

The Committee on Model Criminal Jury Instructions solicits comment on the following proposal by August 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 the language of M Crim JI 3.8 to make it easier to read and understand, and proposes adding a footnote to clarify its use in light of many instructions that contain lesser-included offenses in the instruction itself.

### [AMENDED] M Crim JI 3.8 Less Serious Crimes

You may also consider whether [the defendant is/the defendants are] guilty of the less serious crime known as \_\_\_\_\_ of [name lesser included charge(s)]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[Provide elements of lesser-included offense(s).]

#### Use Note

In some instructions, the language necessary for providing the jury with an instruction on lesser-included offenses may be found within the instruction itself. In some instances, it will be necessary to use this instruction to introduce the lesser-included offense.

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## PROPOSED

The Committee proposes new instructions, M Crim JI 10.10, 10.10a, 10.10b, and 10.10c, for use where gang-related crimes found in MCL 750.411u and 750.411v have been charged.

### [NEW] M Crim JI 10.10 Gang-Motivated Crimes

(1) The defendant is charged with committing a crime related to gang membership or association. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a group of persons that was a gang.

To prove that the group of persons was a gang, the prosecutor must prove that it was a group of five or more persons who had a continuing relationship with each other, and identified themselves as a gang in all three of the following ways:

(a) The group had a unifying mark, manner, protocol, or method of expressing membership, which may include a common name, sign, or symbol, means of recognition, geographical or territorial sites, or boundary or location.

(b) The group had an established leadership or command structure.

(c) The group had defined membership criteria.

(3) Second, that the defendant was a member or an associate<sup>1</sup> of the gang.<sup>2</sup>

(4) Third, that the defendant committed or attempted to commit the felony crime of [identify underlying charged offense], as has previously been described to you.

(5) Fourth, that the defendant's membership in or association with the gang provided the defendant with the motive, means, or opportunity to commit the crime of [identify underlying charged offense].

#### Use Notes

1. The statute does not define the term "associate." Where the jury expresses some confusion about the term or asks for a definition, the Committee on Model Criminal Jury Instructions offers the following: an "associate" is a person who is not a member of the gang, but engages in gang-related activities with its members.

2. Where the defendant challenges whether he or she is a member or associate of a gang, it may be necessary to explain that merely being in the presence of persons who are gang members is not sufficient to establish that a person is a member or associate, but proof of engaging in activities with the gang or as part of the gang is required.

### [NEW] M Crim JI 10.10a Encouraging Gang-Motivated Crimes

(1) The defendant is charged with causing, encouraging, or coercing another person to assist a gang in committing a felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a group of persons that was a gang.

To prove that the group of persons was a gang, the prosecutor must prove that it was a group of five or more persons who had a continuing relationship with each other, and identified themselves as a gang in all three of the following ways:

(a) The group had a unifying mark, manner, protocol, or method of expressing membership, which may include a common name, sign, or symbol, means of recognition, geographical or territorial sites, or boundary or location.

(b) The group had an established leadership or command structure.

(c) The group had defined membership criteria.

(3) Second, that members of the gang committed or planned to commit the felony crime of [identify underlying charged offense], as has previously been described to you.

(4) Third, that the defendant caused, encouraged, or coerced [identify other person(s)] to join, participate in, or assist the gang in committing or attempting to commit the crime of [identify underlying charged offense].

### [NEW] M Crim JI 10.10b Making Threats to Deter a Person from Assisting Another to Withdraw from Gang Membership

(1) The defendant is charged with communicating a threat intending to deter a person from helping another person to withdraw from gang membership or association. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a group of persons that was a gang.

To prove that the group of persons was a gang, the prosecutor must prove that it was a group of five or more persons who had a continuing relationship with each other, and identified themselves as a gang in all three of the following ways:

(a) The group had a unifying mark, manner, protocol, or method of expressing membership, which may include a common name, sign, or symbol, means of recognition, geographical or territorial sites, or boundary or location.

(b) The group had an established leadership or command structure.

(c) The group had defined membership criteria.

(3) Second, that [identify gang member] was a member or associate<sup>1</sup> of the gang.

(4) Third, that the defendant communicated a threat to [identify complainant] that [he/she], [his/her] relative, or someone associated with [him/her] would be injured, or that the person or property of [identify complainant], [his/her] relative, or someone associated with [him/her] would be damaged if [identify complainant] assisted or helped [identify gang member] withdraw from the gang. It does not matter whether the threat directly described the injury or damage that would occur, or implied that injury or damage would occur, so long as a reasonable person would understand it to be a threat of injury or damage.

(5) Fourth, that when the defendant communicated the threat, [he/she] intended to deter or discourage [identify complainant] from assisting or helping [identify gang member] to withdraw from the gang.

#### Use Note

1. The statute does not define the term “associate.” Where the jury expresses some confusion about the term or asks for a definition, the Committee on Model Criminal Jury Instructions offers the following: an “associate” is a person who is not a member of the gang, but engages in gang-related activities with its members.

#### [NEW] M Crim JI 10.10c Threatening a Person to Retaliate for Withdrawing from Gang Membership

(1) The defendant is charged with communicating a threat intending to punish or retaliate against a person for withdrawing from gang membership. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that there was a group of persons that was a gang.

To prove that the group of persons was a gang, the prosecutor must prove that it was a group of five or more persons who had a

continuing relationship with each other, and identified themselves as a gang in all three of the following ways:

(a) The group had a unifying mark, manner, protocol, or method of expressing membership, which may include a common name, sign, or symbol, means of recognition, geographical or territorial sites, or boundary or location.

(b) The group had an established leadership or command structure.

(c) The group had defined membership criteria.

(3) Second, that [identify complainant] was at one time a member or associate<sup>1</sup> of the gang.

(4) Third, that [identify complainant] withdrew from the gang.

(5) Fourth, that the defendant communicated a threat to [identify complainant] that [he/she], a relative of [his/hers], or someone associated with [him/her] would be injured, or that the person or property of [identify complainant], [his/her] relative, or someone associated with [him/her] would be damaged as punishment or retaliation against [identify complainant] for withdrawing from the gang. It does not matter whether the threat directly described the injury or damage that would occur, or implied that injury or damage would occur, so long as a reasonable person would understand it to be a threat of injury or damage.

(6) Fifth, that when the defendant communicated the threat, [he/she] intended to punish or retaliate against [identify complainant] for withdrawing from the gang.

#### Use Note

1. The statute does not define the term “associate.” Where the jury expresses some confusion about the term or asks for a definition, the Committee on Model Criminal Jury Instructions offers the following: an “associate” is a person who is not a member of the gang, but engages in gang-related activities with its members.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instruction, M Crim JI 14.2a, an instruction where committing perjury by signing a false statement is charged under MCL 750.423, as amended. The new instruction addresses the statutory amendment, and is effective June 1, 2019.

#### [NEW] M Crim JI 14.2a Perjury—Record or Document Declaration

(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.

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instruction, M Crim JI 20.38c, the instruction for possessing or accessing child sexually abusive material. The amendment corrects paragraph (2) to comport more closely with statutory language. The amended instruction is effective June 1, 2019.

#### [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 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 genital-genital, oral-genital, anal-genital, or oral-anal penetration, 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, or with an artificial genital, [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.

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, M Crim JI 27.1 and 27.5, instructions for embezzlement crimes. The amendments add gradations for the value of the property stolen to comply with prior statutory amendments to MCL 750.174 and to 750.177 and 750.178. The amended instructions are effective June 1, 2019.

#### **[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] belonged to [name principal].

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

(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.

(7) Sixth, that the fair market value of the property or amount of money embezzled was:

[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 any 12-month period) when deciding whether the prosecutor has proved the value of the property or amount of money embezzled beyond a reasonable doubt.]

#### **[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.

(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].

(7) Sixth, that the fair market value of the property embezzled was:

[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.