate according to the evidence.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 36.7 and 36.8, instructing the jury concerning a human-trafficking victim's testimony or failure to resist, effective November 2017.

[NEW] M Crim JI 36.7 Testimony of Victim Not Required/ Need Not Be Corroborated

[Select (1) or (2) where applicable]

(1) To prove this charge, testimony from the [name complainant] is not required, as long as the evidence presented proves guilt beyond a reasonable doubt.

(2) To prove this charge, it is not necessary that there be evidence other than the testimony of [name complainant], if that testimony proves guilt beyond a reasonable doubt.

[NEW] M Crim JI 36.8 Victim's Resistance or Lack of Resistance Not Relevant

When considering whether the prosecutor has proven this charge, you should not consider whether [name complainant] resisted the defendant.

JUST RELEASED

Michigan Land Title Standards 6th Edition, 3rd Supplement (2015)

The Third Supplement (2015) to the 6th Edition of the Michigan Land Title Standards prepared and published by the Land Title Standards Committee of the Real Property Law Section is now available for purchase.

Order online at <http://e.michbar.org>