

74 From the Committee on Model Criminal Jury Instructions

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by October 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 a new verdict form, M Crim JI 3.33, for use where “open murder” has been charged by the prosecutor and the degree of murder is left for the jury to determine, and proposes to eliminate M Crim JI 16.24 as unnecessary in light of the composite instructions, such as M Crim JI 3.17, and possibly confusing in many contexts.

[NEW] M Crim JI 3.33 Verdict Form (Open Murder)

Defendant:

Count No. ____ Charging open murder involving the death of [*name decedent*]

POSSIBLE VERDICTS:

You may return only one verdict on this count. Mark only one line on this sheet.

[*Select from the options provided to the jury*]

- ____ Not Guilty
- ____ Guilty of first-degree premeditated murder
- ____ Guilty of first-degree felony murder
- ____ Guilty of first-degree premeditated murder and first-degree felony murder
- ____ Guilty of the lesser offense of second-degree murder
- ____ Guilty of the lesser offense of [manslaughter/voluntary manslaughter/involuntary manslaughter]

~~M Crim JI 16.24~~ ~~Degrees of Murder~~

~~If you find the defendant guilty of murder, you must state in your verdict whether it is murder in the first degree or murder in the second degree:~~

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PROPOSED

The Committee proposes a new jury instruction, M Crim JI 7.17, for defense of habitation per *Pond v People*, 8 Mich 150 (1860).

[NEW] M Crim JI 7.17 Use of Deadly Force in Defense of the Home

(1) The defendant claims that [he/she] acted in lawful defense of [his/her] home. A person has the right to use force or even take a life to defend [his/her] home under certain circumstances. If a person acts in lawful defense of [his/her] home, that person's actions are justified and [he/she] is not guilty of [*state crime*].

(2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful defense of [his/ her] home. Remember to judge the defendant's conduct according to how the circumstances appeared to the defendant at the time [he/she] acted.

(3) A person may use deadly force to defend [his/her] home where both of the following conditions exist:

(a) First, at the time [he/she] acted, the defendant must have honestly and reasonably believed that the person whom [he/she] killed or injured used force to enter the defendant's home or was forcibly attempting to enter the defendant's home, and had no right to enter [his/her] home. The use of any force may be sufficient, including opening a door or raising a window.

(b) Second, at the time [he/she] acted, the defendant must have honestly and reasonably believed that the person whom [he/she] killed or injured intended to steal property from the home or do bodily injury to the defendant or someone else who was lawfully in the home, or intended to commit a sexual assault against the defendant or someone else who was lawfully in the home.

If the defendant honestly and reasonably believed that both of those conditions existed, [he/she] could act immediately to

defend [his/her] home even if it turned out later that [he/she] was wrong about those conditions. In deciding if the defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time.

(4) At the time [he/she] acted, the defendant must have honestly and reasonably believed that what [he/she] did was immediately necessary. Under the law, a person may only use as much force as [he/she] thinks is necessary at the time to defend [his /her] home. When you decide whether the amount of force used seemed to be necessary, you may consider whether the defendant knew about any other ways of defending [his/her] home, but you may also consider how the excitement of the moment affected the choice the defendant made.

(5) Where the defendant contends that [he/she] used deadly force to defend [his/her] home, the prosecutor must prove beyond a reasonable doubt that the defendant was not acting in defense of [his/her] home because [he/she] did not have a reasonable belief that [*name person killed or injured by defendant*] was forcibly entering the home and was going to steal or harm someone inside.

(6) When you decide whether the prosecutor proved that the defendant did not have a reasonable belief that [*name person killed or injured by defendant*] was forcibly entering the home and was going to steal or harm someone inside, you should consider all of the circumstances: [the condition of the people involved, including their relative strength/whether (*name person killed or injured by defendant*) was armed with a dangerous weapon or had some other means of injuring the defendant/the nature of any attack or threat by (*name person killed or injured by defendant*)/whether the defendant knew (*name person killed or injured by defendant*) and about any previous violent acts by (him/her) or threats (he/she) made/(*cite any other circumstance that may apply*)].¹

Use Notes

The Committee has prepared this instruction concerning the common-law defense of habitation, see *Pond v People*, 8 Mich 150, 176 (1860), but would note there exists a substantial question whether that

defense survives the promulgation of the Presumption Regarding Self-Defense Act and the Self-Defense Act, particularly MCL 780.951. See also M Crim JI 7.16a. Resolution of that question is beyond the scope of the charge of the Committee.

1. The court may provide all of the circumstances listed, or eliminate those that are not pertinent according to the evidence.

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PROPOSED

The Committee proposes a new set of jury instructions, M Crim JI 13.21, 13.22, 13.23, 13.24, and 13.25, where the prosecutor has charged offenses found in MCL 801.262 and 801.263 that involve bringing weapons, alcohol, or drugs into jail or possession of weapons, alcohol, or drugs by prisoners. The instructions are entirely new.

[NEW] M Crim JI 13.21 Bringing a Weapon into Jail

(1) The defendant is charged with bringing a weapon into jail for a prisoner of the jail. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed a weapon¹ or an item that could be used to injure another person or used to assist an escape from a jail.

(3) Second, that the defendant brought the weapon or item into [identify facility] jail. This includes secondary buildings associated with the jail and the grounds around the jail that are used for jail purposes.

(4) Third, that the defendant brought the weapon into the jail for the use or benefit of a prisoner in the jail. It does not matter whether a prisoner actually obtained the weapon.

Use Note

1. If necessary, the jury could be provided an instruction on the definition of a weapon found in M Crim JI 11.19.

Reference

MCL 801.262(1)(a).

[NEW] M Crim JI 13.22 Furnishing a Weapon to a Prisoner

(1) The defendant is charged with providing a weapon to a prisoner or disposing of a weapon so that a prisoner could have access to it. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed a weapon¹ or an item that could be used to injure another person or used to assist an escape from a jail.

(3) Second, that the defendant sold or gave the weapon or item to [identify prisoner] when [he/she] was a prisoner in a jail, or the defendant disposed of the weapon or item in manner that allowed a prisoner to have access to the weapon or item.

Use Note

1. If necessary, the jury could be provided an instruction on the definition of a weapon found in M Crim JI 11.19.

Reference

MCL 801.262(1)(b).

[NEW] M Crim JI 13.23 Possession of a Weapon by a Prisoner

(1) The defendant is charged with possessing a weapon while a prisoner in jail. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was a prisoner in the [identify facility] jail.

(3) Second, that the defendant knowingly possessed a weapon¹ or an item that could be used to injure another person, or used to assist an escape from a jail.

Use Note

1. If necessary, the jury could be provided an instruction on the definition of a weapon found in M Crim JI 11.19.

Reference

MCL 801.262(2).

[NEW] M Crim JI 13.24 Bringing Alcohol or a Controlled Substance into Jail

(1) The defendant is charged with bringing [alcohol/a controlled substance] into jail. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly possessed [alcohol/(identify controlled substance)], which is a controlled substance under Michigan law].

(3) Second, that the defendant brought the [alcohol/(identify controlled substance)] into [identify facility] jail, or provided the [alcohol/(identify controlled substance)] to [identify prisoner] when [he/she] was a prisoner in a jail, or the defendant disposed of the [alcohol/controlled substance] in manner that allowed a prisoner to have access to the [alcohol/controlled substance]. The jail includes secondary buildings associated with the jail and the grounds around the jail that are used for jail purposes.

Use Note

MCL 801.263 uses the term “alcoholic liquor.” That term is defined in MCL 801.261 as “any spiritous, vinous, malt, or fermented liquor, liquid, or compound whether or not medicated, containing 1/2 of 1% or more of alcohol by volume and which is or readily can be made suitable as a beverage.”

Reference

MCL 801.263(1).

[NEW] M Crim JI 13.25 Possession of Alcohol or a Controlled Substance by a Prisoner

(1) The defendant is charged with possessing [alcohol/a controlled substance] while a prisoner in jail. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was a prisoner in the [identify facility] jail.

(3) Second, that the defendant knowingly possessed [alcohol/(identify controlled substance)], which is a controlled substance under Michigan law].

Use Note

MCL 801.263 uses the term “alcoholic liquor.” That term is defined in MCL 801.261 as “any spiritous, vinous, malt, or fermented liquor, liquid, or compound whether or not medicated, containing 1/2 of 1% or more of alcohol by volume and which is or readily can be made suitable as a beverage.”

Reference

MCL 801.263(2).

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PROPOSED

The Committee proposes a new jury instruction, M Crim JI 35.11, where the prosecutor has charged an offense found in MCL 750.411w involving the possession or use of

devices or programs for “skimming” or for deleting or altering financial transactions. The instruction is entirely new.

**[NEW] M Crim JI 35.11
Sale, Purchase, Installation, Transfer,
or Possession of Automated Sales
Suppression Device or Zapper,
Phantom-Ware, or Skimming Device**

(1) The defendant is charged with the crime of selling, purchasing, installing, transferring, or possessing* [an automated sales suppression device or zapper/phantom-ware/a skimming device]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant sold, purchased, installed, transferred, or possessed* [an automated sales suppression device or zapper/phantom-ware/a skimming device].

[Select from the following:]

(a) An “automated sales suppression device” or “zapper”¹ is a software program carried on a memory stick or removable compact disc, accessed through an internet link or any other way, that falsifies the electronic records of electronic cash registers² and other point-of-sale systems, including falsi-

fying information such as transaction data³ and transaction reports.⁴

(b) “Phantom-ware”⁵ is a hidden programming option embedded in the operating system of an electronic cash register² or hardwired into an electronic cash register that can be used to create a virtual second till or that could eliminate or manipulate transaction records that may or may not be preserved in digital formats to represent the record of transactions in the electronic cash register.

(c) A “skimming device”⁶ is any combination of devices or methods that are designed or adapted to be placed on the physical property of another person and to obtain another person’s personal information or personal identifying information,⁷ or to obtain any other information that allows access to a person’s financial accounts, from a financial transaction device⁸ without the permission of the owner of the financial transaction device.

(3) Second, that the defendant knew that the device or program that [he/she] sold, purchased, installed, transferred, or possessed* was [an automated sales suppression device or zapper/phantom-ware/a skimming device].

Use Notes

*The Court may select the appropriate acts according to the charges and evidence rather than reciting all five acts.

1. “Automated sales suppression device” or “zapper” is defined in MCL 750.411w(5)(a).

2. “Electronic cash register” is defined in MCL 750.411w(5)(b).

3. “Transaction data” is defined in MCL 750.411w(5)(g).

4. “Transaction report” is defined in MCL 750.411w(5)(h).

5. “Phantom-ware” is defined in MCL 750.411w(5)(e).

6. “Skimming device” is defined in MCL 750.411w(5)(f).

7. “Personal identifying information” and “personal information” are defined in MCL 445.63(q) and (r).

8. “Financial transaction device” is defined in MCL 750.157m.



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