

CHAPTER FIVE

OFFENSES AGAINST THE PERSON

<u>No.</u>	<u>Subject</u>
5-101	Deliberate Homicide
5-101(a)	Issues in Deliberate Homicide
5-101(b)	Issues in Deliberate Homicide – "Felony Murder"
5-102	Mitigated Deliberate Homicide
5-102(a)	Issues in Mitigated Deliberate Homicide
5-102(b)	Mitigated Deliberate Homicide as a Lesser Included Offense
5-103	Negligent Homicide
5-103(a)	Issues in Negligent Homicide
5-104	Soliciting Suicide
5-104(a)	Issues in Soliciting Suicide
5-105	Vehicular Homicide While Under the Influence
5-105(a)	Issues in Vehicular Homicide While Under the Influence
5-106	Assault
5-106(a)	Issues in Assault
5-106(b)	Definition of "Bodily Injury"
5-107	Aggravated Assault
5-107(a)	Issues in Aggravated Assault
5-107(b)	Definition of "Serious Bodily Injury"
5-108	Assault with a Weapon
5-108(a)	Issues in Assault with a Weapon
5-109	Intimidation: Threat of Harm, Restraint, or Commission of Felony
5-109(a)	Issues in Intimidation
5-110	Intimidation: Pending Fire, Explosion, Disaster
5-110(a)	Issues in Intimidation
5-111	Mistreating Prisoners
5-111(a)	Issues in Mistreating Prisoners
5-112	Negligent Vehicular Assault
5-112(a)	Issues in Negligent Vehicular Assault
5-113	Partner or Family Member Assault
5-113(a)	Issues in Partner or Family Member Assault
5-113(b)	Definition of Partners or Family Member
5-114	Criminal Endangerment
5-114(a)	Issues in Criminal Endangerment
5-115	Negligent Endangerment
5-115(a)	Issues in Negligent Endangerment
5-116	Assault on Judicial Officer/Peace Officer
5-116(a)	Issues in Assault on Judicial Officer/Peace Officer
5-116(b)	Definition of Judicial Officer/Peace Officer
5-117	Assault on a Minor
5-117(a)	Issues in Assault on a Minor

5-118	Stalking
5-118(a)	Issues in Stalking
5-118(b)	Definition of Substantial Emotional Distress
5-118(c)	Harassment
5-118(d)	Intimidation
5-119	Kidnapping
5-119(a)	Issues in Kidnapping
5-120	Aggravated Kidnapping
5-120(a)	Issues in Aggravated Kidnapping
5-121	Custodial Interference
5-121(a)	Issues in Custodial Interference
5-122	Robbery
5-122(a)	Issues in Robbery
5-123	Definition of "Without Consent"
5-124	Sexual Assault
5-124(a)	Issues in Sexual Assault
5-125	Sexual Intercourse Without Consent
5-125(a)	Issues in Sexual Intercourse Without Consent
5-126	Deviate Sexual Conduct
5-126(a)	Issues in Deviate Sexual Conduct
5-127	Incest
5-127(a)	Issues in Incest
5-128	Sexual Abuse of Children
5-128(a)	Issues in Sexual Abuse of Children

INSTRUCTION NO. [5-101]

[Deliberate Homicide]

A person commits the offense of deliberate homicide if:

1. the person purposely or knowingly causes the death of another human being.

OR

2. the person [**attempts to commit**] [**commits**] [**is legally accountable for the attempt or commission of**] [*insert specific felony applicable*], and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-101 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Deliberate Homicide, No. 5-101, 2009, Source and Comment]

SOURCE: MCA § 45-5-102 (2007).

COMMENT: If the Defendant is charged with deliberate homicide by purposely or knowingly causing the death of another (MCA § 45-5-102(a)), give accompanying Instruction No. 5-101(a).

If the Defendant is charged with felony murder (MCA § 45-5-102(b)), give accompanying Instruction No. 5-101(b).

INSTRUCTION NO. [5-101(a)]

To convict the Defendant of deliberate homicide, the State must prove the following elements:

1. That the Defendant caused the death of _____, a human being;

AND

2. That the Defendant acted purposely or knowingly

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-101(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Deliberate Homicide, No. 5-101(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-102(1)(a) (2007).

COMMENT: This Instruction should be given with Instruction No. 5-101 defining deliberate homicide. If the Defendant is charged under the “felony murder” rule, MCA § 45-5-102(1)(b), the applicable issues Instruction, No. 5-101(b) should be given. If both deliberate homicide theories are submitted to the jury, the Alternative Charge Instruction, No. 1-108, should be given. **The verdict form should clearly reflect that the Defendant can only be found guilty of one of the alternative offenses.**

INSTRUCTION NO. [5-101(b)]

[Issues in Deliberate Homicide – “Felony Murder”]

To convict the Defendant of deliberate homicide, the State must prove the following elements:

1. That the Defendant [**attempted to commit**] [**committed**] [**is legally accountable for the attempt or commission of**]

_____;

AND

2. In the course of committing _____ [**or flight thereafter**] the Defendant [**or any person legally accountable for the crime**] caused the death of _____, a human being.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-101(b) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Deliberate Homicide – “Felony Murder”, No. 5-101(b), 2009, Source and Comment]

SOURCE: MCA § 45-5-102(1)(b) (2007).

COMMENT: This instruction should be given if the Defendant is charged under the “felony murder” rule, MCA § 45-5-102(1)(b). If the Defendant is charged alternatively under both theories of deliberate homicide, the Alternative Charge Instruction, No. 1-108, should be modified appropriately and given. Definition of the underlying felony should also be given. **The verdict form should clearly reflect that the Defendant can only be found guilty of one of the alternative offenses.**

INSTRUCTION NO. [5-102]

[Mitigated Deliberate Homicide]

A person commits the offense of mitigated deliberate homicide when the person purposely or knowingly causes the death of another human being but does so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse.

The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the Defendant's situation.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-102 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Mitigated Deliberate Homicide, No. 5-102, 2009, Source and Comment]

SOURCE: MCA § 45-5-103 (2007).

COMMENT: For examples of evidence of “extreme mental or emotional stress” see; *State v. Miller*, 1998 MT 177, 966 P.2d 721, and *State v. Howell*, 1998 MT 20, 954 P.2d 1102.

If mitigated deliberate homicide is claimed as a lesser included offense, give this instruction and Instruction No. 5-102(b).

INSTRUCTION NO. [5-102(a)]

[Issues in Mitigated Deliberate Homicide]

To convict the Defendant of mitigated deliberate homicide, the State must prove the following elements:

1. That the Defendant caused the death of _____, a human being;

AND

2. That the Defendant did so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse;

AND

3. That the Defendant acted purposely or knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-102(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Mitigated Deliberate Homicide, No. 5-102(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-103 (2007)

COMMENT: This instruction should be given only where the State charges mitigated deliberate homicide. If mitigated deliberate homicide is offered as a lesser included offense, Instruction No. 5-102(b) should be given.

INSTRUCTION NO. [5-102(b)]

[Mitigated Deliberate Homicide as a Lesser Included Offense]

The Defendant is charged with deliberate homicide. Mitigated deliberate homicide is a lesser-included offense of deliberate homicide. The Defendant cannot be convicted of more than one of these offenses.

In order to find the Defendant guilty of the lesser offense of mitigated deliberate homicide, the State must prove the following two elements:

1. First, that the Defendant caused the death of _____,

AND

2. Second, that when the Defendant did so, **[he]** **[she]** acted purposely or knowingly.

In addition, there must be a finding that there were mitigating circumstances, that is, that the Defendant was acting under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. Neither party has the burden of proof as to mitigating circumstances. Either party may present evidence of mitigation. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the Defendant's situation.

Therefore, after considering all of the evidence, you should first consider the verdict on the greater offense of deliberate homicide. If you find the Defendant guilty of deliberate homicide, you need go no further as you will have reached a verdict in this case.

But if you find from your consideration of all the evidence that the State has proved beyond a reasonable doubt (1) that the Defendant caused the death of _____, AND (2) that when the Defendant did so, **[he]** **[she]** acted purposely or knowingly, AND (3) that the Defendant, at the time **[he]** **[she]** caused the death of _____, was acting under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse, then you should find the Defendant guilty of the lesser offense of mitigated deliberate homicide.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 5-102(b) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Mitigated Deliberate Homicide as a Lesser Included Offense, No. 5-102(b), 2009, Source and Comment]

SOURCE: MCA § 45-5-103(3) (2007).

COMMENT: This instruction incorporates the language of the amended version of MCA § 45-5-103, passed by the 2003 legislature, which substituted a defendant's burden of proof regarding mitigation for the statement that neither party has the burden of proof. Therefore this instruction should only be utilized for offenses committed on or after October 1, 2003. It should only be given in cases in which the jury will be instructed on mitigated deliberate homicide as a lesser-included offense. **IF THE STATE CHARGES MITIGATED DELIBERATE HOMICIDE, INSTRUCTION NO. 5-102(a) SHOULD BE GIVEN.**

Because this instruction is unique to the mitigated deliberate homicide lesser included offense situation, it should be utilized in place of Instruction No. 1-111. However, if there are additional counts charged, or other lesser included offenses justified by the evidence, warranting a lesser included offense instruction for those offenses as well, then this instruction should be given in conjunction with Instruction No. 1-111.

Because this situation involves unique verdict considerations, consult *Demontiney v. District Court, et al*, 2002 MT 161, 310 Mont. 406, 51 P.3d 476,

INSTRUCTION NO. [5-103]

[Negligent Homicide]

A person commits the offense of negligent homicide if the person negligently causes the death of a human being.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-103 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Negligent Homicide, No. 5-103, 2009, Source and Comment]

SOURCE: MCA § 45-5-104 (2007).

COMMENT: Pursuant to MCA § 45-5-104(2), negligent homicide is not an included offense of deliberate homicide charged under the felony murder rule, MCA § 45-5-102(1)(b).

The mental state “Negligently” is defined in Instruction 2-105 and should be given with this instruction.

INSTRUCTION NO. [5-103(a)]

[Issues in Negligent Homicide]

To convict the Defendant of Negligent Homicide, the State must prove the following elements:

1. That the Defendant caused the death of _____, a human being;

AND

2. That the Defendant acted negligently.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-103(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Negligent Homicide, No. 5-103(a), 2009, Source]

SOURCE: MCA § 45-5-104(1) (2007).

INSTRUCTION NO. [5-104]

[Soliciting Suicide]

A person who purposely **[aids]** or **[solicits]** another to commit suicide, but such suicide does not occur, commits the offense of **[aiding]** or **[soliciting]** suicide.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-104 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Soliciting Suicide, No. 5-104, 2009, Source and Comment]

SOURCE: MCA § 45-5-105(1) (2007).

COMMENT: The statutory definition of “solicit” refers to the commission of an “offense”. MCA § 45-2-101(2007). Since suicide is not an offense, the statutory definition is not applicable to this offense and should not be used.

INSTRUCTION NO. [5-104(a)]

[Issues in Soliciting Suicide]

To convict the Defendant of soliciting suicide, the State must prove the following elements:

1. That the Defendant [**aided**] or [**solicited**] _____ in the commission of suicide;

AND

2. That _____ did not commit suicide;

AND

3. That the Defendant acted purposely.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-104(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Soliciting Suicide, No. 5-104(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-105(1) (2007).

COMMENT: The name of the individual whose suicide is solicited should be inserted in the appropriate blanks.

INSTRUCTION NO. [5-105]

[Vehicular Homicide While Under the Influence]

A person commits the offense of vehicular homicide while under the influence if the person negligently causes the death of another human being while the person is operating a vehicle in violation of MCA §§ 61-8-401 or 61-8-406.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-105 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Vehicular Homicide While Under the Influence, No. 5-105, 2009, Source and Comment]

SOURCE: MCA § 45-5-106(1) (2007).

COMMENT: MCA § 45-5-106(2) provides that vehicular homicide while under the influence is not a lesser included offense of felony murder as provided in MCA § 45-5-102(1)(b)

The jury should also be instructed on the offense of DUI as defined in MCA § 61-8-401 or if applicable, MCA § 61-8-406.

INSTRUCTION NO. [5-105(a)]

[Issues in Vehicular Homicide While Under the Influence]

To convict the Defendant of Vehicular Homicide While Under the Influence, the State must prove the following elements:

1. That the Defendant caused the death of _____;

AND

2. That at the time the Defendant caused the death of _____, the Defendant was operating a vehicle in violation of MCA § 61-8-401 or MCA § 61-8-406;

AND

3. That the Defendant acted negligently.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-105(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

**[Issues in Vehicular Homicide While Under the Influence, No. 5-105(a), 2009,
Source and Comment]**

SOURCE: MCA § 45-5-106(1) (2007).

COMMENT: The jury should also be instructed on the offense of DUI as defined in MCA § 61-8-401 or, if applicable, MCA § 61-8-406.

INSTRUCTION NO. [5-106]

[Assault]

A person commits the offense of assault if the person:

[purposely or knowingly causes bodily injury to another];

OR

[negligently causes bodily injury to another with a weapon];

OR

[purposely or knowingly makes physical contact of an insulting or provoking nature with any individual];

OR

[purposely or knowingly causes reasonable apprehension of bodily injury in another.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-106 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Assault, No. 5-106, 2009, Source and Comment]

SOURCE: MCA § 45-5-201(1) (2007).

INSTRUCTION NO. [5-106(a)]

[Issues in Assault]

To convict the Defendant of assault, the State must prove the following elements:

1. **[That the Defendant caused bodily injury to _____]; [That the Defendant made a physical contact of a provoking or insulting nature on _____]; [That the Defendant caused a reasonable apprehension of bodily injury in _____];**

AND

2. That the Defendant acted purposely or knowingly.

OR

1. That the Defendant caused bodily injury to _____ with a weapon,

AND

2. That the Defendant acted negligently.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-106(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Assault, No. 5-106(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-201(1) (2007).

COMMENT: Note that the statutory changes to the assault statutes that were made in 1999 render the comments to this instruction appearing in the 1999 edition inaccurate.

The definition of “bodily injury” as set forth in instruction 5-106(b), and in MCA § 45-2-101(5) (2007) should be given with this instruction. The definition of “weapon” should also be given where appropriate.

INSTRUCTION NO. [5-106(b)]

[Definition of “Bodily Injury”]

“Bodily injury” means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-106(b) (2009)

Plaintiff’s Proposed Instruction No. _____ Defendant’s Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of “Bodily Injury, No. 5-106(b), 2009, Source]

SOURCE: MCA § 45-2-101(5) (2007).

INSTRUCTION NO. [5-107]

[Aggravated Assault]

A person commits the offense of aggravated assault if the person

[purposely or knowingly causes serious bodily injury to another]

OR

[purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-107 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Aggravated Assault, No. 5-107, 2009, Source and Comment]

SOURCE: MCA § 45-5-202(1) (2007).

COMMENT: The 2007 amendment to MCA § 45-5-202(1) inserted “or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another.” The Amendment was effective October 1, 2007.

In *State v. Hoffman*, 314 Mont. 155, 64 P.3d 1013 (2003), the Montana Supreme Court concluded that criminal endangerment, negligent endangerment, and partner or family member assault were not lesser included offenses of aggravated assault.

INSTRUCTION NO. [5-107(a)]

[Issues in Aggravated Assault]

To convict the Defendant of aggravated assault, the State must prove the following elements:

1. That the Defendant caused serious bodily injury to _____;

AND

2. That the Defendant acted purposely or knowingly.

OR

1. That the Defendant, with the use of physical force or contact, caused reasonable apprehension of serious bodily injury or death in _____;

AND

2. That the Defendant acted purposely or knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-107(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Aggravated Assault, No. 5-107(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-202(1) (2007).

COMMENT: The 2007 amendment to MCA § 45-5-202(1) inserted “or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another.” The Amendment was effective October 1, 2007.

The definition of “serious bodily injury” as set forth in instruction 5-107(b), and in MCA § 45-2-101(66) (2007) should be given with this instruction.

INSTRUCTION NO. [5-107(b)]

[Definition of “Serious Bodily Injury”]

“Serious bodily injury” means bodily injury that

[creates a substantial risk of death.]

OR

[causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ.]

OR

[at the time of injury can reasonably be expect to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ.]

The term includes serious mental illness or impairment.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-107(b) (2009)

Plaintiff’s Proposed Instruction No. _____ Defendant’s Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of “Bodily Injury, No. 5-107(b), 2009, Source]

SOURCE: MCA § 45-2-101(66) (2007).

INSTRUCTION NO. _____[5-108]

Assault With a Weapon

A person commits the offense of assault with a weapon if the person purposely or knowingly causes:

[bodily injury to another with a weapon]

or

[reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appeared to _____ to be a weapon].

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-108 (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Assault with a weapon, No. 5-108, Source and Comment, 2009]

SOURCE: 45-5-213 MCA (2007)

INSTRUCTION NO.[5-108(a)]

[Issues in Assault With a Weapon]

To convict the Defendant with assault with a weapon, the State must prove the following elements:

[1. That the Defendant caused bodily injury to _____ with a weapon]

or

[1. That the Defendant caused reasonable apprehension of serious bodily injury in _____ by use of a weapon or what reasonably appeared to _____ to be a weapon.]

2. That the Defendant acted purposely or knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-108(a) (2009)

Plaintiff's Proposed Instruction No. ____ Defendant's Proposed Instruction No. ____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Assault with a Weapon, No. 5-108(a), Source and Comment, 2009]

SOURCE: 45-5-213 MCA (2007)

INSTRUCTION NO. [5-109]

[Intimidation: Threat of Harm, Restraint, or Commission of Felony]

A person commits the offense of intimidation when, with the purpose to cause another to **[perform] [omit the performance of]** any act, the person communicates, without lawful authority, and under circumstances which reasonably tend to produce a fear that it will be carried out, a threat to:

[inflict physical harm on the person threatened or any other person.]

OR

[subject any person to physical confinement or restraint.]

OR

[commit any felony.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-109 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Intimidation: Threat of Harm, Restraint, or Commission of Felony, No. 5-109, 2009, Source]

SOURCE: MCA § 45-5-203(1) (2007). See also, *State v. Plenty Hawk*, 285 Mont. 183, 948 P.2d 209 (1997) and *State v. Ross*, 269 Mont. 347, 889 P.2d 161(1995).

INSTRUCTION NO. [5-109(a)]

[Issues in Intimidation]

To convict the Defendant of the charge of intimidation, the State must prove the following elements:

1. That the Defendant communicated to _____ a threat to **[inflict physical harm on (him/her/any other person)] [subject any person to physical confinement or restraint] [commit any felony];**

AND

2. That the Defendant was without legal authority to perform the threatened act;

AND

3. That the circumstances reasonably tended to produce a fear that the threat would be carried out;

AND

4. That the Defendant had the purpose to cause the alleged victim to **[perform] [omit the performance of]** any act.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-109(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Intimidation, No. 5-109(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-203(1) (2007).

COMMENT: This instruction is designed to address only the first subsection of MCA § 45-5-203. See Instructions 5-109 and 5-109(a) for offenses relating to subsection 2.

INSTRUCTION NO. [5-110]

[Intimidation: Pending Fire, Explosion Disaster]

A person commits the offense of Intimidation if the person knowingly communicates a **[threat] [false report]** of a pending **[fire] [explosion] [disaster]** which would endanger life or property.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-110 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Intimidation: Pending Fire, Explosion, Disaster, No 5-110, 2009, Source and Comment]

SOURCE: MCA § 45-5-203(2) (2007).

COMMENTS: This instruction and instruction 5-110(a) apply only to the second section of the statute.

INSTRUCTION NO. [5-110(a)]

[Issues in Intimidation]

To convict the Defendant of Intimidation, the State must prove the following elements:

1. That the Defendant communicated a [**threat**] [**false report**] of a pending [**fire**] [**explosion**] [**disaster**] which would endanger life or property;

AND

2. That the Defendant acted knowingly.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-110(a) (2009)

Plaintiffs Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Intimidation, No. 5-110(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-203(2) (2007).

COMMENTS: The issues in this instruction apply only to the second section of MCA § 45-5-203.

INSTRUCTION NO. [5-111]

[Mistreating Prisoners]

A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, the person purposely or knowingly:

[assaults or otherwise injures a prisoner.]

OR

[intimidates, threatens, endangers or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him or for any other purpose.]

OR

[violates any civil right of a prisoner.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-111 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Mistreating Prisoners, No. 5-111, 2009, Source and Comment]

SOURCE: MCA § 45-5-204(1) (2007).

COMMENT: This instruction was not included in the 1999 edition of the MCJI; the Commission added it to this edition.

INSTRUCTION NO. [5-111(a)]

[Issues in Mistreating Prisoners]

To convict the Defendant of Mistreating Prisoners, the State must prove the following elements:

1. That the Defendant, while responsible for the care or custody of _____, a prisoner, **[assaulted or otherwise injured _____] [intimidated, threatened, endangered or withheld reasonable necessities from _____ with the purpose to obtain a confession from [him] [her] for any other purpose] [violated any civil right of _____]**

AND

2. That the Defendant acted purposely or knowingly.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI § 5-111(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Mistreating Prisoners, No. 5-111(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-204(1) (2007).

COMMENT: This instruction was not included in the 1999 edition of the MCJI; the Commission added it to this edition.

INSTRUCTION NO. [5-112]

[Negligent Vehicular Assault]

A person who negligently operates a vehicle, other than a bicycle, while under the influence of alcohol or drugs, and who causes bodily injury to another commits the offense of negligent vehicular assault.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-112 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Negligent Vehicular Assault, No. 5-112, 2009, Source and Comment]

SOURCE: MCA § 45-5-205(1) (2007).

COMMENT: The definition of driving while under the influence of alcohol or drugs as provided in MCA § 61-8-401(1) (2007), should be given with this instruction.

The definition of “negligently” as defined in MCA § 45-2-101(2007) and MCJI 2-105 must be given with this instruction.

Bicycle is defined in MCA § 61-8-102(b) (2007).

INSTRUCTION NO. [5-112(a)]

[Issues in Negligent Vehicular Assault]

To convict the Defendant of negligent vehicular assault, the State must prove the following elements:

1. That the Defendant operated a vehicle, other than a bicycle;

AND

2. That when operating the vehicle, Defendant was under the influence of alcohol or drugs;

AND

That the Defendant's conduct while operating the vehicle was the cause of bodily injury to _____.

AND,

4. That the Defendant acted negligently.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-112(a) (2007)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Negligent Vehicular Assault, No. 5-112(a), 2009, Source]

SOURCE: MCA § 45-5-205(1) (2007).

INSTRUCTION NO. [5-113]

[Partner or Family Member Assault]

A person commits the offense of partner or family member assault if the person:

[purposely or knowingly causes bodily injury to a partner or family member]

OR

[negligently causes bodily injury to a partner or family member with a weapon]

OR

[purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member].

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-113 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Partner or Family Member Assault, No. 5-113, 2009, Source and Comment]

SOURCE: MCA § 45-5-206(1) (2007).

COMMENT: The definition of “partner” or “family member” as defined in MCA § 45-5-206(2) (2007) and MCJI 5-112(b) should also be given with this instruction.

INSTRUCTION NO. [5-113(a)]

[Issues in Partner or Family Member Assault]

To convict the Defendant of partner or family member assault, the State must prove the following elements:

1. That the Defendant caused bodily injury to _____, a partner or family member;

AND

2. That the Defendant acted purposely or knowingly.

OR

1. That the Defendant caused reasonable apprehension of bodily injury in _____, a partner or family member;

AND

2. That the Defendant acted purposely or knowingly.

OR

1. That the Defendant caused bodily injury to _____, a partner or family member with a weapon;

AND

2. That the Defendant acted negligently.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-113(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Partner or Family Member Assault, No. 5-113(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-206(1) (2007).

COMMENT: The definition of “partner” or “family member” as defined in MCA § 45-5-206(2) (2007) and MCJI 5-113(b) should also be given with this instruction.

INSTRUCTION NO. [5-113(b)]

[Definition of Partners or Family Member]

"Family member," means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the age of the parties and whether the parties reside in the same household.

"Partners," means spouses, former spouses, persons who have a child in common, or persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-113(b) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of Partners or Family Member, No. 5-113(b), 2009, Source and Comment]

SOURCE: MCA §§ 45-5-206(2)(a) and (b) (2007).

COMMENT: Utilize only the applicable portion of the definition.

INSTRUCTION NO. [5-114]

[Criminal Endangerment]

A person commits the offense of criminal endangerment if the person knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-114 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Criminal Endangerment, No. 5-114, 2009, Source and Comment]

SOURCE: MCA § 45-5-207(1) (2007).

COMMENT: The definition of “serious bodily injury” should be given with this instruction when applicable. Care should be taken not to confuse the use of this definition with “serious bodily harm” as used in the statutes defining justifiable use of force.

The definition of “knowingly” must be given with this instruction.
See MCJI 2-104.

Note that this instruction, and the one following it, do not address the second portion of the statute relating to placing an obstruction for the purpose of damaging a saw or other harvesting equipment

INSTRUCTION NO. [5-114(a)]

[Issues in Criminal Endangerment]

To convict the Defendant of criminal endangerment the State must prove the following elements:

1. That the Defendant engaged in conduct that created a substantial risk of death or serious bodily injury to _____;

AND

2. That the Defendant acted knowingly.

If you find from your consideration of the evidence that both of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-114(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Criminal Endangerment, No. 5-114(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-207(1) (2007).

COMMENT: See: *Porter v. State*, 313 Mont. 149, 60 P.3d 951 (2002), for a discussion of Criminal Endangerment and the sufficiency of the evidence to sustain a charge of criminal endangerment.

Note that this instruction, and the one preceding it, do not address the second portion of the statute relating to placing an obstruction for the purpose of damaging a saw or other harvesting equipment

INSTRUCTION NO. [5-115]

[Negligent Endangerment]

A person commits the offense of negligent endangerment if the person negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-115 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Negligent Endangerment, No. 5-115, 2009, Source and Comment]

SOURCE: MCA § 45-5-208(1) (2007).

COMMENT: The Court should also instruct on the mental state of “negligently” and the definition of “serious bodily injury.” See MCJI 2-105 for a definition of “negligently” and MCJI 5-107(b) for a definition of “serious bodily injury.”

INSTRUCTION NO. [5-115(a)]

[Issues in Negligent Endangerment]

To convict the Defendant of negligent endangerment the State must prove the following elements:

1. That the Defendant engaged in conduct that created a substantial risk of death or serious bodily injury to _____;

AND

2. That the Defendant acted negligently.

If you find from your consideration of the evidence that both of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-115(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Negligent Endangerment, No. 5-115(a), 2009, Source]

SOURCE: MCA § 45-5-208(1) (2007).

COMMENT: The Court should also instruct on the mental state of “negligently” and the definition of “serious bodily injury.” See MCJI 2-105 for a definition of “negligently” and MCJI 5-107(b) for a definition of “serious bodily injury.”

INSTRUCTION NO. [5-116]

[Assault on a Judicial Officer/Peace Officer]

A person commits the offense of assault on a judicial officer/peace officer if the person purposely or knowingly causes:

[bodily injury to a judicial officer/peace officer.]

OR

[reasonable apprehension of serious bodily injury in a judicial officer/peace officer by use of a weapon.]

OR

[bodily injury to a judicial officer/peace officer with a weapon.]

OR

[serious bodily injury to a judicial officer/peace officer.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-116 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Assault on a Judicial Officer/Peace Officer, No. 5-116, 2009, Source and Comment]

SOURCE: MCA § 45-5-210(1) (2007).

COMMENT: Utilize only the applicable bracketed language.

The definition of “judicial officer” or “peace officer” as defined in MCA § 45-5-210(3) (2007) and MCJI 5-116(b) should also be given with this instruction.

Also, please note that under subsection MCA §45-5-210(4) (2007), criminal endangerment, negligent endangerment, and assault, as defined in MCA § 45-5-201, are not included as offenses of assault on a peace officer or judicial officer.

INSTRUCTION NO. [5-116(a)]

[Issues in Assault on Judicial Officer/Peace Officer]

To convict the Defendant of assault on a judicial officer/peace officer, the State must prove the following elements:

1. **[That the Defendant caused bodily injury to _____.]**

OR

[That the Defendant caused reasonable apprehension of serious bodily injury to _____ by the use of a weapon;]

OR

[That the Defendant caused bodily injury to _____ with a weapon.]

OR

[That the Defendant caused serious bodily injury to _____.]

AND

2. That _____ is a **[judicial officer] [peace officer]**.

AND

3. That the Defendant acted purposely or knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-116(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Assault on a Judicial Officer/Peace Officer, No. 5-116(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-210(1) (2007).

COMMENT: This instruction must be accompanied by the definition of either “peace officer” or “judicial officer” as provided by MCA § 45-5-210 (a) or (b) and MCJI 5-116(b).

Also, please note that under subsection MCA §45-5-210(4) (2007), criminal endangerment, negligent endangerment, and assault, as defined in MCA § 45-5-201, are not included as offenses of assault on a peace officer or judicial officer.

INSTRUCTION NO. [5-116(b)]

[Definition of Judicial Officer/Peace Officer]

“Judicial officer” means justices of the supreme court, judges of the district courts, justices of the peace, municipal judges, city judges, workers’ compensation judges, water court judges, and judges pro tempore.

“Peace officer” means a person who by virtue of the person’s office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of the person’s authority. This includes a person, sworn or unsworn, who is responsible for the care or custody of an adult or youth offender.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-116(b) (2009)

Plaintiff’s Proposed Instruction No. _____ Defendant’s Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of Judicial Officer/Peace Officer, No. 5-116(b), 2009, Source and Comment]

SOURCE: MCA §§ 45-5-210(3)(a) and (b) (2007). See also MCA § 1-1-202(2) (2007) and MCA § 45-2-101(55) (2007).

COMMENT: Utilize only the applicable portion of the definition

INSTRUCTION NO. [5-117]

[Assault on a Minor]

A person commits the offense of assault on a minor if the person commits an offense of assault and, at the time of the offense, the victim is under 14 years of age and the offender is 18 years of age or older.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-117 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Assault on a Minor, No. 5-117, 2009, Source]

SOURCE: MCA § 45-5-212(1) (2007).

INSTRUCTION NO. [5-117(a)]

[Issues in Assault on a Minor]

To convict the Defendant of assault on a minor, the State must prove the following elements:

1. That the defendant committed an assault as defined by MCA § 45-5-201.

AND

2. That at the time of the offense, the victim was under 14 years of age.

AND

3. That at the time of the offense the Defender was 18 years of age or older.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-117(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Assault on a Minor, No. 5-117(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-212(1) (2007).

COMMENT: This instruction should be accompanied by the instructions defining the elements of assault as defined by MCA § 45-5-201 (2007). See MCJI 5-106 and MCJI 5-106(a).

INSTRUCTION NO. [5-118]

[Stalking]

A person commits the offense of stalking if the person purposely or knowingly causes another substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:

[following the stalked person]

OR

[harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication, or any other action, device or method.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-118 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Stalking, No. 5-118, 2009, Source and Comment]

SOURCE: MCA § 45-5-220(1) (2007).

COMMENT: Attempts by the accused person to contact or follow the stalked person after the accused has been given actual notice that the stalked person does not want to be contacted or followed constitutes prima facie evidence that the accused person purposely or knowingly followed, harassed, threatened or intimidated the stalked person. MCA § 45-5-220(6) (2007).

If applicable, the court should also instruct on the definition of “electronic communication” as found in MCA § 45-8-213(4) (2007). “Substantial emotional distress” is defined in MCJI 5-118(b). “Serious bodily injury” is defined in MCJI 5-107(b) and MCA § 45-2-101(66) (2007).

Legislative intent and the common definition of “repeatedly” means only more than one instance of harassment, intimidation, or threat. See *State v. McCarthy*, 294 Mont. 270, 980 P.2d 629 (1999).

See also *State v. Martel*, 273 Mont. 143, 902 P.2d 14 (1995) and *State v. Adgerson*, 318 Mont. 22, 78 P.3d 850 (2003).

INSTRUCTION NO. [5-118(a)]

[Issues in Stalking]

To convict the Defendant of stalking, the State must prove the following elements:

1. That the Defendant caused the victim substantial emotional distress or reasonable apprehension of bodily injury;

AND

2. That the Defendant caused the victim this substantial emotional distress or reasonable apprehension of bodily injury by: **[following the stalked person] [harassing, threatening, or intimidating the stalked person in person or by mail, electronic communication, or any other action, device or method.]**;

AND

3. That the Defendant engaged in the conduct repeatedly;

AND

4. That the Defendant acted purposely or knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-118(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Stalking, No. 5-118(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-220(1) (2007).

COMMENT: See the comment above following the definition of Stalking for applicable definition information.

INSTRUCTION NO. [5-118(b)]

[Definition of Substantial Emotional Distress]

"Substantial emotional distress" means extreme pain, either of body or mind, and is synonymous with agony, distress, or torment.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-118(b) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of Substantial Emotional Distress, No. 5-118(b), 2009, Source and Comment]

SOURCE: *Words and Phrases*, Vol. 13

COMMENT: See *State v. Martel*, 273 Mont. 143, 902 P.2d 14 (1995), and *First Bank Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989).

INSTRUCTION NO. [5-118(c)]

[Definition of Harass]

“Harass” means to annoy repeatedly.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-118(c) (2009)

Plaintiff’s Proposed Instruction No. _____ Defendant’s Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of Harass, No. 5-118(c), 2009, Source and Comment]

SOURCE: *State v. Martel*, 273 Mont. 143, 902 P.2d 14 (1995), *citing* Webster's Collegiate Dictionary, (10th Ed.1993).

COMMENT: This definition applies only to stalking.

INSTRUCTION NO. [5-118(d)]

[Definition of Intimidate]

Intimidate means “to make timid; to frighten.”

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-118(d) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of Intimidate, No. 5-118(d), 2009, Source and Comment]

SOURCE: *State v. Martel*, 273 Mont. 143, 902 P.2d 14 (1995), *citing* Webster's Collegiate Dictionary, (10th Ed.1993).

COMMENT: This definition applies **only** to stalking

INSTRUCTION NO. [5-119]

[Kidnapping]

A person commits the offense of kidnapping if he knowingly or purposely and without lawful authority restrains another person by:

[secreting or holding him/her in a place of isolation]

OR

[using or threatening to use physical force].

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-119 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Kidnapping, No. 5-119, 2009, Source and Comment]

SOURCE: MCA § 45-5-302(1) (2007).

COMMENT: Use only the applicable bracketed language

INSTRUCTION NO. [5-119(a)]

[Issues in Kidnapping]

To convict the Defendant of Kidnapping, the State must prove the following elements:

1. That the Defendant restrained _____ by **[secreting him/her in a place of isolation] [using or threatening to use physical force];**

AND

2. That in doing so the Defendant acted without lawful authority;

AND

3. That the Defendant acted knowingly or purposely.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-119(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Kidnapping, No. 5-119(a), 2009, Source]

SOURCE: MCA § 45-5-302(1) (2007).

COMMENT: Use only the applicable bracketed language

INSTRUCTION NO. [5-120]

[Aggravated Kidnapping]

A person commits the crime of aggravated kidnapping if the person knowingly or purposely and without lawful authority restrains another person by **[secreting or holding the person in a place of isolation] [using or threatening to use physical force]** with the purpose:

[to hold for ransom or reward];

OR

[to hold as a shield or hostage];

OR

[to facilitate commission of any felony or flight thereafter];

OR

[(to inflict bodily injury) (to terrorize) (the victim) (another)];

OR

[to interfere with the performance of any (governmental) (political) function];

OR

[to hold another in a condition of involuntary servitude].

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-120 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Aggravated Kidnapping, No. 5-120, 2009, Source and Comment]

SOURCE: MCA § 45-5-303(1) (2007).

COMMENT: Utilize only the applicable bracketed language.

See also *State v. Meyer*, 328 Mont. 247, 119 P.3d 1214 (2005) for information regarding when to include an instruction on lesser included offense of Unlawful Restraint in an Aggravated Kidnapping trial. Failure to include the instruction could be reversible error in certain situations.

Domestic Abuse and Sexual Intercourse without Consent are not lesser included offenses of Aggravated Kidnapping and can therefore be charged separately. See *State v. Clawson*, 239 Mont. 413, 781 P.2d 267 (1989) and *State v. Brady*, 249 Mont. 290, 816 P.2d 413 (1991).

INSTRUCTION NO. [5-120(a)]

[Issues in Aggravated Kidnapping]

To convict the Defendant of aggravated kidnapping, the State must prove the following elements:

1. That the Defendant restrained _____ by **[secreting or holding him/her in a place of isolation] [using or threatening to use physical force];**

AND

2. That the Defendant restrained _____ with the purpose to **[hold for ransom or reward] [hold as a shield or hostage] [facilitate the commission of (any felony)] [facilitate the flight after the commission of (any felony)] [inflict bodily injury on _____] [inflict bodily injury on another] [terrorize _____] [terrorize another] [interfere with the performance of any (governmental) (political) function] [hold another in a condition of involuntary servitude];**

AND

3. That in so doing the Defendant acted without lawful authority;

AND

4. That the Defendant acted knowingly or purposely.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-120(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Aggravated Kidnapping, No. 5-120(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-303(1) (2007).

COMMENT: The name of the victim should be inserted in the appropriate blanks.

See also *State v. Meyer*, 328 Mont. 247, 119 P.3d 1214 (2005) for information regarding when to include an instruction on lesser included offense of Unlawful Restraint in an Aggravated Kidnapping trial. Failure to include the instruction could be reversible error in certain situations.

Domestic Abuse and Sexual Intercourse without Consent are not lesser included offenses of Aggravated Kidnapping and can therefore be charged separately. See *State v. Clawson*, 239 Mont. 413, 781 P.2d 267 (1989) and *State v. Brady*, 249 Mont. 290, 816 P.2d 413 (1991).

INSTRUCTION NO. [5-121]

[Custodial Interference]

A person commits the offense of custodial interference if, knowing that he/she has no legal right to do so, takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another or to an institution.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-121 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Custodial Interference, No. 5-121, 2009, Source and Comment]

SOURCE: MCA § 45-5-304(1) (2007).

COMMENT: *State v. Price*, 311 Mont. 439, 57 P3d 42 (2002), provides a good discussion of venue and constitutionality issues with respect to this statute.

INSTRUCTION NO. [5-121(a)]

[Issues in Custodial Interference]

To convict the Defendant of custodial interference, the State must prove the following elements:

1. The Defendant **[took] [enticed] [withheld]** from lawful custody
_____;

AND

2. That _____ was **[a child] [an incompetent person] [a person entrusted by authority of law to the custody of another person or institution];**

AND

3. That the Defendant knew, that is, that the Defendant was aware, that he/she had no legal right to do so;

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-121(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Custodial Interference, No. 5-121(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-304(1) (2007).

COMMENT: Note the limitations relating to the application of this offense in MCA §45-5-304(3) (2007).

INSTRUCTION NO. [5-122]

[Robbery]

A person commits the offense of robbery if, in the course of committing a theft the person:

[inflicts bodily injury upon another];

OR

[threatens to inflict bodily injury upon any person];

OR

[purposely or knowingly puts any person in fear of immediate bodily injury];

OR

[(commits) (threatens immediately to commit) any felony, other than theft.]

The phrase "in the course of committing a theft" as used in this section includes acts which occur **[in an attempt to commit] [in the commission of] [in flight after the attempt or commission of]** theft.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-122 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Robbery, No. 5-122, 2009, Source and Comment]

SOURCE: MCA § 45-5-401(1) and MCA § 45-5-401(3) (2007).

COMMENT: Utilize only the appropriate bracketed language.

INSTRUCTION NO. [5-122(a)]

[Issues in Robbery]

To convict the Defendant of robbery, the State must prove the following elements:

1. That the Defendant [**committed theft**] [**attempted to commit theft**] [**was fleeing after committing or attempting to commit theft**];

AND

2. That the Defendant while so doing [**inflicted bodily injury upon** _____]; [**threatened to inflict bodily injury upon** _____]; [**put** _____ **in fear of immediate bodily injury**]; [**committed or threatened to commit any felony other than theft**];

AND

3. That the Defendant acted purposely or knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-122(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Robbery, No. 5-122(a), 2009, Source and Comment]

SOURCE: MCA§ 45-5-401(1) (2007).

COMMENT: The name of the victim should be inserted in the appropriate blanks.

An appropriate instruction pertaining to theft should also be provided. See MCJI Chapter 6 for the proper instruction.

INSTRUCTION NO. [5-123]

[Definition of Without Consent]

As used in these instructions, the term "without consent" means:

[the victim is compelled to submit by force against (himself) (herself) or another];

OR

[the victim is incapable of consent because (he) (she) is: (mentally defective or incapacitated) (physically helpless) (overcome by deception, coercion, or surprise) (less than 16 years old) (incarcerated in an adult or juvenile correction, detention, or treatment facility and the Defendant is an employee, contractor, or volunteer of the facility and has supervisory or disciplinary authority over the victim unless the act is part of a lawful search)].

[receiving services from a youth care facility and the defendant:

[has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and is an employee, contractor, or volunteer of the youth care facility]

OR

[admitted to a mental health facility]

OR

[is admitted to a community-based facility or a residential facility or is receiving community-based services and the defendant:

has supervisory or disciplinary authority over the victim or is providing treatment to the victim, and is an employee, contractor, or volunteer of the facility or community-based service.

The term "force" means:

[the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender];

OR

[the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat].

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-123 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Definition of Without Consent, No. 5-123, 2009, Source and Comment]

SOURCE: MCA § 45-5-501(1) (2007).

COMMENT: Note that this instruction should be given only in prosecutions for sexual intercourse without consent under § 45-5-503 in addition to MCJI 5-125 and 5-125(a).

INSTRUCTION NO. [5-124]

[Sexual Assault]

A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-124 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Sexual Assault, No. 5-124, 2009, Source and Comment]

SOURCE: MCA § 45-5-502(1) (2007).

COMMENT: Note that the provisions relating to consent for sexual assault are contained in MCA § 45-5-502(5) (2007), and differ from the definition of “without consent” for purposes of sexual intercourse without consent, as defined in MCA § 45-5-501 and MCJI 5-123. A separate instruction on lack of consent for purposes of sexual assault should be based on MCA § 45-5-502(5).
See also the definition of sexual contact in MCJI 2-107.

INSTRUCTION NO. [5-124(a)]

[Issues in Sexual Assault]

To convict the Defendant of sexual assault, the State must prove the following elements:

1. The Defendant subjected _____ to sexual contact;

AND

2. The act of sexual contact was without the consent of

_____;

AND

3. The Defendant acted knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-124(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Sexual Assault, No. 5-124(a), 2009, Source and Comment]

SOURCE: MCA §45-5-502(1) (2007).

COMMENT: Sexual assault, a misdemeanor, is elevated to a felony upon proof of either of the following aggravating circumstances: (1) that the victim was less than 16 years old at the time of the offense and the offender was 3 or more years older than the victim at the time of the offense, or (2) that the Defendant inflicted bodily injury upon anyone in the course of committing sexual assault. Note that the jury must find the aggravating circumstances for increased punishment. See 46-1-401.

INSTRUCTION NO. [5-125]

[Sexual Intercourse Without Consent]

A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-125 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Sexual Intercourse Without Consent, No. 5-125, 2009, Source and Comment]

SOURCE: MCA §45-5-503(1) (2007).

COMMENT: The term “without consent” is defined in section MCA § 45-5-501(1) and (2), and is set forth in these instructions as Instruction No. 5-123. The term “sexual intercourse” is defined in §45-2-101. These definitions should be given together with the substantive instructions covering the charged offense.

INSTRUCTION NO. [5-125(a)]

[Issues in Sexual Intercourse Without Consent]

To convict the Defendant of sexual intercourse without consent, the State must prove the following elements:

1. The Defendant had sexual intercourse with _____;

AND

2. The act of sexual intercourse was without the consent of _____;

AND

3. The Defendant acted knowingly.

If you find from your consideration of all the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-125(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Sexual Intercourse Without Consent, No. 5-125(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-503(1) (2007).

COMMENT: Note the aggravating circumstances for sentencing purposes in MCA § 45-5-503(3) (2007). Aggravating circumstances must be alleged and proved beyond a reasonable doubt to the trier of fact. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the enhancement instruction in MCJI 1-123.

INSTRUCTION NO. [5-126]

[Deviate Sexual Relations]

A person commits the offense of deviate sexual conduct who **[knowingly engages in deviate sexual relations]** or who **[causes another to engage in deviate sexual relations.]**

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-126 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Deviate Sexual Relations, No. 5-126, 2009, Source and Comment]

SOURCE: MCA § 45-5-505(1) (2007).

COMMENT: This instruction should be given with MCJI 2-102 defining deviate sexual relations.

NOTE, however, that in *Gryczan v. State*, 283 Mont. 433, 942 P.2d 718 (1997) the Montana Supreme Court found that the portion of the deviate sexual conduct statute proscribing sexual relations between two persons of the same sex unconstitutional. At the time of this writing, the offense should only be charged in situations involving sexual relations with animals.

INSTRUCTION NO. [5-126(a)]

[Issues in Deviate Sexual Conduct]

To convict the Defendant of deviate sexual conduct the State must prove the following elements:

1. That the Defendant [**performed an act of deviate sexual relations with an animal**] [**caused _____ to engage in an act of deviate sexual relations with an animal**];

AND

2. That the Defendant acted knowingly.

If you find from your consideration of all of the evidence that these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-126(a) (2007)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Deviate Sexual Conduct, No. 5-126(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-505(1) (2007).

COMMENT: This instruction should be given with MCJI 2-102 defining deviate sexual relations. Note the comment following MCJI 5-126 relating to the constitutionality of a portion of MCA § 45-5-505.

INSTRUCTION NO. [5-127]

[Incest]

A person commits the offense of incest if he knowingly **[marries] [cohabits with] [has sexual intercourse with] or [has sexual contact with]** an **[ancestor] [a descendant] [a brother or sister of the whole or half blood] or [any stepson] or [stepdaughter]**.

[It is not a defense to this prosecution that the alleged victim is (not the legitimate child of the Defendant) (related to the Defendant by adoption)].

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-127 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Incest, No. 5-127, 2009, Source and Comment]

SOURCE: MCA § 45-5-507(1) (2007).

COMMENT: Definitional instructions such as MCJI 2-101 defining “cohabit” or MCJI 2-107 defining “sexual contact” should be given if applicable. Issues regarding consent should be set forth in a separate instruction,.

INSTRUCTION NO. [5-127(a)]

[Issues in Incest]

To convict the Defendant of incest, the State must prove the following elements:

1. That the Defendant **[married] [cohabited with] [had sexual intercourse with] [had sexual contact with]** _____;

AND

2. That _____ was the Defendant's **[ancestor] [descendant] [brother/sister or the whole or half blood] [stepson] [stepdaughter]**;

AND

3. That the Defendant acted knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-127(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Incest, No. 5-127(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-507(1) (2007).

COMMENT: Note the aggravating circumstances for sentencing purposes in MCA § 45-5-507(4) (2007). Aggravating circumstances must be alleged and proved beyond a reasonable doubt to the trier of fact.

See *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and enhancement instruction MCJI 1-123.

INSTRUCTION NO. [5-128]

[Sexual Abuse of Children]

A person commits the offense of sexual abuse of children if the person:

[knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated.]

OR

[knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated.]

OR

[knowingly, by any means of communication, including electronic communication, persuades, entices, counsels, or procures a child to engage in sexual conduct, actual or simulated, for use in a(n) (exhibition) (photograph, film, videotape, or recording).]

OR

[knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium, including a medium by use of electronic communication, in which children are engaged in sexual conduct, actual or simulated.]

OR

[knowingly possesses any visual or print medium, including a medium by use of electronic communication, in which children are engaged in sexual conduct, actual or simulated.]

OR

[finances (insert the appropriate activity listed above) knowing that it is of that nature.]

OR

[knowingly possesses with intent to sell any visual or print medium,

including a medium by use of electronic communication, in which children are engaged in sexual conduct, actual or simulated.]

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-128 (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Sexual Abuse of Children, No. 5-128, 2009, Source and Comment]

SOURCE: MCA § 45-5-625 (2007).

COMMENT: Note the aggravating circumstances for sentencing purposes in MCA § 45-5-507(4). Aggravating circumstances must be alleged and proved beyond a reasonable doubt to the trier of fact.

See *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and enhancement instruction MCJI 1-123.

INSTRUCTION NO. [5-128(a)]

[Issues in Sexual Abuse of Children]

To convict the Defendant of sexual abuse of children, the State must prove the following elements:

1. **[That the Defendant employed, used, or permitted the employment or use of (a child) (children) in an exhibition of sexual conduct, actual or simulated]**

OR

[That the Defendant photographed, filmed, videotaped, developed or duplicated photographs, films, or videotapes, or recorded (a child) (children) engaging in sexual conduct, actual or simulated]

OR

[That the Defendant, by any means of communication, including electronic communication, persuaded, enticed, counseled, or procured (a child) (children) under 16 years of age or a person the Defendant believed to be a child under 16 years of age, to engage in sexual conduct, actual or simulated]

OR

[That the Defendant processed, developed, printed, published, transported, distributed, sold, exhibited, or advertised visual or print medium, including a medium by use of electronic communication, in which (a child is) (children are) engaged in sexual conduct, actual or simulated]

OR

[That the Defendant possessed any visual or print medium, including a medium by use of electronic communication, in which (a child is) (children are) engaged in sexual conduct, actual or simulated]

OR

[That the Defendant financed (an exhibition) (photographs, films, videotapes or recordings) (visual or print medium, including a medium by use of electronic communication) where (a child is) (children are) engaged in sexual conduct, actual or simulated]

OR

[That the Defendant possessed with intent to sell any visual or print medium, including a medium by use of electronic communication, in which (a child is) (children are) engaged in sexual conduct, actual or simulated];

AND

2. That the Defendant acted knowingly.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
DISTRICT JUDGE

SOURCE: MCJI 5-128(a) (2009)

Plaintiff's Proposed Instruction No. _____ Defendant's Proposed Instruction No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Sexual Abuse of Children, No. 5-128(a), 2009, Source and Comment]

SOURCE: MCA § 45-5-625 (2007).

COMMENT: An instruction based on MCA § 45-8-213(4) (2007), defining “electronic communication” should be given with this instruction where applicable.