

The Committee solicits comment on the following proposals by July 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 M Crim JI 7.16a, the instruction that applies to the rebuttal presumption regarding self-defense found in MCL 780.951, to clarify that the presumption is rebuttable, and to make the instruction easier to understand and in accord with the statutory language. Deletions are in strike-through and additions are underlined.

[AMENDED] M Crim JI 7.16a Rebuttable Presumption Regarding Fear of Death, Great Bodily Harm, or Sexual Assault

(1) If you find both that—

(a) the deceased was in the process of breaking and entering a business or dwelling; or committing home invasion, or had broken into and entered a business or dwelling; or committed home invasion and was still present in the business or dwelling, or is was unlawfully attempting to remove a person from a dwelling, business, or vehicle against the person's will,

and

(b) the defendant honestly and reasonably believed the deceased was engaged in any of the conduct just described

—~~you must presume it is presumed~~ that the defendant had an honest and reasonable belief that imminent [death/great bodily harm/sexual assault] would occur. The prosecutor can overcome this presumption by proving beyond a reasonable doubt that the defendant did not have an honest and reasonable belief that [death/great bodily harm/sexual assault] was imminent.

(2) This presumption does not apply if—

[Use the appropriate paragraph below based on the claims of the parties and the evidence admitted.]

(a) the deceased has the legal right to be in the dwelling, business, or vehicle and there is not a “no contact” [court order/

pretrial supervision order/probation order/parole order] against the deceased, or

(b) the individual being removed is a child or grandchild or otherwise in the lawful custody of the deceased victim, or

(c) the defendant was engaged in the commission of a crime or using the dwelling, business premises, or vehicle to further the commission of a crime, or

(d) the deceased was a peace officer who was entering or attempting to enter the premises or vehicle in the performance of his or her duties, or

(e) the deceased was [the spouse of the defendant/the former spouse of the defendant/a person with whom the defendant had or previously had a dating relationship/a person with whom the defendant had a child in common/a resident or former resident of the defendant's household], and the defendant had a prior history of domestic violence as the aggressor.

PROPOSED

The Committee proposes amending M Crim JI 11.37a and 11.37b, the instructions that apply to discharging a firearm at or in a building, contrary to MCL 750.234b. The current instructions incorrectly require that the prosecutor prove an element of “physical injury” to establish the underlying crime, whereas “physical injury” is an aggravating element in both cases. Deletions are in strike-through and additions are underlined.

[AMENDED] M Crim JI 11.37a Discharge of a Firearm at a Building

(1) The defendant is charged with intentionally discharging a firearm at a dwelling or potentially occupied structure. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant discharged a firearm.¹

(3) Second, that [he/she] did so intentionally, that is, on purpose.

(4) Third, that [he/she] discharged the firearm at a building that [he/she] had reason to believe was either a dwelling or a potentially occupied structure.

A dwelling is a building where people usually live. It does not matter whether or

not someone was actually in the building at the time.

A potentially occupied structure is a building that a reasonable person knows or should know was likely to be occupied by one or more persons due to its nature, function, or location. It does not matter whether a person was actually present in the structure.

~~(5) [Fourth, that when the defendant discharged the firearm, [he/she] caused physical injury to/caused serious body injury to/caused the death of] (name complainant).~~

[Select from paragraphs (5) through (7) where one of the following aggravating factors has been charged:]

(5) Fourth, that when the defendant discharged the firearm [he/she] caused the death of [name complainant].

(6) Fourth, that when the defendant discharged the firearm [he/she] caused serious impairment of a body function to [name complainant].

[Use (6) where it is alleged that the complainant suffered serious body injury]²

(6) Serious impairment² 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 the use of a foot, hand, finger, or thumb.

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

(d) Loss or substantial impairment of a body 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.

(7) Fourth, that, when the defendant discharged the firearm, [he/she] caused physical injury to (name complainant) [not amounting to serious impairment of a body function].³

Use Notes

1. *Firearm* is defined in MCL 28.421(1)(c) and MCL 750.222(e).

2. MCL 750.234a(10)(b) references MCL 257.58c for the definition of *serious impairment of a body function*.

3. 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 body function.”

This charge does not apply to a peace officer in the performance of his or her duties. MCL 750.234b(6).

Self-defense or defense of others is a defense to this charge. MCL 750.234b(7). Appropriate instructions from M Crim JI 7.15 through 7.24 must be given where such a defense is raised.

[AMENDED] M Crim JI 11.37b Discharge of a Firearm in a Building

(1) The defendant is charged with intentionally discharging a firearm in a dwelling or potentially occupied structure. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant discharged a firearm.¹

(3) Second, that [he/she] did so intentionally, that is, on purpose.

(4) Third, that [he/she] discharged the firearm in a building that [he/she] had reason to believe was either a dwelling or a potentially occupied structure.

A dwelling is a building where people usually live. It does not matter whether or not someone was actually in the building at the time.

A potentially occupied structure is a building that a reasonable person knows or should know was likely to be occupied by one or more persons due to its nature, function, or location. It does not matter whether a person was actually present in the structure.

(5) Fourth, that the defendant acted with reckless disregard for the safety of other persons.

~~(6) [Fifth, that when the defendant discharged the firearm, [he/she] caused physical injury to/caused serious body injury to/caused the death of] (name complainant):~~

~~[Select from paragraphs (5) through (7) where one of the following aggravating factors has been charged:]~~

~~[Select from paragraphs (6) through (8) where one of the following aggravating factors has been charged:]~~

~~(6) Fifth, that when the defendant discharged the firearm [he/she] caused the death of [name complainant].~~

~~(7) Fifth, that when the defendant discharged the firearm [he/she] caused serious impairment of a body function to [name complainant].~~

~~Use (6) where it is alleged that the complainant suffered serious body injury²~~

~~(6) Serious impairment² 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 the use of a foot, hand, finger, or thumb.~~

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

~~(d) Loss or substantial impairment of a body 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.~~

~~(8) Fifth, that when the defendant discharged the firearm, [he/she] caused physical injury to [name complainant] [not amounting to serious impairment of a body function].³~~

Use Notes

1. *Firearm* is defined in MCL 28.421(1)(c) and MCL 750.222(e).

2. MCL 750.234a(10)(b) references MCL 257.58c for the definition of *serious impairment of a body function*.

3. 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 body function.”

This charge does not apply to a peace officer in the performance of his or her duties. MCL 750.234b(6).

Self-defense or defense of others is a defense to this charge. MCL 750.234b(7). Ap-

propriate instructions from M Crim JI 7.15 through 7.24 must be given where such a defense is raised.

PROPOSED

The Committee proposes new instructions, M Crim JI 11.43 and 11.43a, where violations of MCL 750.210 and 750.209a are charged and the penalty may be enhanced under MCL 750.212a, involving the crimes of carrying or possessing explosive or combustible substances or compounds with intent to frighten, injure, or kill, or carrying explosives in a public place.

[NEW] M Crim JI 11.43 Carrying or Possessing Explosive or Combustible Substances with Intent to Damage Property or to Frighten, Injure, or Kill a Person

(1) The defendant is charged with possessing or carrying an explosive or combustible substance with intent to damage property or to frighten, injure, or kill a person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed [(an explosive or combustible substance or compound/a substance or compound that will become an explosive or combustible substance or compound when combined with another substance or compound)/an article containing (an explosive or combustible substance or compound/a substance or compound that will become an explosive or combustible substance or compound when combined with another substance or compound)].¹

(3) Second, that the defendant knew that the substance or compound that [he/she] possessed was explosive or combustible, or would become an explosive or combustible substance or compound when combined with another substance or compound.

(4) Third, that when the defendant possessed the explosive or combustible substance or compound, [he/she] intended to [frighten, terrorize, intimidate, threaten, harass, injure, or kill another person/damage or destroy (any real or personal property without permission from the owner/any public property without permission from the

governmental agency having authority over the property²).

[Select from paragraphs (5) through (9) where one of the following aggravating factors has been charged:]

(5) Fourth, that the explosive or combustible substance or compound damaged another person's property.

(6) Fourth, that the explosive or combustible substance or compound caused the death of another person.

(7) Fourth, that the explosive or combustible substance or compound caused the serious impairment of a body function to another person.³

(8) Fourth, that the explosive or combustible substance or compound caused physical injury [not amounting to serious impairment of a body function⁴] to another person.

(9) Fourth, that the explosive or combustible substance or compound was possessed 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].⁵

Use Notes

1. There is no statutory definition for explosive or combustible substances or compounds.

2. Use the second alternative only where the property is public property.

3. 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 causing a "serious impairment of a body function."

4. A definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that se-

rious 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.

5. MCL 750.212a.

[NEW] M Crim JI 11.43a Possessing Explosive Substance or Device in a Public Place

(1) The defendant is charged with possessing an explosive substance or device in a public place with unlawful intent. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed an explosive substance or device.¹

(3) Second, that the defendant knew that the substance or device that [he/she] possessed was explosive.

(4) Third, that the defendant possessed the explosive substance or device in a public place.¹

(5) Fourth, that when the defendant possessed the explosive substance or device, [he/she] intended to frighten, terrorize, intimidate, threaten, harass, or annoy another person.

[Provide paragraph (6) where the aggravating factor has been charged.]

(6) Fifth, that the explosive substance or device was possessed in [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].²

Use Notes

1. There is no statutory definition for explosive or combustible substances or compounds.

2. MCL 750.212a.

PROPOSED

The Committee proposes new instructions, M Crim JI 11.44 and 11.44a, where violations of MCL 750.211a are charged, and the penalty may be enhanced under MCL 750.212a, involving the crimes of making, selling, buying, or possessing Molotov cocktails, or of making, selling, buying, or possessing incendiary explosive devices with intent to frighten, injure, or kill, or carrying explosives in a public place.

[NEW] M Crim JI 11.44 Manufacturing, Buying, Selling, Furnishing, or Possessing Molotov Cocktails

(1) The defendant is charged with manufacturing, selling, furnishing, buying, or possessing a Molotov cocktail. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [manufactured/sold/furnished/bought/possessed] a Molotov cocktail or similar device.

A Molotov cocktail is an improvised incendiary device that is constructed from a bottle or other container filled with a flammable or combustible material or substance and that has a wick, a fuse, or other device that is designed or intended to ignite the contents of the bottle or container when it is thrown or placed near a target.

(3) Second, that when the defendant [manufactured/sold/furnished/bought/possessed] it, [he/she] knew that it was a Molotov cocktail or similar incendiary device.

**[NEW] M Crim JI 11.44a
Manufacturing, Buying, Selling
Furnishing, or Possessing an
Incendiary Explosive Device with
Intent to Damage Property or to
Frighten, Injure, or Kill a Person**

(1) The defendant is charged with manufacturing, selling, furnishing, buying, or possessing an incendiary device with intent to damage property or to frighten, injure, or kill a person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [manufactured/sold/furnished/bought/possessed] a device that [would explode on impact/would explode with the application of heat or a flame/was highly incendiary].

(3) Second, that when the defendant [manufactured/sold/furnished/bought/possessed] the device, [he/she] knew that it [would explode on impact/would explode with the application of heat or a flame/was highly incendiary].

(4) Third, that when the defendant [manufactured/sold/furnished/bought/possessed] the device, [he/she] intended to frighten, terrorize, intimidate, threaten, harass, injure, or kill another person or intended to [damage or destroy any real or personal property without permission from the owner/damage or destroy any public property without permission from the governmental agency with authority over the public property¹].

[Select from paragraphs (5) through (9) where one of the following aggravating factors has been charged.]

(5) Fourth, that the device damaged [another person's property without permission from the owner/public property without permission from the governmental agency with authority over the property¹].

(6) Fourth, that the device caused the death of another person.

(7) Fourth, that the device caused the serious impairment of a body function to another person.²

(8) Fourth, that the device caused physical injury [not amounting to serious impairment of a body function³] to another person.

(9) Fourth, that the device was manufactured, sold, furnished, bought, or possessed 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].⁴

Use Notes

1. Use the second alternative only where the property is public property.

2. A 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.

3. 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 causing a "serious impairment of a body function."

4. MCL 750.212a.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, effective May 2018.

ADOPTED

The Committee has adopted M Crim JI 12.9 (§8 defense instruction), a new instruction for use where a defendant asserts an affirmative defense to marijuana charges under MCL 333.26428(a) in cases where a question of fact remains for jury determination per *People v Hartwick/Tuttle*, 498 Mich 192 (2015).

**[NEW] M Crim JI 12.9
Medical Marijuana
Affirmative Defense**

(1) The defendant says that [he/she] is not guilty since [his/her] [acquisition/possession/cultivation/manufacture/use/delivery/transfer/transportation] of marijuana was legal because it was permitted for medical purposes. The burden is on the defendant to prove that [he/she] [acquired/possessed/cultivated/manufactured/used/delivered/transferred/transported] marijuana for medical purposes.

(2) Before considering the medical marijuana 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 defense that [he/she] [acquired/possessed/cultivated/manufactured/used/delivered/transferred/transported] the marijuana for medical purposes.

(3) In order to establish that [his/her] [acquisition/possession/cultivation/manufacture/use/delivery/transfer/transportation] of marijuana was legal, the defendant must prove three 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, that a physician provided a professional opinion stating that the [defendant/defendant's patient] is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate a serious or debilitating medical condition or the symptoms of a serious or debilitating medical condition.

The term "therapeutic benefit" means tending to cure or restore to health.

The term "palliative benefit" means moderating pain or symptoms by making them easier to bear, without necessarily curing the underlying medical condition.

In order to prove that a physician provided a professional opinion, the defendant must establish both of the following conditions:

(a) that [(he/she)/(his/her) patient] had a bona fide physician-patient relationship

with the physician who provided the professional opinion; and

(b) that the opinion was made after a full assessment of the [defendant's/defendant's patient's] medical history and current medical condition.

A bona fide relationship means that there was an actual and ongoing relationship between [defendant/defendant's patient] and the physician when the opinion was provided.¹

(5) Second, that the defendant [and (his/her) primary caregiver] [acquired/possessed/cultivated/manufactured/used/delivered/transferred/transported] no more marijuana than was reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of treating or alleviating the [defendant's/defendant's patient's] medical condition or symptoms.

(6) Third, that the defendant [and (his/her) primary caregiver] [was/were] engaged in the [acquisition/possession/cultivation/manufacture/use/delivery/transfer/transportation] of marijuana to treat or alleviate the [defendant's/patient's] medical condition.

(7) You should consider these elements separately. If you find that the defendant has proved all three of these elements by a preponderance of the evidence, then you must find [him/her] not guilty because [his/her] [acquisition/possession/cultivation/manufacture/use/delivery/transfer/transportation] of marijuana was permitted for medical purposes. If the defendant has failed to prove any or all of these elements, [he/she] was not legally permitted to [acquire/possess/cultivate/manufacture/use/deliver/transfer/transport] marijuana.

Use Note

1. If there is a question regarding the existence of a bona fide physician-patient relationship, see *People v Hartwick*, 498 Mich 192, 231; 870 NW2d 37 (2015), and MCL 333.26423(a) for further guidance. The statute provides:

(a) "Bona fide physician-patient relationship" means a treatment or counseling relationship between a physician and patient in which all of the following are present:

(1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.

(2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.

(3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marijuana as a treatment of the patient's debilitating medical condition.

(4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the medical use of marijuana to treat that condition.

SBM

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Changes submitted before January 16 will appear in the next Alphabetical Roster Edition.

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