

## 62 From the Committee on Model Criminal Jury Instructions

The Committee on Model Criminal Jury Instructions solicits comment on the following proposals by May 1, 2020. 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 an instruction, M Crim JI 17.37, where the prosecutor has charged an offense found in MCL 750.411t involving the crime of “hazing.” The instruction is entirely new.

### [NEW] M Crim JI 17.37 Hazing

(1) [The defendant is charged with/You may also consider the lesser offense of<sup>1</sup>] hazing [causing physical injury/causing serious impairment of a body function/causing death]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [attended/was an employee of/was a volunteer with] [*identify educational institution*].

(3) Second, that [*name complainant*] was [pledging/being initiated into/affiliating with/participating in/holding office in/maintaining membership in] [*identify organization*] or attempting to [pledge/initiate into/affiliate with/participate in/hold office in/maintain membership in] [*identify organization*].

(4) Third, that when the defendant [attended/was an employee of/was a volunteer with] [*identify educational institution*], [he/she] engaged in or participated in an act of hazing [*name complainant*].

Hazing is an intentional, knowing or reckless act that the defendant knew or should have known would endanger the physical health or safety of [*name complainant*]. It does not matter whether the defendant acted alone or with others, and does not matter whether [*name complainant*] consented to or allowed the defendant to engage in or participate in the act.

Hazing includes<sup>2</sup> [physical brutality, such as whipping, beating, striking, branding, electronic shocking, placing of a harmful

substance on the body, or similar activity/physical activity, such as sleep deprivation, exposure to the elements, confinement in a small space, or calisthenics, that would place another person at an unreasonable risk of harm or would adversely affect his or her physical health or safety/activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that would place another person at an unreasonable risk of harm or would adversely affect his or her physical health or safety/activity that induces, causes, or requires an individual to perform a duty or task that involves committing a crime or an act of hazing].

Hazing does not include activity that is normal and customary in an athletic program, a physical education program, military training, or a similar program that is sanctioned by [*identify educational institution*].

(5) Fourth, the defendant must have committed the act of hazing for the purpose of pledging or initiating [*name complainant*] into [*identify organization*], or so that [*name complainant*] could be affiliated with, participate in, hold office in, or maintain membership in [*identify organization*].<sup>3</sup>

(6) Fifth, that the defendant's act of hazing caused [physical injury/serious impairment of body function/death] to [*name complainant*].

Serious impairment of a body function includes, but is not limited to, one or more of the following:<sup>4</sup>

(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.

## Use Notes

The Committee believes that questions of whether the institution where the defendant is employed or volunteers is an “educational institution” and whether the organization where the complainant is pledging fits within the definition provided in MCL 750.411t(7)(a) and (c) are legal matters that are not determined by the jury.

1. Use the second alternative only where the defendant has been charged with hazing causing serious impairment and the court is instructing on the lesser included offense of hazing causing physical injury.

2. The court need only provide alternatives that apply according to the charges and evidence.

3. The court may provide all of the statutory options in this paragraph or only the options that apply according to the evidence.

4. The definition of *serious impairment of a body function* is found in MCL 257.58c. It should only be provided where the court is instructing the jury on the elements of hazing causing serious impairment of a body function under MCL 750.411t(2)(c).

## PROPOSED

The Committee proposes an instruction, M Crim JI 35.1a, where the prosecutor has charged an offense found in MCL 750.540e involving the crime of malicious use of a telecommunications service. The instruction is entirely new.

### [NEW] M Crim JI 35.1a Malicious Use of Telecommunications Service

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

(2) First, that the defendant used [*identify service provider*] to communicate with [*identify complainant*].

(3) Second, that, when communicating with [*identify complainant*], the defendant [threatened physical harm or damage to any person or property/made a deliberately false report that a person had been injured, had suddenly taken ill, had died, or had

been the victim of a crime or an accident/deliberately refused or failed to disengage a connection between telecommunications devices or between a telecommunications device and other equipment provided by a telecommunications service<sup>1</sup> or device/used vulgar, indecent, obscene, or offensive language or suggested any lewd or lascivious act in the course of the conversation or message/repeatedly initiated telephone calls and, without speaking, deliberately hung up or broke the telephone connection when or after the telephone call was answered/made an uninvited commercial telephone call soliciting business or contributions that was received between the hours of 9 p.m. and 9 a.m., whether the call was made by a person or recording device/deliberately engaged or caused to engage the use of (*identify complainant*)'s telecommunications service or device in a repetitive manner that caused interruption in the telecommunications service or prevented (*identify complainant*) from using (his/her) telecommunications service or device].

(4) Third, that the defendant did so with the intent to terrorize, frighten, intimidate, threaten, harass, molest, annoy, or disturb the peace and quiet of [*identify complainant*].

#### Use Note

1. If the jury has not been provided with the definition of a “telecommunications service” and the court finds that it would be appropriate to do so, the following is suggested based on the wording of MCL 750.219a:

A “telecommunications service provider” is a person or organization providing a telecommunications service, such as a cellular, paging, or other wireless communications company, or a facility, cell site, mobile telephone switching office, or other equipment for a telecommunications service, including any fiber optic, cable television, satellite, Internet-based system, telephone, wireless, microwave, data transmission or radio distribution system, network, or facility, whether the service is provided directly by the provider or indirectly through any distribution system, network, or facility.

A “telecommunications service” is a system for transmitting information by any method, including electronic, electromag-

netic, magnetic, optical, photo-optical, digital, or analog technologies.

A “telecommunications access device” is any instrument, including a computer circuit, a smart card, a computer chip, a pager, a cellular telephone, a personal communications device, a modem, or other component that can be used to receive or send information by any means through a telecommunications service.

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## PROPOSED

The Committee proposes instructions M Crim JI 38.1, 38.4, and 38.4a where the prosecutor has charged an offense found in MCL 750.543f or 750.543m, which involve committing an act of terrorism, making a terrorist threat, or making a false report of terrorism. The instructions are entirely new.

### [NEW] M Crim JI 38.1 Committing an Act of Terrorism

(1) The defendant is charged with the crime of committing a knowing and premeditated act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant committed the crime of [*state felony*].<sup>1</sup> For the crime of [*state felony*], the prosecutor must prove each of the following elements beyond a reasonable doubt: [*state elements of felony*].

(3) Second, that the defendant acted deliberately when committing the crime of [*state felony*], which means that the defendant considered the pros and cons of committing the crime and thought about it and chose [his/her] actions before [he/she] did it. There must have been real and substantial reflection for long enough to give a reasonable person a chance to think twice about committing the crime. The law does not say how much time is needed. It is for you to

decide if enough time passed under the circumstances of this case, but committing the crime cannot have been the result of a sudden impulse without thought or reflection.

(4) Third, that the defendant knew or had reason to know that committing the felony was dangerous to human life, meaning that committing the felony would cause a substantial likelihood of death or serious injury, or that the felony involved a kidnapping.<sup>2</sup>

(5) Fourth, that, when committing the felony, the defendant intended to intimidate or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

[*Use the following paragraph where it is charged that a death resulted from the defendant's actions*]

(6) Fifth, that the commission of the felony caused the death of [*identify victim*].

#### Use Notes

1. Under MCL 750.543b(a)(i), an act of terrorism requires that the defendant must have committed a “violent felony.” The definitional statute provides in MCL 750.543b(h) that a “violent felony” is one that has an element of the use, attempted use, or threatened use of physical force against an individual, or of the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.

2. The definition of “dangerous to human life” is found at MCL 750.543b(b).

### [NEW] M Crim JI 38.4 Making a Terrorist Threat

(1) The defendant is charged with the crime of making a threat to commit an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant communicated with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, the defendant threatened

to commit an act of terrorism. A threat does not have to be stated in any particular terms but must express a warning of danger or harm.<sup>1</sup>

To prove that the defendant threatened to commit an act of terrorism, the prosecutor must prove:

(A) that the defendant communicated that [he/she] would commit the felony crime of [state felony];<sup>2</sup>

(B) that the defendant knew or had reason to know that committing the felony would be dangerous to human life, meaning that committing the felony would cause a substantial likelihood of death or serious injury, or the felony involved a kidnapping;<sup>3</sup>

(C) that, by committing the felony, the defendant would intend to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

It does not matter whether the defendant actually could commit the felony or actually intended to commit the felony, but only whether the defendant threatened to commit the felony as an act of terrorism.

#### Use Notes

1. Drawn from M Crim JI 21.3 and dictionary definitions.

2. Under MCL 750.543b(a)(i), an act of terrorism requires a “violent felony.” The definitional statute provides in MCL 750.543b(h) that a “violent felony” is one that has an element of the use, attempted use, or threatened use of physical force against an individual, or of the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.

3. The definition of “dangerous to human life” is found at MCL 750.543b(b).

#### [NEW] M Crim JI 38.4a Communicating a False Report of Terrorism

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

(2) First, that the defendant communicated with [identify recipient(s) of communication] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, the defendant reported that an act of terrorism had occurred, was occurring, or would occur.

An act of terrorism<sup>1</sup> means committing the felony crime of [state felony described in threat], knowing that it would be dangerous to human life,<sup>2</sup> with the intent to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

(4) Third, that the report was false.

(5) Fourth, that the defendant knew that it was false.

#### Use Notes

1. The definition of an “act of terrorism” is found at MCL 750.543b(a).

2. The definition of “dangerous to human life” is found at MCL 750.543b(b).



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