755B INVOLUNTARY INTOXICATION OR DRUGGED CONDITION — § 939.42(2)

ADD THE FOLLOWING TO THE INSTRUCTION ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DEFINITION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF INTOXICATION RELATES.

Involuntary Intoxication

Evidence has been presented which, if believed by you, tends to show that the defendant was involuntarily (intoxicated) (drugged) at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) [1] required for this offense.

(An intoxicated) (A drugged) condition may be a defense to criminal liability if it is involuntarily produced. (An intoxicated) (A drugged) condition is involuntary when it is brought about by duress, deceit, or mistake.[2]

If the defendant was so (intoxicated) (drugged) that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime).

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

This instruction was approved by the Committee in March 2015.

Wis JI-Criminal 755 originally addressed only the version of the involuntary intoxication defense now specified in § 939.42(1). 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).

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].

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.

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. Here insert either a general description of the required mental state (e.g., "knowledge that the property belonged to another") or a more specific one, tailored to the facts of the case (e.g., "knowledge that the wallet belonged to John Jones").

In a theft case, the instruction would read as follows:

Evidence has been received which, if believed by you, tends to show that the defendant was involuntarily (intoxicated) (drugged) at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with knowledge that the property belonged to another required for this offense. If the defendant was so (intoxicated) (drugged) that he did not know the property belonged to another person, you must find him not guilty of theft. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant knew the property belonged to John Jones.

Involuntary intoxication that tends to negate a mental element calls for the same approach to integrating the defense with the elements of the crime as that used for voluntary intoxication under former § 939.42(2). See the note following the Comment to Wis JI-Criminal 765 discussing the issue.

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.

