

## 70 From the Committee on Model Criminal Jury Instructions

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 10.9, M Crim JI 10.9a, M Crim JI 10.9b, M Crim JI 10.9c, and M Crim JI 10.9d, for violations of the “organized retail crime” statutes, MCL 752.1081 *et seq.*, effective October 1, 2018.

**[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 find 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 from a retail merchant. [It does not matter whether the property was actually stolen, if you find 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 antishoplifting 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 antishoplifting or inventory device<sup>1</sup>/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]<sup>2</sup> 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]<sup>2</sup>/cheat the owner out of the value of the retail merchandise that was taken<sup>3</sup>].

(6) Fifth, that when the retail merchandise was taken, the defendant intended that the merchandise would be resold, distributed, or otherwise 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. The Committee recognizes that MCL 752.1084(1)(c) could be interpreted so that paragraphs (4), (5), and (6) of this instruction do not apply to the language involving removal, destruction, deactivation, or evasion of antishoplifting or inventory devices. However, the Committee believes MCL 752.1084(1)(c) to be ambiguous when considered together with the statutory definition of “organized retail crime” in MCL 752.1083(c). The Committee concluded that, in light of the statutory definition, the ambiguity is best resolved by including these paragraphs when instructing on removal, destruction, deactivation, or evasion of antishoplifting or inventory devices. Where there is disagreement with the inclusion of (4), (5), and/or (6), the Committee notes that, while use of the Model Criminal Jury Instructions is mandated by MCR 2.512(D)(2), the rule allows a challenge to an instruction on the ground that it does not accurately state the applicable law.

2. Use this phrase only where the charge involves conspiracy to commit an organized retail crime.

3. 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.

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The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 11.41, for violations of the chemical irritants statute, MCL 750.200j, effective October 1, 2018.

#### **[NEW] M Crim JI 11.41 Chemical Irritants—Unlawful Acts**

(1) [The defendant is charged with/You may also consider the lesser offense of<sup>1</sup>] committing an unlawful act with a chemical irritant or device for an unlawful purpose [resulting in (property damage/death/serious impairment of a body function/injury)/occurring in or directed at a public facility].<sup>2</sup> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [manufactured/delivered/possessed/transported/placed/used/released] a [substance/device].

(3) Second, that the [substance/device] that the defendant [manufactured/delivered/possessed/transported/placed/used/released] was a [chemical irritant/chemical irritant device/smoke device].

*[Provide definitions. Where the charge does not involve “chemical irritant devices,” provide the definition for “chemical irritants” from paragraph (a), only. Where the charge does involve “chemical irritant devices,” provide the definition from paragraph (b) then provide the definition for “chemical irritants” from paragraph (a).]*<sup>3</sup>

(a) A “chemical irritant” means a solid, liquid, or gas that, through its chemical or physical properties, alone or in combination with one or more other substances, can be used to produce an irritant effect in humans, animals, or plants.

(b) A “chemical irritant device” means a device designed or intended to release a chemical irritant.

(4) Third, that the defendant [manufactured/delivered/possessed/transported/placed/used/released] the [chemical irritant/chemical irritant device/smoke device] 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 (5) through (9) where one of the following aggravating factors has been charged:]*

(5) Fourth, that the [manufacture/delivery/possession/transportation/placement/use/release] of the [chemical irritant/chemical irritant device/smoke device] resulted in property damage.

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(6) Fourth, that the [manufacture/delivery/possession/transportation/placement/use/release] of the [chemical irritant/chemical irritant device/smoke device] resulted in the death of another person.

(7) Fourth, that the [manufacture/delivery/possession/transportation/placement/use/release] of the [chemical irritant/chemical irritant device/smoke device] resulted in serious impairment of a body function to another person.

Serious impairment of a body function<sup>4</sup> 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.

(8) Fourth, that the [manufacture/delivery/possession/transportation/placement/use/release] of the [chemical irritant/chemical irritant device/smoke device] resulted in physical injury [not amounting to serious impairment of a body function<sup>1</sup>] to another person.

(9) Fourth, that the [manufacture/delivery/possession/transportation/placement/use/release] of the [chemical irritant/chemical irritant device/smoke device] 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>5</sup>

### Use Notes

1. 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.”

2. Select where an aggravating factor in paragraphs (5) through (9) is charged.

3. MCL 750.200h(a) and (b) provides the definitions. The statute does not provide a definition for a smoke device.

4. The definitional statute, MCL 750.200h, cites MCL 257.58c.

5. MCL 750.212a.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, M Crim JI 11.42 and M Crim JI 11.42a, for violations of the offensive or injurious substances statute, MCL 750.209, effective October 1, 2018.

### **[NEW] M Crim JI 11.42 Offensive or Injurious Substances— Placement with Intent to Injure**

(1) [The defendant is charged with/You may also consider the lesser offense of<sup>1</sup>] placing an offensive or injurious substance for an unlawful purpose [resulting in (property damage/death/serious impairment of a body function/injury)/occurring in or directed at a public facility].<sup>2</sup> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant placed an offensive or injurious substance or compound<sup>3</sup> in or near to [real/personal] property.

(3) Second, that when the defendant placed the offensive or injurious substance or compound, [he/she] intended to [injure or coerce another person/injure the property or business of another person/interfere with another person’s use, management,

conduct, or control of his or her property or business].

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

(4) Third, that the offensive or injurious substance or compound damaged another person’s property.

(5) Third, that the offensive or injurious substance or compound caused the death of another person.

(6) Third, that the offensive or injurious substance or compound caused the serious impairment of a body function to another person.

Serious impairment of a body function<sup>4</sup> 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.

(7) Third, that the offensive or injurious substance or compound caused physical injury [not amounting to serious impairment of a body function<sup>1</sup>] to another person.

(8) Third, that placement of the offensive or injurious substance or compound 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>5</sup>

### Use Notes

1. 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.”

2. Select where an aggravating factor in paragraphs (4) through (8) is charged.

3. The statute does not provide a definition for an offensive or injurious substance or compound.

4. A definitional statute, MCL 750.200h, cites MCL 257.58c.

5. MCL 750.212a.

### [NEW] M Crim JI 11.42a Offensive or Injurious Substances— Placement with Intent to Annoy

(1) [The defendant is charged with/You may also consider whether the defendant<sup>1</sup>] placing an offensive or injurious substance with intent to annoy or alarm [resulting in (property damage/death/serious impairment of a body function/injury)/occurring in or directed at a public facility].<sup>2</sup> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant placed an offensive or injurious substance or compound<sup>3</sup> in or near to [real/personal] property.

(3) Second, that when the defendant placed the offensive or injurious substance or compound, [he/she] intended to annoy or alarm another person.

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

(4) Third, the offensive or injurious substance or compound damaged another person's property.

(5) Third, that the offensive or injurious substance or compound caused the death of another person.

(6) Third, that the offensive or injurious substance or compound caused the

serious impairment of a body function to another person.

Serious impairment of a body function<sup>4</sup> 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.

(7) Third, that the offensive or injurious substance or compound caused physical injury [not amounting to serious impairment of a body function<sup>1</sup>] to another person.

(8) Third, that placement of the offensive or injurious substance or compound 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>5</sup>

### Use Notes

1. 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.”

2. Select where an aggravating factor in paragraphs (4) through (8) is charged.

3. The statute does not provide a definition for an offensive or injurious substance or compound.

4. A definitional statute, MCL 750.200h, cites MCL 257.58c.

5. MCL 750.212a.



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