

## 70 From the Committee on Model Criminal Jury Instructions

The Committee solicits comment on the following proposals by January 1, 2019. 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 3.29, 3.30, and 3.31, the jury verdict forms used for multiple counts with and without insanity defenses and lesser offenses, because the current forms fail to provide a general “not guilty” option for each charged count. See *People v Wade*, 283 Mich App 462 (2009). Deletions are in strike-through, and new language is underlined.

### [AMENDED] M Crim JI 3.29 Verdict Form (Insanity Defense)

Defendant: \_\_\_\_\_

#### POSSIBLE VERDICTS:

You may return only one verdict on this ~~each~~ charge. Mark only one verdict ~~on this~~ sheet for each count.

Not Guilty

Not Guilty by Reason of Insanity

Count 1

Not Guilty

Not Guilty by Reason of Insanity

Guilty but Mentally Ill of \_\_\_\_\_

Guilty of \_\_\_\_\_

Count 2

Not Guilty

Not Guilty by Reason of Insanity

Guilty but Mentally Ill of \_\_\_\_\_

Guilty of \_\_\_\_\_

### [AMENDED] M Crim JI 3.30 Verdict Form (Lesser Offenses)

Defendant: \_\_\_\_\_

#### POSSIBLE VERDICTS:

You may return only one verdict on this ~~each~~ charge. Mark only one ~~box on this~~ sheet verdict for each count.

Not Guilty

Count 1

Not Guilty

Guilty of \_\_\_\_\_

Count 2

Not Guilty

Guilty of \_\_\_\_\_

Guilty of the Lesser Offense of:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

### [AMENDED] M Crim JI 3.31 Verdict Form (Insanity Defense with Lesser Offenses)

Defendant: \_\_\_\_\_

#### POSSIBLE VERDICTS:

You may return only one verdict on this ~~each~~ charge. Mark only one verdict ~~on this~~ sheet for each count.

Not Guilty

Not Guilty by Reason of Insanity

Count 1

Not Guilty

Not Guilty by Reason of Insanity

Guilty but Mentally Ill of \_\_\_\_\_

Guilty of \_\_\_\_\_

Count 2

Not Guilty

Not Guilty by Reason of Insanity

Guilty but Mentally Ill of \_\_\_\_\_

Guilty of \_\_\_\_\_

Guilty but Mentally Ill of the Lesser  
Offense of \_\_\_\_\_

Guilty of the Lesser Offense of  
\_\_\_\_\_

## PROPOSED

The Committee proposes a new instruction, M Crim JI 14.2a, where perjury is charged under MCL 750.423(2)—false declarations made under penalty of perjury (including in electronic media). The instruction is entirely new.

### [NEW] M Crim JI 14.2a Perjury

(1) The defendant is charged with the crime of perjury. To prove this charge, the

prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant put [his/her] signature on a record.

A record includes a written document, or something that is electronically stored or capable of being preserved in some other way. It must be capable of being retrieved or recovered in a form that can be seen, heard, or perceived in some way.

A signature is any symbol that the defendant has adopted as [his/her] own, and includes electronic symbols, sounds, or processes.

(3) Second, that the record included a provision that the statements or declarations made in the record were given under penalty of perjury.

(4) Third, that the record contained a false declaration or statement. The declaration or statement that is alleged to have been false in this case is that [give details of alleged false statement].

(5) Fourth, that the defendant knew that the declaration or statement was false when [he/she] made it.

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## PROPOSED

The Committee proposes amending M Crim JI 20.38c, the instruction for possessing or accessing child sexually abusive activity, to clarify that it applies when the defendant possesses or accesses child sexually abusive material for viewing it himself or herself. Deletions are in strike-through, and new language is underlined.

### [AMENDED] M Crim JI 20.38c Child Sexually Abusive Activity— Possessing or Accessing

(1) The defendant is charged with the crime of possessing or accessing child sexually abusive material. To prove this charge,

the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [possessed child sexually abusive material/intentionally looked for child sexually abusive material ~~and intentionally caused to view it, or to cause it to be sent to or seen by another person~~].

(3) Child sexually abusive materials are pictures, movies, or illustrations of [a person under 18 years of age/the representation of a person under 18 years of age] engaged in one or more of the following sexual acts:

[Choose any of the following that apply:]

(a) sexual intercourse, which is penetration of a genital, oral, or anal opening by the genitals, mouth, or tongue, or with an artificial genital, whether the intercourse is real or simulated, and whether it is between persons of the same or opposite sex, or between a person and an animal, [and/or]

(b) erotic fondling, which is the touching of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for the purpose of sexual gratification or stimulation of any person involved, but does not include other types of touching, even if affectionate, [and/or]

(c) sadomasochistic abuse, which is restraining or binding a person with rope, chains, or any other kind of binding material; whipping; or torturing for purposes of sexual gratification or stimulation, [and/or]

(d) masturbation, which is stimulation by hand or by an object of a person's clothed or unclothed genitals, pubic area, buttocks, female breasts, or the developing or undeveloped breast area of a child for sexual gratification or stimulation, [and/or]

(e) passive sexual involvement, which is watching, drawing attention to, or exposing someone to persons who are performing real or simulated sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity for the purpose of sexual gratification or stimulation of any person involved, [and/or]

(f) sexual excitement, which is the display of someone's genitals in a state of stimulation or arousal, [and/or]

(g) erotic nudity, which is showing the genital, pubic, or rectal area of someone in a way that tends to produce lewd or lustful emotions.

[Choose either (4) or (5), depending on whether the depiction is an actual person or is a created representation of a person under the age of 18:]

(4) Second, that the defendant knew or should reasonably have known that the person shown in the sexually abusive material was less than 18 years old, or failed to take reasonable precautions to determine whether the person was less than 18 years old.

(5) Second, that the defendant possessed or accessed a portrayal of a person appearing to be under the age of 18, knowing that the person portrayed appeared to be under the age of 18, and all of the following conditions apply:

(a) An average person, applying current community standards, would find that the material appealed to an unhealthy or shameful interest in nudity, sex, or excretion.

(b) A reasonable person would not find any serious literary, artistic, political, or scientific value in the material.

(c) The material shows or describes sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity, as previously described for you.

(6) Third, that the defendant [knew that (he/she) possessed/knowingly looked for] the material.

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## PROPOSED

The Committee proposes amending M Crim JI 27.1, the jury instruction for embezzlement charged under MCL 750.174, and M Crim JI 27.5, the jury instruction for embezzlement charged under MCL 750.177 or 750.178 to accommodate statutory changes and clarify the instructions. Deletions are in strike-through, and new language is underlined.

### [AMENDED] M Crim JI 27.1 Embezzlement by Agent or Servant

(1) The defendant is charged with the crime of embezzlement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the [money/property] ~~belongs~~ belonged to [name principal].<sup>1</sup>

(3) Second, that the defendant had a relationship of trust with [name principal] because the defendant was [define relationship].<sup>2</sup>

(4) Third, that the defendant obtained possession or control of the [money/property] because of this relationship.

(5) Fourth, that the defendant

[Choose (a), (b), or (c):]

(a) dishonestly disposed of the [money/property].

(b) converted the [money/property] to [his/her] own use.

(c) took or hid the [money/property] with the intent to convert it to [his/her] own use without the consent of [name principal].

(6) Fifth, that at the time the defendant did this, [he/she] intended to defraud or cheat [name principal] of some property.<sup>3</sup>

(7) Sixth, that the fair market value of the property or amount of money embezzled was:<sup>4</sup>

[Choose only one of the following unless instructing on lesser offenses:]

(a) \$100,000 or more.

(b) \$50,000 or more but less than \$100,000.

(c) \$20,000 or more, but less than \$50,000.

(d) \$1,000 or more, but less than \$20,000.

(e) \$200 or more, but less than \$1,000.

(f) some amount less than \$200.

[Use the following paragraph only if applicable:]

(8) [You may add together the fair market value of property or money embezzled in separate incidents if part of a scheme or course of conduct (within a any 12-month period)<sup>5</sup> when deciding whether the prosecutor has proved the value of the property or amount of money embezzled ~~the amount required~~ beyond a reasonable doubt.]

## Use Notes

1. The principal must be someone other than the defendant.

2. The statute lists agent, servant, employee, trustee, bailee, or custodian. See the table of contents to chapter 22 for a list of definitions that may be used.

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3. This is a specific intent crime. The defendant's intent to return or replace the money at a later time does not provide a defense. *People v Butts*, 128 Mich 208; 87 NW 224 (1901).

4. The Fair Market Value Test, M Crim JI 22.1, should be given when applicable.

5. The 12-month time limit does not apply if the embezzlement scheme or course of conduct was directed against only one person or one legal entity. In those cases, with one victim, do not include the parenthetical phrase referring to the 12-month period.

## **[AMENDED] M Crim JI 27.5 Embezzlement of Mortgaged Property**

(1) The defendant is charged with the crime of dishonestly [embezzling/removing/hiding/transferring] mortgaged property. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the property in question here, [identify property], had a [identify encumbrance] on it.

(3) Second, that [the defendant/someone else] held this property.

(4) Third, that the defendant [embezzled/removed/hid/transferred] the property.<sup>1</sup>

(5) Fourth, that when the defendant did this [he/she] knew that the property had a [identify encumbrance] on it.

(6) Fifth, that when the defendant did this, [he/she] intended to defraud or cheat [name complainant].<sup>2</sup>

~~[Use (7) for felonies:]~~

~~(7) Sixth, that the fair market value of the property involved is over \$100.<sup>3</sup>~~

~~[Use (8) for misdemeanors:]~~

~~(8) Sixth, that the property involved is worth something.~~

~~(7) Sixth, that the fair market value of the property embezzled was:<sup>3</sup>~~

~~[Choose only one of the following unless instructing on lesser offenses:]~~

~~(a) \$20,000 or more.~~

~~(b) \$1,000 or more, but less than \$20,000.~~

~~(c) \$200 or more, but less than \$1,000.~~

~~(d) some amount less than \$200.~~

### **Use Notes**

1. Define terms used. See the table of contents to chapter 22 for a list of definitions.

2. This is a specific intent crime.

3. The Fair Market Value Test, M Crim JI 22.1, should be given when applicable.

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## **PROPOSED**

The Committee proposes new instructions for crimes charged under MCL 750.49, pertaining to using animals for fighting or targets (or providing facilities for doing so or breeding such animals, etc.): M Crim JI 33.1, 33.1a, 33.1b, 33.1c, 33.1d, 33.1e, 33.1f, and 33.1g. These instructions are entirely new.

## **[NEW] M Crim JI 33.1 Possession or Sale of Animal for Fighting, Baiting, or Shooting**

(1) The defendant is charged with a crime involving possession or sale of an animal for [fighting/baiting/shooting]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [owned/possessed/used/bought/sold/offered to buy or sell/imported/exported] [a/an] [identify kind of animal].

(3) Second, that the [identify kind of animal] was to be used [for the purpose of fighting/for the purpose of baiting/as a target to be shot at as a test of skill in marksmanship].

(4) Third, that the defendant knew that the [identify kind of animal] was to be used [for the purpose of fighting/for the purpose of baiting/as a target to be shot at as a test of skill in marksmanship].

### **Use Note**

If the defendant raises an issue concerning "possession," the jury may be instructed in accord with M Crim JI 12.7 and 11.34b.

## **[NEW] M Crim JI 33.1a Use of an Animal for Fighting, Baiting, or Shooting**

(1) The defendant is charged with a crime involving the use of an animal for fighting, baiting, or shooting. To prove this charge, the prosecutor must prove each of

the following elements beyond a reasonable doubt:

[Select (2), (3), (4) or (5) according to what has been charged:]

(2) First, that the defendant knowingly [was a party to/caused] the use of [a/an] [identify kind of animal] [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(3) First, that the defendant [rented/obtained the use of] [a building/a shed/a room/a yard/grounds/premises] for the purpose of using [a/an] [identify kind of animal] [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(4) First, that the defendant permitted the use of [a building/a shed/a room/a yard/grounds/premises] that belonged to [him/her] or that was under [his/her] control for the purpose of using [a/an] [identify kind of animal] [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(5) First, that the defendant [organized/promoted/collected money for] the use of [a/an] [identify kind of animal] [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(6) Second, that the defendant knew that the [identify kind of animal] was to be used [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

## **[NEW] M Crim JI 33.1b Exhibitions of Animal Fighting, Baiting, or Shooting**

(1) The defendant is charged with a crime involving the exhibition of an animal for fighting, baiting, or shooting. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

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

(2) First, that the defendant was present at [a building/a shed/a room/a yard/grounds/premises] where preparations were being made for an exhibition of [a/an] [identify kind of animal] [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(3) First, that the defendant was present at an exhibition of [a/an] [identify kind of animal] [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(4) Second, that the defendant knew that an exhibition of [identify kind of animal]

[for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship] [was about to take place/was taking place].

**[NEW] M Crim JI 33.1c  
Breeding, Buying, or Selling  
Animal Trained for Fighting,  
Baiting, or Shooting**

(1) The defendant is charged with a crime involving the breeding, buying or selling of an animal for [fighting/baiting/shooting]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [bred/bought/sold/offered to buy or sell/exchanged/imported/exported] [(a/an) (*identify kind of animal*)/the offspring of (a/an) (*identify kind of animal*)] trained or used [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

(3) Second, that the defendant knew the [*identify kind of animal*] had been trained or used [for fighting/for baiting/as a target to be shot at as a test of skill in marksmanship].

**[NEW] M Crim JI 33.1d  
Possessing or Buying Equipment for  
Animal Fighting, Baiting, or Shooting**

(1) The defendant is charged with a crime involving the possession or sale of equipment used for animal [fighting/baiting/shooting]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly [owned/possessed/used/bought/sold/offered to buy or sell/transported/delivered] any device or equipment intended to be used for [ (*identify kind of animal*) fighting/baiting (a/an) (*identify kind of animal*)/targeting [a/an] (*identify kind of animal*) to be shot at as a test of skill in marksmanship].

(3) Second, that the defendant knew the device or equipment was intended to be used for [(*identify kind of animal*) fighting/baiting (a/an) (*identify kind of animal*)/targeting [a/an] (*identify kind of animal*) to be shot at as a test of skill in marksmanship].

**[NEW] M Crim JI 33.1e  
Inciting Animal Used in  
Fighting to Attack a Person**

(1) The defendant is charged with a crime involving inciting an animal trained or used for fighting to attack a person. To

prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [a/an] [*identify kind of animal*] was [trained or used for fighting/was the first or second generation offspring of an animal trained or used for fighting].

(3) Second, that the defendant knew that the [*identify kind of animal*] was [trained or used for fighting/the first or second generation offspring of an animal trained or used for fighting].

(4) Third, that the defendant incited the [*identify kind of animal*] to attack a person.

(5) Fourth, that the defendant intended to incite the animal to attack a person.

[Use (6) when the attack is alleged to have caused death.]

(6) Fifth, that the animal caused the death of that person.

**[NEW] M Crim JI 331.f  
Owning Animal Trained  
for Fighting—Attacking a Person**

(1) The defendant is charged with a crime involving ownership of an animal trained or used for fighting that attacked another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant owned [a/an] [*identify kind of animal*] that was [trained or used for fighting/the first or second generation offspring of a dog trained or used for fighting].

(3) Second, that the defendant knew the [*identify kind of animal*] was [trained or used for fighting/the first or second generation offspring of a dog trained or used for fighting].

(4) Third, that the [*identify kind of animal*] attacked another person without provocation.

[Use (5) when the attack is alleged to have caused death.]

(5) Fourth, that the [*identify kind of animal*] caused the death of that person.

**Use Note**

The section of the statute addressed by this instruction, MCL 750.49(13), provides only that first or second generation dogs are included, and not other fighting animals.

**[NEW] M Crim JI 33.1g  
Owning Animal Trained  
for Fighting—Unrestrained**

(1) The defendant is charged with a crime involving ownership of an animal trained or used for fighting that was not securely restrained. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant owned [a/an] [*identify kind of animal*] that was [trained or used for fighting/the first or second generation offspring of (a/an) (*identify kind of animal*) trained or used for fighting].

(3) Second, that the defendant knew the [*identify kind of animal*] that was [trained or used for fighting/the first or second generation offspring of (a/an) (*identify kind of animal*) trained or used for fighting].

(4) Third, that the [*identify kind of animal*] [went beyond the property limits of its owner without being securely restrained/was not securely enclosed or restrained on the owner's property].



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