755A INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(1)

INSERT THE FOLLOWING AFTER THE ELEMENTS OF THE CRIME ARE DEFINED BUT BEFORE THE CONCLUDING PARAGRAPHS.[1]

Involuntary Intoxication

The defense of involuntary intoxication is also an issue in this case.

(An intoxicated) (A drugged) condition is a defense to criminal liability if it is involuntarily produced and makes the person unable to tell whether his acts are right or wrong at the time the acts are committed.

(Intoxication) (A drugged condition) is involuntary when it is brought about by duress, deceit, or mistake.[2]

Jury's Decision

If you are satisfied beyond a reasonable doubt that all _______ elements of this offense have been proved,[3] and that at the time of the alleged offense the defendant was not in an involuntary (intoxicated) (drugged) condition which made him unable to distinguish between right and wrong, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

This instruction was originally published as Wis JI-Criminal 755 in 1962 and revised in 1984, 1994, and 2005. This revision renumbered the instruction as Wis JI-Criminal 755A and was approved by the Committee in February 2015.

Section 939.42, the statute that formerly codified both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014].

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As amended by Act 307, § 939.42 reads as follows:

> **939.42 Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:
>
> (1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.
> (2) Negatives the existence of a state of mind essential to the crime.

With the revision of § 939.42 by Act 307, the Committee decided to split former Wis JI-Criminal 755 into two versions: Wis JI-Criminal 755A for cases under sub. (1) and Wis JI-Criminal 755B for cases under sub. (2).

The 1953 Legislative Council Report on the Criminal Code commented on this defense as follows:

> In practice the defense provided by subsection (1) is seldom raised, for it is necessary to show that the intoxicated or drugged condition both (a) was involuntarily produced and (b) rendered the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act was committed. In order to show that the intoxication was involuntary, it generally is necessary to show that it was induced by force or fraud on the part of a third person, or that it resulted from a mistake on the part of the actor as to the intoxicating nature of the thing he consumed. If it can be established that the intoxicated or drugged condition was involuntary, it still is necessary to show that it was of such a degree as to render the actor incapable of distinguishing between right and wrong. Thus, in regard to the effect which involuntary intoxication must produce in order to be considered a defense, the same test applies as in the case of mental disease or deficiency as a defense. The fact that the temporary inability to distinguish between right and wrong dealt with under subsection (1) intoxication does not mean that a mental disease such as delirium tremens is not a defense when produced by voluntary intoxication, but it is a defense under the section on insanity and feeblemindedness rather than under this section.

The primary issue discussed by Wisconsin appellate courts since the 1953 Report has been the connection between involuntary intoxication and addiction to drugs or alcohol. See note 2, below.

1. The Committee recommends that all instructions on defensive matters be combined with the instruction on the underlying offense. Combining the instructions will help the jury understand the issues and clarify the allocation of the burden of persuasion.

Involuntary intoxication can be considered an "affirmative defense" in the sense that it is not an issue in the case until raised by the evidence and is not necessarily inconsistent with any elements of the crime. The Committee recommends combining the instruction on involuntary intoxication with that for the underlying crime by inserting Wis JI-Criminal 755 after the explanation of the elements of the crime but before the concluding paragraphs. The nonexistence of the defense should then be included in the concluding paragraph. This will clarify for the jury the facts that it must find in order to return a guilty verdict and make it less likely that the instructions could be interpreted as shifting the burden of persuasion to the defendant. The Wisconsin Court of Appeals has suggested this as "the better policy." State v. Staples, 99 Wis.2d 364, 299 N.W.2d 270 (Ct. App. 1980).

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2. Addiction to drugs or alcohol is not a basis for "involuntariness" under the statute. Loveday v. State, 74 Wis.2d 503, 247 N.W.2d 116 (1976). Language in previous cases that may be inconsistent with this holding was withdrawn. (See Roberts v. State, 41 Wis.2d 537, 543, 545-46, 164 N.W.2d 525, 527, and 529 (1969); Staples v. State, 74 Wis.2d 13, 19-20, 245 N.W.2d 679 (1976).

In State v. Gardner, 230 Wis.2d 32, 601 N.W.2d 670 (Ct. App. 1999), the court held that the involuntary intoxication defense can apply where intoxication results from the effects of prescription drugs. The court declined to limit the defense to situations when the defendant did not know about the intoxicating effect of the medication. "Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong." 230 Wis.2d 32, 41. However, "this does not include cases where a patient knowingly takes more than the prescribed dosage, or mixes a prescription drug with alcohol or other controlled substance. Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects." 230 Wis.2d 32, 42.

3. The Committee recommends that the absence of the defense be added to the concluding paragraph. See note 1, supra. The appropriate number of elements should be inserted in the blank. Refer to the applicable instruction for the offense.

Once a defensive matter, such as involuntary intoxication, is raised by the evidence, the burden is on the state to prove the absence of the defensive matter to support a conviction for the crime charged. Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1974).

Using battery as an example, combining the elements with the absence of involuntary intoxication would result in the following:

> If you are satisfied beyond a reasonable doubt that all four elements of battery have been proved, and that at the time of the act the defendant was not in an involuntary intoxicated condition which made him unable to distinguish between right and wrong, you should find the defendant guilty.

(See Wis JI-Criminal 1220, Battery.)

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