

The Committee solicits comment on the following proposals by February 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 new instructions M Crim JI 10.9, 10.9a, 10.9b, 10.9c, and 10.9d for the organized retail crime statutes found at MCL 752.1083 and 752.1084.

### [NEW] M Crim JI 10.9 Organized Retail Crime— Merchandise Theft

(1) The defendant is charged with committing an organized retail crime involving the theft of retail merchandise. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

*[Select (2), (3), or (4) according to what has been charged:]*

(2) First, that the defendant took some property from a person or a business that sells merchandise at retail without the consent of the person or business.

(3) First, that the defendant organized, supervised, financed, or otherwise managed or assisted another<sup>1</sup> in taking some property from a person or a business that sells merchandise at retail.

(4) First, that the defendant conspired with another person or persons<sup>2</sup> to take some property from a person or a business that sells merchandise at retail.

(5) Second, that the property [taken/to be taken] was retail merchandise, which is a new article, product, commodity, item, or component that was intended for sale in retail commerce.

(6) Third, that the defendant intended to [permanently deprive the owner of the retail merchandise that was taken or intended to be taken/cheat the owner out of the value of the retail merchandise that was taken<sup>3</sup>].

(7) Fourth, that when the retail merchandise was taken, the defendant intended that

the merchandise would be resold or distributed, or would otherwise be reentered in commerce. Reentering the merchandise in commerce includes transferring it to another person or another business that sells merchandise at retail. A transfer may be done personally, by mail, or through any electronic medium, including the internet, but it must be intended to be done in exchange for something of value. It does not matter whether the reentry or transfer of the merchandise actually took place, so long as the defendant intended that it take place at the time that it was taken.

### Use Notes

1. In cases where the defendant is alleged to have aided or assisted another person and the defendant is not the person who is alleged to have committed the act, the aiding and abetting instructions (see Chapter 8) should be given.

2. The conspiracy instructions in M Crim JI 10.1, 10.2, 10.3, and 10.4 should be given when the theory is that the defendant conspired with another to commit an organized retail crime.

3. Use the second option only when the defendant returns the stolen merchandise to the original owner for a fraudulent refund.

### [NEW] M Crim JI 10.9a Organized Retail Crime— Possession of Stolen Merchandise

(1) The defendant is charged with committing an organized retail crime involving the possession or receipt of stolen retail merchandise. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that some property was [stolen/explicitly represented to the defendant as being stolen] from a retail merchant. [It does not matter whether the property was actually stolen, if you believe that someone told the defendant that it was stolen.<sup>1</sup>]

(3) Second, that the property was retail merchandise, which is a new article, product, commodity, item, or component that was intended for sale in retail commerce.

(4) Third, that the defendant [received/bought/possessed] the merchandise.

(5) Fourth, that when the defendant [received/bought/possessed] the merchandise, [he/she] knew or believed that it was stolen. [It does not matter whether the property was actually stolen, if you believe that someone told the defendant that it was stolen.<sup>1</sup>]

(6) Fifth, that when the defendant [received/bought/possessed] the merchandise, [he/she] intended that the merchandise would be resold or distributed, or would otherwise be reentered in commerce. Reentering the merchandise in commerce includes transferring it to another person or another business that sells merchandise at retail. A transfer may be done personally, by mail, or through any electronic medium, including the internet, but it must be intended to be done in exchange for something of value. It does not matter whether the reentry or transfer of the merchandise actually took place, so long as the defendant intended that it take place at the time that it was taken.

### Use Note

1. Read this sentence only when providing the second option that the property was represented to the defendant as being stolen.

### [NEW] M Crim JI 10.9b Organized Retail Crime—Subterfuge

(1) The defendant is charged with committing an organized retail crime by evading detection of the theft of retail merchandise. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [removed, destroyed, deactivated, or evaded an anti-shoplifting or inventory device/used an artifice, instrument, container, device, or other article/deliberately caused a fire alarm to sound].

(3) Second, that the defendant [removed, destroyed, deactivated, or evaded an anti-shoplifting or inventory device/used an artifice, instrument, container, device, or other article/deliberately caused a fire alarm to sound] so that [he/she] or others could take property without the owner's consent from a person or a business that sells merchandise at retail.

(4) Third, that the property stolen or intended to be stolen was retail merchandise, which is a new article, product, commodity, item, or component that was intended for sale in retail commerce.

(5) Fourth, that when the defendant [removed, destroyed, deactivated, or evaded an antishoplifting or inventory device/used an artifice, instrument, container, device, or other article/deliberately caused a fire alarm to sound], [he/she] intended to [permanently deprive the owner of the retail merchandise that was taken or intended to be taken/cheat the owner out of the value of the retail merchandise that was taken].

(6) Fifth, that when the retail merchandise was taken, the defendant intended that the merchandise would be resold, distributed, or otherwise would be reentered in commerce. Reentering the merchandise in commerce includes transferring it to another person or another business that sells merchandise at retail or transferring it to another person. A transfer may be done personally, by mail, or through any electronic medium, including the internet, but it must be intended to be done in exchange for something of value. It does not matter whether the reentry or transfer of the merchandise actually took place, so long as the defendant intended that it take place at the time that it was taken.

#### Use Note

1. Use the second option only when the defendant makes a return of the stolen merchandise to the original owner for a fraudulent refund.

#### [NEW] M Crim JI 10.9c Organized Retail Crime— Telecommunications Device

(1) The defendant is charged with committing an organized retail crime involving a telecommunications device. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.

(2) First, that the defendant purchased a wireless telecommunications device.

(3) Second, that the defendant purchased the device using fraudulent credit.

(4) Third, that at the time that the defendant purchased the device, [he/she] knew that the method of payment that [he/she] used was fraudulent.

(5) Fourth, that when the defendant used fraudulent credit to purchase the wireless telecommunications device, [he/she] intended to defraud or cheat someone.

#### [NEW] M Crim JI 10.9d Organized Retail Crime— Telecommunications Service Agreement

(1) The defendant is charged with committing an organized retail crime involving a wireless telecommunications service agreement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.

(2) First, that the defendant [obtained/used another person to obtain] a wireless telecommunications service agreement with [name of the wireless telecommunications company].

(3) Second, that when the defendant [obtained/used the other person to obtain] the service agreement [he/she] intended to break the agreement in order to cheat [name of the wireless telecommunications company], or [he/she] intended to defraud or cheat someone.

#### PROPOSED

The Committee proposes new instructions M Crim JI 11.39, 11.39a, and 11.39b for the “explosives” statutes found at MCL 750.204, 750.204a, 750.207, and 750.212.

#### [NEW] M Crim JI 11.39 Explosives—Sending

(1) The defendant is charged with sending or delivering an explosive substance or dangerous thing for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [(sent/delivered) an (explosive substance<sup>1</sup>/dangerous thing)/caused an (explosive substance/dangerous thing) to be taken or received].

(3) Second, that when the defendant [(sent/delivered) the (explosive substance/dangerous thing)/caused (an explosive sub-

stance/dangerous thing) to be taken or received], [he/she] intended to frighten, terrorize, intimidate, threaten, harass, injure, or kill [(name complainant)/any person], or did so to damage or destroy any real or personal property without the permission of [(name complainant)/the owner of the property/a governmental agency with authority over the public property].

[Select from paragraphs (4) through (8) where one of the following aggravating factors has been charged.]

(4) Third, that the [sending/delivery] of the [explosive substance/dangerous thing] damaged property.

(5) [Third, that/You may also consider whether<sup>2</sup> the [sending/delivery] of the [explosive substance/dangerous thing] caused physical injury [not amounting to serious impairment of a bodily function<sup>2</sup>] to another person.

(6) Third, that the [sending/delivery] of the [explosive substance/dangerous thing] caused a serious impairment of a bodily function to another person.<sup>3</sup>

(7) Third, that the [sending/delivery] of the [explosive substance/dangerous thing] caused the death of another person.

(8) Third, that the [sending/delivery] of the [explosive substance/dangerous thing] occurred in or was directed at [a child care or day care facility/a health care facility or agency/a building or structure open to the general public/a church, synagogue, mosque, or other place of religious worship/a school of any type/an institution of higher learning/a stadium/a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad)/an airport/a port/a natural gas refinery, storage facility, or pipeline/an electric, steam, gas, telephone, power, water, or pipeline facility/a nuclear power plant, reactor facility, or waste storage area/a petroleum refinery, storage facility, or pipeline/a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods/a government-owned building, structure, or other facility].<sup>4</sup>

#### Use Notes

1. There is no statutory definition of “explosive substance” or “dangerous thing.”

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a “physical injury,” rather than a “serious impairment of a bodily function.”

3. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

- (a) Loss of a limb or loss of use of a limb.
  - (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
  - (c) Loss of an eye or ear or loss of use of an eye or ear.
  - (d) Loss or substantial impairment of a bodily function.
  - (e) Serious visible disfigurement.
  - (f) A comatose state that lasts for more than three days.
  - (g) Measurable brain or mental impairment.
  - (h) A skull fracture or other serious bone fracture.
  - (i) Subdural hemorrhage or subdural hematoma.
  - (j) Loss of an organ.
4. MCL 750.212a.

## Reference

### Statutes

MCL 750.204; 750.212a

## [NEW] M Crim JI 11.39a Explosives—Placing

(1) The defendant is charged with placing an explosive substance for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant placed an explosive substance<sup>1</sup> in or near any real or personal property.

(3) Second, that when the defendant placed the explosive substance, [he/she] did so to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or did so to damage or destroy any real or personal property without the permission of the owner or a governmental agency with authority over the property, if it is public property.

[Select from paragraphs (4) through (8) where one of the following aggravating factors has been charged:]

(4) Third, that the placement of the explosive substance damaged property.

(5) [Third, that/You may also consider whether<sup>2</sup>] the placement of the explosive substance caused physical injury [not amounting to serious impairment of a bodily function<sup>2</sup>] to another person.

(6) Third, that the placement of the explosive substance caused a serious impairment of a bodily function to another person.<sup>3</sup>

(7) Third, that the placement of the explosive substance caused the death of another person.

(8) Third, that the placement of the explosive substance occurred in or was directed at [a child care or day care facility/a health care facility or agency/a building or structure open to the general public/a church, synagogue, mosque, or other place of religious worship/a school of any type/an institution of higher learning/a stadium/a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad)/an airport/a port/a natural gas refinery, storage facility, or pipeline/an electric, steam, gas, telephone, power, water, or pipeline facility/a nuclear power plant, reactor facility, or waste storage area/a petroleum refinery, storage facility, or pipeline/a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods/a government-owned building, structure, or other facility].<sup>4</sup>

## Use Notes

1. There is no statutory definition of “explosive substance” or “dangerous thing.”

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a “physical injury,” rather than a “serious impairment of a bodily function.”

3. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

- (a) Loss of a limb or loss of use of a limb.
- (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.

(c) Loss of an eye or ear or loss of use of an eye or ear.

(d) Loss or substantial impairment of a bodily function.

(e) Serious visible disfigurement.

(f) A comatose state that lasts for more than three days.

(g) Measurable brain or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or subdural hematoma.

(j) Loss of an organ.

4. MCL 750.212a.

## Reference

### Statutes

MCL 750.207; 750.212a

## [NEW] M Crim JI 11.39b Explosives—False Bomb

(1) The defendant is charged with possessing, delivering, or placing a device that was constructed to look like an explosive device for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [possessed/delivered/sent/transported/placed] a device.

(3) Second, that the device was [made to appear to be an explosive, an incendiary device, or a bomb/described as being an explosive, an incendiary device, or a bomb].

(4) Third, that when the defendant [possessed/delivered/sent/transported/placed] the device, [he/she] intended to frighten, terrorize, intimidate, threaten, harass, or annoy [(name complainant)/a person].

## Use Note

MCL 750.204a(2) permits prosecution of this offense in various jurisdictions. The “venue” instruction, M Crim JI 3.10, may have to be altered to explain why the violation may be prosecuted in Michigan.

## Reference

### Statutes

MCL 750.204a; 750.212a