

Criminal Jury Instructions Committee
MINUTES
Saturday, September 24, 2005

[1] **Minutes** of the last committee meeting held May 21, 2005 were reviewed and approved by the committee.

[2] **Indecent Exposure, CJI2d 20.33**. The committee reviewed *People v Neal*, 266 Mich App 654 (2005), which holds that an indecent exposure need not occur in public to be done “openly.” The committee voted [8 to 4 or thereabouts] to amend paragraph (4) of the instruction to read:

(4) Third that the defendant did this under circumstances in which another person might reasonably have been expected to observe it and to be offended by it.

[3] **Assault with Intent to Commit Sexual Penetration [or Contact], CJI2d 20.17 and 20.18**. The committee reviewed *People v Starks*, 473 Mich 227 (2005), in which the supreme court overruled *People v Worrell*, 417 Mich 617 (1983), and held that consent is not always a defense to an assault with intent to commit CSC crime. Specifically, if the victim is legally incapable because of age or otherwise to consent to the sexual act, the defendant may be convicted of assault with intent to commit that act notwithstanding expressed consent.

The committee voted to amend CJI2d 20.17(2) and CJI2d 20.18(2), sentence 2, to read:

A battery is a forceful or violent touching [without lawful consent]* of the person or something closely connected with the person of another.

A use note will then be added which reads:

*Use the bracketed material only if consent is not a defense to the criminal sexual conduct that is the object of the assault.

[4] **OWI/OWVI Causing Death, CJI2d 15.11**. The committee reviewed the supreme court opinion in *People v Schaefer and People v Large*, 473 Mich 418 (2005). Our present instruction says in ¶(6) “that the defendant’s intoxicated or visibly impaired driving was a substantial cause of the victim’s death.” In *Schaefer*, the court held that its earlier opinion in *People*

v Lardie, 452 Mich 231 (1996), “that the defendant’s intoxicated driving was a substantial cause of the victim’s death” was erroneous. *Schaefer*, p 422. Instead, the *Schaefer* court held that the statute “requires that the defendant’s *operation* of the motor vehicle, not the defendant’s intoxicated manner of driving, must cause the victim’s death.” *Schaefer*, p 422.

The committee voted to modify ¶(6) to read:

(6) Fifth, that the defendant’s operation of the motor vehicle was a proximate cause of the victim’s death. [When I use the word “proximate cause” I mean first, the defendant’s operation of the motor vehicle must have, in fact, been a cause of the victim’s death and, second, death or serious bodily injury must have been a natural and probable result of the defendant’s operation of the motor vehicle.]*

Then an additional use note will be added that reads:

*The bracketed material is available to define the phrase “proximate cause” if appropriate or necessary in light of the proofs. The material is taken from M Civ JI 15.01. Further instructions concerning causation can be found at M Civ JI 1503, More Than One Proximate Cause, M Civ JI 15.04, Causation by Multiple Defendants, and M Civ JI 15.06, Intervening Outside Force. Those instructions could be modified as warranted by the evidence and theories of the parties.

If the conduct of the victim or a third party is claimed to be a sole or contributing cause, see commentary to CJI2d 16.20, Contributing Negligence.

The same changes will be made in CJI2d 15.12, OWI/OWVI Causing Serious Impairment of a Body Function.

The committee further voted to have the reporter draft for adoption comparable instructions for driving with controlled substance in body causing death or serious impairment of a body function and driving while license suspended or revoked causing death or serious impairment of a body function.

[5] **Felon in Possession, CJI2d 11.38a.** *People v Perkins*, 473 Mich 626 (2005), attached at pp 42-49, uses the same approach the committee did concerning restoration of firearm rights. That is, if and only if the defendant

offers some evidence of restoration must the prosecutor prove non-restoration beyond a reasonable doubt. Having reviewed that opinion together with our present instruction, the committee decided that *Perkins* applies to the 5-year period for specified felonies and nonspecified felonies, CJI 11.38. As a result, the bracketed and italicized directive between paragraphs (3) and (4) of CJI2d 11.38a will be repositioned between paragraphs (2) and (3) and modified to read:

[Use the following paragraphs as appropriate only if the defendant offers some evidence that less than five years has passed since completion of the sentence on the underlying offense and that his firearm rights have been restored, MCL 28.424.]

A comparable change will be made in CJI2d 11.38, inserting an italicized directive between present paragraphs (2) and (3), to read:

[Use the following paragraph only if the defendant offers some evidence that more than three years has passed since completion of the sentence on the underlying offense.]

[6] **Possible Verdicts, CJI2d 15.6.** The committee reviewed an email from Anica Letica dated August 29, 2005, and our present instruction concerning possible verdicts in drunk driving cases. OWI can be committed in two ways, OUIL or UBAC. The prosecutor must prove either or both to convict. All jurors must agree that one, the other, or both was committed to convict. The jury need not be unanimous on which of the two theories has been proved as long as the all agree that one, the other, or both have been established. The committee concluded that the present instruction correctly states the law.

[7] **Reckless Driving, CJI2d 15.15 (Proposed).** The committee reviewed a suggested instruction for reckless driving, MCL 257.626, and asked the reporter to draft a corresponding instruction in standard form and circulate them by email for inclusion in this year's supplement. An addition to the instruction covering reckless driving causing serious impairment of a body function was considered and approved at the meeting. However, such an instruction covering MCL 257.626c already exists, CJI2d 15.10 – although the causation requirement will need to be modified as in Item (4) above. Here is the reckless driving instruction for MCL 257.626.

CJI2d 15.5 Reckless Driving

(1) [The defendant is charged with the crime of/You may also consider the lesser charge of {fnt 1}] reckless driving [causing serious impairment of a body function {fnt 2}]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant drove a motor vehicle on a highway {fnt 3} or other place open to the public [or generally accessible to motor vehicles, including a designated parking area].

(3) Second, that the defendant drove the in willful or wanton disregard for the safety of persons or property. “Willful or wanton disregard” means more than simple carelessness, but does not require proof of an intent to cause harm. It means knowingly disregarding the possible risks to the safety of people or property.”

[8] **Use of Deadly Force in Self-Defense, CJI2d 7.15.** The committee reviewed this instruction and an email from committee member Steve Taratuta. Mr. Taratuta is pointed out that the last sentence of paragraph (1) provides: “If a person acts in lawful self-defense, [his/her] actions are excused and [he/she] is not guilty of any crime.” Mr. Taratuta then noted that self-defense is not a defense to felon in possession. Therefore, a felon in unlawful possession of a firearm used in lawful self-defense, would not be guilty of homicide but would be guilty of being a felon in possession. Mr. Taratuta suggested the sentence be modified to read:

“If a person acts in lawful self-defense, [his/her] actions are justified and [he/she] is not guilty of (*state crime*).”

The committee adopted this change in the instruction.

[9] **Definition of “Mentally Incapable” in Criminal Sexual Conduct Instructions, CJI2d 20.06, 20.10, 20.11, 20.16, and 20.20.** The committee reviewed an email from Anica Letica and the instructions noted above. The committee also considered the extent to which *People v Breck*, 230 Mich App 450 (1998), requires an expanded definition of “mentally incapable.”

Our current instruction defines “mentally incapable” to mean that the victim was “unable to understand what [he/she] was doing” by engaging with defendant in the sexual act. The statute, MCL 750.520a(g) defines

mentally incapable to mean that the victim was “temporarily or permanently incapable of appraising the nature of his or her conduct.” So the difference is between –

“unable to understand what [he/she] was doing”, and

“incapable of appraising the nature of his or her conduct”

The committee agreed with Ms. Letica that *Breck* says that the statutory definition is broader and more inclusive than the instructional definition. The victim may full well “understand” that she is engaging in the physical act of sexual intercourse without being able to “appraise” the moral nature or wrongfulness of her doing so with the worker at the long-term care facility.

The committee voted to modify the instruction to read:

“incapable of appraising either the physical or moral nature of [his/her] conduct.”

[10] **Meth Labs**. The committee reviewed correspondence from member Karen Plants along with the meth lab statute, MCL 333.7401c, our current instruction titled “Maintaining a Drug House”, CJI2d 12.8, and our current instruction captioned “Unlawful Manufacture of a Controlled Substance.” The committee asked the reporter to draft specific instructions for meth labs for possible use instead of our standard manufacturing instruction. Those proposed instructions will be considered at the committee’s next meeting.

[11] **Old Business** - None

[12] **New Business** – None.

[13] **Next Meeting** – May, 2006

[14] **Adjournment**

