

The Committee has adopted the following amendments to the criminal jury instructions for operating a vehicle while intoxicated effective December 15, 2014.

ADOPTED

The Committee has adopted amendments to M Crim JI 15.1, 15.3, 15.4, 15.5, 15.6, 15.11, and 15.12, the operating while intoxicated instructions for MCL 257.625, to accommodate recent statutory amendments that involve driving under the influence of controlled substances. Further revisions of Chapter 15 to address high bodily alcohol content and medical marijuana amendments will be proposed in the future.

[AMENDED] M Crim JI 15.1 Operating While Intoxicated—OWI

The defendant is charged with operating a motor vehicle

- (1) with an unlawful bodily alcohol level; [and/or]
- (2) while under the influence of alcohol; [or]
- (3) while under the influence of a controlled substance; [or]
- (4) while under the influence of an intoxicating substance; [or]
- (5) while under the influence of a combination of [alcohol/a controlled substance/ an intoxicating substance]¹.

Use Note

1. Select the appropriate combination of alcohol/substances based on the evidence presented.

[AMENDED] M Crim JI 15.3 Specific Elements of Operating While Intoxicated [OWI]

(1) To prove that the defendant operated a motor vehicle while intoxicated, the prosecutor must also prove beyond a reasonable doubt that the defendant [Choose from the following:]

(a) operated the vehicle with a bodily alcohol level of 0.08 grams or more [per 100 milliliters of blood/210 liters of breath/67 milliliters of urine];¹

(b) was under the influence of alcohol while operating the vehicle;

(c) was under the influence of a controlled substance while operating the vehicle;

(d) was under the influence of an intoxicating substance while operating the vehicle;

(e) was under the influence of a combination of [alcohol/a controlled substance/ an intoxicating substance]² while operating the vehicle.

[Choose from the following alternatives:]

(2) “Under the influence of alcohol” means that because of drinking alcohol, the defendant’s ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be what is called “dead drunk,” that is, falling down or hardly able to stand up. On the other hand, just because a person has drunk alcohol or smells of alcohol does not prove, by itself, that the person is under the influence of alcohol. The test is whether, because of drinking alcohol, the defendant’s mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner.

(3) “Under the influence of a controlled substance” means that because of using or consuming a controlled substance, the defendant’s ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be falling down or hardly able to stand up. On the other hand, just because a person has consumed or used a controlled substance does not prove, by itself, that the person is under the influence of a controlled substance. The test is whether, because of the use or consumption of a controlled substance, the defendant’s mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner. [Name substance] is a controlled substance.

(4) “Under the influence of an intoxicating substance” means that because of consuming or taking into [his/her] body an intoxicating substance, the defendant’s ability to operate a motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be falling down or hardly able to stand up. On the other hand, just because a person has consumed or used an

intoxicating substance does not prove, by itself, that the person is under the influence of an intoxicating substance. The test is whether, because of consuming or taking into [his/her] body an intoxicating substance, the defendant’s mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner. [Choose (a) or (b) as appropriate:]

(a) [Name substance] is an intoxicating substance.

(b) An intoxicating substance is a substance in any form, including but not limited to vapors and fumes, other than food, that was taken into the defendant’s body in any manner, that is used in a manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.

Use Notes

1. If the defendant is charged with OWI by virtue of bodily alcohol content only, use the appropriate bracketed material in this paragraph (1)(a) and do not use any of the following paragraphs (1)(b) through (4). If the defendant is charged with OWI by virtue of operating under the influence of alcohol, a controlled substance, or an intoxicating substance only, do not use this paragraph (1)(a), but use the appropriate alternative paragraphs (1)(b)–(e) with the associated paragraph (2), (3), or (4). If the defendant is charged with OWI alternatively as having an unlawful bodily alcohol content or operating under the influence of alcohol or a substance, use the appropriate paragraphs based on the evidence presented.

2. Select the appropriate combination of alcohol or substances based on the evidence presented.

[AMENDED] M Crim JI 15.4 Specific Elements of Operating While Visibly Impaired [OWVI]

[The defendant is charged with/You may also consider the less serious charge of] operating a motor vehicle while visibly impaired. To prove that the defendant operated while visibly impaired, the prosecutor must prove beyond a reasonable doubt that, due to the [drinking of alcohol/use or consumption of a controlled substance/use or consumption of an intoxicating substance/ use or consumption of a combination of

(alcohol/a controlled substance/an intoxicating substance)¹], the defendant drove with less ability than would an ordinary careful driver. The defendant's driving ability must have been lessened to the point that it would have been noticed by another person.

Use Note

1. Select the appropriate combination of alcohol/substances based on the evidence presented.

[AMENDED] M Crim JI 15.5 Factors in Considering Operating While Intoxicated [OWI] and Operating While Visibly Impaired [OWVI]

As you consider the possible verdicts, you should think about the following: [Choose appropriate paragraphs:]

(1) What was the mental and physical condition of the defendant at the time that [he/she] was operating the motor vehicle? Were the defendant's reflexes, ability to see, way of walking and talking, manner of driving, and judgment normal? If there was evidence that any of these things seemed abnormal, was this caused by [drinking alcohol/using or consuming a controlled substance/using or consuming an intoxicating substance/using or consuming a combination of (alcohol/a controlled substance/an intoxicating substance)]?

(2) You may also consider bodily alcohol content in reaching your verdict. In that regard, [was/were] the test(s) technically accurate? Was the equipment properly assembled and maintained and in good working order when the test(s) [was/were] given?

(3) Were the test results reliable? Was the test given correctly? Was the person who gave it properly trained? Did the circumstances under which the test was given affect the accuracy of the results?

(4) One way to determine whether a person is intoxicated is to measure how much alcohol is in [his/her] [blood/breath/urine]. There was evidence in this trial that a test was given to the defendant. The purpose of this test is to measure the amount of alcohol in a person's [blood/breath/urine].

[Choose (5)(a) or (5)(b):]

(5) If you find

(a) that there were 0.08 grams or more of alcohol [per 100 milliliters of the defendant's blood/per 210 liters of the defendant's

breath/per 67 milliliters of the defendant's urine] when [he/she] operated the vehicle, you may find the defendant guilty of operating a motor vehicle with an unlawful bodily alcohol content, whether or not this alcohol content affected the defendant's ability to operate a motor vehicle.

(b) [use for acts occurring on or after October 31, 2010:] that there were 0.17 grams or more of alcohol [per 100 milliliters of blood/per 210 liters of breath/per 67 milliliters of urine] when [he/she] operated the vehicle, whether or not this alcohol content affected the defendant's ability to operate a motor vehicle, you may also find that the defendant was operating a motor vehicle with a bodily alcohol content of 0.17 grams or more, whether or not it affected the defendant's ability to operate a motor vehicle.

(6) You may infer that the defendant's bodily alcohol content at the time of the test was the same as [his/her] bodily alcohol content at the time [he/she] operated the motor vehicle.²

(7) In considering the evidence and arriving at your verdict, you may give the test whatever weight you believe that it deserves. The results of a test are just one factor you may consider, along with all other evidence about the condition of the defendant at the time [he/she] was operating the motor vehicle.

Use Notes

1. Where a combination of alcohol and other controlled or intoxicating substances is shown, select the appropriate combination of alcohol/substances based on the evidence presented.

2. If the evidence warrants, the following can be added to this paragraph (6): "However, you have heard evidence that the defendant consumed alcohol after driving but before the [blood/breath/urine] test was administered. You may consider this evidence in determining whether to infer that the defendant's bodily alcohol content at the time of the test was the same as [his/her] bodily alcohol content at the time that [he/she] operated the motor vehicle."

[AMENDED] M Crim JI 15.6 Possible Verdicts

There are three possible verdicts:

(1) not guilty, or

(2) guilty of violating section 625 of the Michigan Vehicle Code [ordinance] by [Choose appropriate paragraphs:]

(a) operating a motor vehicle with an unlawful bodily alcohol level.

[Use for acts occurring on or after October 31, 2010:] If you all agree that the defendant violated section 625, do you find the defendant had a level of 0.17 grams or more of alcohol [per 100 milliliters of blood/per 210 liters of breath/per 67 milliliters of urine]?

[] Yes

[] No

[and/or]

(b) operating a motor vehicle while under the influence of alcohol;

[or]

(c) operating a motor vehicle while under the influence of a controlled substance;

[or]

(d) operating a motor vehicle while under the influence of an intoxicating substance;

[or]

(e) operating a motor vehicle while under the influence of a combination of [alcohol/a controlled substance/an intoxicating substance].¹

[(f) If you all agree that the defendant either operated a motor vehicle with an unlawful bodily alcohol level or while under the influence of [alcohol/a controlled substance/an intoxicating substance/a combination of (alcohol/a controlled substance/an intoxicating substance)], it is not necessary that you agree on which of these violations occurred. However, in order to return a verdict of guilty, you must all agree that one of those violations did occur.]²

or

(3) guilty of operating a motor vehicle while impaired.

Use Notes

1. Select the appropriate combination of alcohol/substances based on the evidence presented.

2. Use bracketed paragraph (2)(f) only if the defendant is charged with both UBAL and OWI. This paragraph specifically states that the jury need not be unanimous on which theory applies as long as all jurors agree that the defendant violated MCL 257.625 in at least one fashion. See

People v Nicolaidis, 148 Mich App 100; 383 NW2d 620 (1985).

**[AMENDED] M Crim JI 15.11
Operating While Intoxicated [OWI]
and Operating While Visibly Impaired
[OWVI] Causing Death**

(1) The defendant is charged with the crime of operating¹ a motor vehicle while intoxicated or while visibly impaired causing the death of another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was operating a motor vehicle on or about [state date] in the [county/city] of [state jurisdiction]. Operating means driving or having actual physical control of the vehicle.

(3) Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].

(4) Third, that while operating the vehicle, the defendant was intoxicated or visibly impaired.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he/she] had consumed [alcohol/a controlled substance/an intoxicating substance/a combination of (alcohol/a controlled substance/an intoxicating substance)²] and might be intoxicated or visibly impaired.

(6) Fifth, that the defendant's operation of the vehicle caused the victim's death. To "cause" the victim's death, the defendant's operation of the vehicle must have been a factual cause of the death, that is, but for the defendant's operation of the vehicle the death would not have occurred. In addition, operation of the vehicle must have been a proximate cause of death, that is, death or serious injury must have been a direct and natural result of operating the vehicle.

Use Notes

1. The term "operating" has been defined by the Michigan Supreme Court in *People v Wood*, 450 Mich 399; 538 NW2d 351 (1995). The court held that "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a

position posing no such risk." *Id.* at 404–405. The holding in *Wood* was applied in *People v Lechleitner*, 291 Mich App 56; 804 NW2d 345 (2010), which held that the defendant was properly convicted under the operating-while-intoxicated-causing-death statute where he was intoxicated, operated his vehicle, and crashed it, with the result that it sat in the middle of the freeway at night creating a risk of injury or death to others, and a following car swerved to miss his stopped truck and killed another motorist on the side of the road.

If it is claimed that the defendant's operation of the vehicle was not a proximate cause of death because of an intervening, superseding cause, review *People v Schaefer*, 473 Mich 418, 438–439; 703 NW2d 774 (2005). *Schaefer* was modified in part on other grounds by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), which was overruled in part on other grounds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).

2. Select the appropriate combination of alcohol/substances based on the evidence presented.

**[AMENDED] M Crim JI 15.12
Operating While Intoxicated [OWI]
and Operating While Visibly Impaired
[OWVI] Causing Serious Impairment
of a Body Function**

(1) The defendant is charged with the crime of operating a motor vehicle while intoxicated or while visibly impaired causing serious impairment of a body function to another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was operating a motor vehicle on or about [state date] in the [county/city] of [state jurisdiction]. Operating means driving or having actual physical control of the vehicle.

(3) Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].

(4) Third, that while operating the vehicle, the defendant was intoxicated or visibly impaired.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he/she] had consumed [alcohol/a controlled substance/

an intoxicating substance/a combination of (alcohol/a controlled substance/an intoxicating substance)¹] and might be intoxicated or visibly impaired.

(6) Fifth, that the defendant's operation of the vehicle caused² a serious impairment of a body function³ to [name victim]. To "cause" such injury, the defendant's operation of the vehicle must have been a factual cause of the injury, that is, but for the defendant's operation of the vehicle the injury would not have occurred. In addition, operation of the vehicle must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of operating the vehicle.

Use Notes

1. Select the appropriate combination of alcohol/substances based on the evidence presented.

2. If it is claimed that the defendant's operation of the vehicle was not a proximate cause of serious impairment of a body function because of an intervening, superseding cause, review *People v Schaefer*, 473 Mich 418, 438–439; 703 NW2d 774 (2005). *Schaefer* was modified in part on other grounds by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), which was overruled in part on other grounds by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).

3. The statute, MCL 257.58c, 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 3 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.