

CHAPTER TEN

DRIVING UNDER THE INFLUENCE

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INSTRUCTION NO. [10-101]

[Ways of this State Open to the Public]

The phrase "ways of this state open to the public" means any highway, road, alley, lane, parking area, or other public or private place adapted and fitted for public travel that is in common use by the public.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-101 (2009)

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

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Ways of this State Open to the Public, No. 10-101, 2009, Source]

SOURCE: MCA § 61-8-101(1) (2007).

INSTRUCTION NO. [10-102]

[Driving Under the Influence of Alcohol]

A person commits the offense of driving under the influence of alcohol if, while under the influence of alcohol, he/she drives or is in actual physical control of a vehicle upon the ways of this state open to the public.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-102 (2009)

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

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Driving Under the Influence of Alcohol, No. 10-102, 2009, Source and Comment]

SOURCE: MCA § 61-8-401(1)(a) (2007).

COMMENT: This instruction should be used only in those cases in which alcohol is involved since only subsection (1)(a) utilizes the phrase "ways of this state open to the public." Subsections (b), (c) and (d) require that the vehicle be operated "within this state." Consequently, if the Defendant is charged under these subsections, the instruction must be modified accordingly.

INSTRUCTION NO. [10-102(a)]

[Issues In Driving While Under the Influence of Alcohol]

To convict the Defendant of the offense of driving while under the influence of alcohol, the State must prove the following elements:

That the Defendant:

1. was [driving] [in actual physical control of] a vehicle
2. upon the ways of this state open to the public
3. while under the influence of alcohol.

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 10-102(a) (2009)

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

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Issues in Driving Under the Influence of Alcohol, No. 10-102(a), 2009, Source and Comment]

SOURCE: MCA § 61-8-401(1)(a) (2007).

COMMENT: This instruction is designed to be utilized in a case in which alcohol is the substance involved. If the Defendant is charged under subsection (1)(b), (c) or (d), the language in element number 2 relative to where the vehicle was operated will have to be modified accordingly.

Although conviction under this statute subjects Defendant to possible jail time, subsection 7 of 61-8-401 provides for absolute liability thus negating the need for proving particular mental state. *See, State v. McDole*, 226 Mont. 169, 734 P.2d 683 (1987).

INSTRUCTION NO. [10-102(b)]

[Definition of “Under the Influence”]

The phrase "under the influence" means that as a result of taking into the body [alcohol] [drugs] [or any combination of alcohol and drugs], a person's ability to safely operate a motor vehicle has been diminished.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-102(b) (2009)

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

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

[Under the Influence, No. 10-102(b), 2009, Source]

SOURCE: MCA § 61-8-401(3) (2007).

INSTRUCTION NO. [10-102(c)]

[Inferences--Driving Under the Influence]

The concentration of alcohol in the Defendant, as shown by analysis of a sample of his/her blood or breath drawn or taken within a reasonable time after the alleged act of driving under the influence of alcohol gives rise to the following inferences:

- (a) If there was at that time an alcohol concentration of 0.04 or less, it may be inferred that the Defendant was not under the influence of alcohol.
- (b) If there was at that time an alcohol concentration in excess of 0.04 but less than 0.08 that fact may not give rise to any inference that the Defendant was or was not under the influence of alcohol, but the fact may be considered with other competent evidence in determining the guilt or innocence of the Defendant.
- (c) If there was at that time an alcohol concentration of 0.08 or more, you are permitted, but not required to infer that the Defendant was under the influence of alcohol. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you.

You must weigh the evidence presented and decide whether the State has proven beyond a reasonable doubt that the Defendant was under the influence of alcohol.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-102(c) (2009)

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

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

[Inferences--Driving Under the Influence, No. 10-102(c), 2009, Source]

SOURCE: MCA § 61-8-401(4) (2007); MCA § 61-8-407 (2007).

INSTRUCTION NO. [10-103]

[Operation of Noncommercial Vehicle by Person with Alcohol Concentration of .08 or More.]

A person commits the offense of operating a noncommercial vehicle with an alcohol concentration of 0.08 or more if he **[drives] [is in actual physical control of]** a noncommercial vehicle upon the ways of this state open to the public while the alcohol concentration in his/her **[blood] [breath] [urine]** is 0.08 or more.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-103 (2009)

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

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

[Operation of Noncommercial Vehicle by Person with Alcohol Concentration of .08 or More, No. 10-103, 2009, Source and Comment]

SOURCE: MCA § 61-8-406(1)(a) (2007).

COMMENT: MCA § 61-8-407 defines the standard for determining alcohol concentration.

INSTRUCTION NO. [10-103(a)]

[Issues In Operation of Noncommercial Vehicle by Person with Alcohol Concentration of .08 or More]

To convict the Defendant of the offense of operating a noncommercial vehicle with an alcohol concentration of 0.08 or more, the state must prove the following elements:

1. That the Defendant was [**driving**] [**in actual physical control of**] a noncommercial vehicle;

AND

2. The crime occurred upon the ways of this state open to the public;

AND

3. That the alcohol concentration in the driver's [blood] [breath] [urine] was 0.08 or more.

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 10-103(a) (2009)

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

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

[Issues In Operation of Noncommercial Vehicle by Person with Alcohol Concentration of .08 or More, No. 10-103(a), 2009, Source and Comment]

SOURCE: MCA § 61-8-406(1)(a) (2007).

COMMENT: The statute defining this offense provides that it is an absolute liability offense thereby negating the necessity of proving a particular mental state, even though jail time is a possibility upon conviction.

INSTRUCTION NO. [10-103(b)]

[Definition of “Alcohol Concentration”]

“Alcohol Concentration” means either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-103(b) (2009)

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

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

[Definition of “Alcohol Concentration,” No. 10-103(b), 2009, Source]

SOURCE: MCA § 61-8-407 (2007).

INSTRUCTION NO. [10-104]

[Operation of Vehicle by Person Under Twenty-one with Alcohol Concentration of .02 or More]

A person commits the offense of operating a vehicle while under the age of 21 with an alcohol concentration of .02 or more if he/she is under the age of 21 and **[drives]** **[is in actual physical control of]** a vehicle upon the ways of this state open to the public and his/her alcohol concentration is 0.02 or more.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-104 (2009)

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

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

[Operation of Vehicle by Person Under Twenty-one with Alcohol Concentration of .02 or More, No. 10-104, 2009, Source and Comment]

SOURCE: MCA § 61-8-410(1) (2007).

COMMENT: MCA § 61-8-407 defines the standard for determining alcohol concentration.

INSTRUCTION NO. [10-104(a)]

[Issues in Operation of Vehicle by Person Under Twenty-one with Alcohol Concentration of .02 or More]

To convict the Defendant of the offense of operating a motor vehicle while under the age of 21 with an alcohol concentration of .02 or more , the state must prove the following elements:

1. The Defendant was under the age of 21;

AND

2. He/She was **[driving] [in actual physical control of]** a vehicle;

AND

3. The vehicle was operating upon the ways of this state open to the public;

AND

4. The Defendant's alcohol concentration was 0.02 or more.

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 10-104(a) (2009)

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

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

[Issues in Operation of Vehicle by Person Under Twenty-one with Alcohol Concentration of .02 or More, No. 10-104(a), 2009, Source and Comment]

SOURCE: MCA § 61-8-410(1) (2007).

COMMENT: The statute defining this offense provides that it is an absolute liability offense thereby negating the necessity of proving a particular mental state, even though jail time is a possibility upon conviction.

INSTRUCTION NO. [10-105]

[Unlawful Possession of Open Alcoholic Beverage Container in Motor Vehicle on Highway]

A person commits the offense of unlawful possession of an open alcoholic beverage container in a motor vehicle if the person knowingly possesses an open alcoholic beverage container within the passenger area of a motor vehicle on highway.

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-105 (2009)

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

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

[Unlawful Possession of Open Alcoholic Beverage Container in Motor Vehicle on Highway, No. 10-105, 2009, Source and Comment]

SOURCE: MCA § 61-8-460(1) (2007).

COMMENT: The terms “alcoholic beverage”, “highway”, “open alcoholic beverage container”, and “passenger area” are defined in § 61-8-461 MCA.

INSTRUCTION NO. [10-105(a)]

[Issues in Unlawful Possession of Open Alcoholic Beverage Container in Motor Vehicle on Highway]

To convict the Defendant of the offense of unlawful possession of open alcoholic beverage container in motor vehicle on highway, the state must prove the following elements:

1. That the Defendant possessed an open alcoholic beverage container in the passenger area of a motor vehicle;

AND

2. The vehicle was operating on a highway.

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 10-105(a) (2009)

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

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

[Issues in Unlawful Possession of Open Alcoholic Beverage Container in Motor Vehicle on Highway, No. 10-105(a), 2009, Source and Comment]

SOURCE: MCA § 61-8-460(1) (2007).

COMMENT: The terms “alcoholic beverage”, “highway”, “open alcoholic beverage container”, and “passenger area” are defined in § 61-8-461 MCA.

INSTRUCTION NO. [10-106]

[Definition of “Actual Physical Control”]

The Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger and is in a position to, and has the ability to, operate the vehicle in question. [A motorist does not relinquish control over a vehicle simply because it is incapable of (starting) (moving).]

GIVEN: _____
DISTRICT JUDGE

Source: MCJI 10-106 (2009)

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

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

[Definition of “Actual Physical Control,” No. 10-106, 2009, Source and Comment]

SOURCE: *State v. Hudson*, 327 Mont. 286, 289-90 (2005); *State v. Robison*, 281 Mont. 64 (1997); *Turner v. State*, 244 Mont. 151 (1990); *Gebhardt v. State*, 238 Mont. 90 (1989).

COMMENT: The final, bracketed, sentence of this instruction is for use in those situations where, for example, a vehicle has become stuck (*Gebhardt*) or the vehicle will not start but is being manually directed (*Turner*). In those circumstances use the final sentence with the appropriate language.