765 VOLUNTARY INTOXICATION[1] — § 939.42(2)

INSTRUCTION WITHDRAWN
FOR OFFENSES OCCURRING AFTER APRIL 18, 2014,
BECAUSE THE STATUTE TO WHICH IT PERTAINED
WAS REPEALED BY 2013 WISCONSIN ACT 307

ADD THE FOLLOWING TO THE INSTRUCTION[2] ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DEFINITION OF THE MENTAL ELEMENT TO WHICH THE EVIDENCE OF INTOXICATION RELATES.

Intoxication

Evidence has been presented which, if believed by you, tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the (describe mental state) [3] required for this offense.

If the defendant was so intoxicated 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

Wis JI-Criminal 765 was originally published in 1962 and revised in 1984, 1995, 1999, 2004, and 2010. Its withdrawal for offenses occurring after the effective date of 2013 Wisconsin Act 307 was approved by the Committee in March 2015.

Section 939.42, the statute codifying both voluntary and involuntary intoxication defenses, was revised by 2013 Wisconsin Act 307 [effective date: April 18, 2014]. Reference to voluntary intoxication was eliminated; as amended, the statute refers only to involuntary intoxication.

The Committee concluded that the text of Wis JI-Criminal 765 should be retained for use in cases involving crimes occurring before April 18, 2014 – the effective date of Act 307.

Questions remain whether evidence relevant to the non-existence of the mental element of a crime may be categorically excluded by the legislative repeal of a statute recognizing a defense like voluntary intoxication.

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.

Act 307 also repealed former sub. (3) of § 939.24, which read as follows:

> (3) A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable substantial risk of death or great bodily harm to another human being.

The 1995 revision of this instruction responded to the decision in State v. Foster, 191 Wis.2d 14, 528 N.W.2d 22 (Ct. App. 1995). In Foster, the trial court changed the then-current version of Wis JI-Criminal 765 from "you must consider the evidence that he was intoxicated" to "you may consider . . ." The defendant claimed this was error. The court of appeals rejected that claim but held that neither the standard instruction nor the trial court's modification was a correct statement of the law:

> We conclude that a correct statement of the law should be conveyed by instructing a jury that it 'must consider the evidence regarding whether the defendant was intoxicated at the time of the alleged offense.'

191 Wis.2d 14, 28.

The court agreed with the state's contention that the standard instruction advised a jury "not merely to consider evidence, but rather, to consider evidence in a way that favors the intoxication defense." But the trial court's modification to use "may" was erroneous because a "jury could interpret this to mean that it need not consider that evidence at all." 191 Wis.2d 14, 28. Thus, the court of appeals read the phrase "you must consider evidence that he was intoxicated" as an improper suggestion that the defendant really was intoxicated.

The Committee determined that the concerns discussed in Foster could best be addressed by changing the introductory section of the instruction to read:

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

This reaffirms that it is not mere intoxication that may constitute a defense; intoxication must negate the mental state required for the crime.

1. This instruction is for the defense formerly recognized by § 939.42(2), 2011-12 Wis. Stats., which provided that an "intoxicated or drugged condition" is a defense if it "[n]egatives the existence of a state of mind essential to the crime." The state was revised by 2013 Wisconsin Act 307 to apply only to involuntary intoxication.

2. The Committee recommends that the instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the required mental state is defined. The Committee has concluded that this is the best way to instruct on defensive matters that are inconsistent with elements of a crime.

3. 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 intoxicated 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 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.

Combining the intoxication instruction with the instruction on the crime

This instruction is substantially briefer than the pre-1984 versions of Wis JI-Criminal 765. It differs in that it does not offer extensive explanation of what intoxication is or describe what effects intoxication must have in order to be a "defense." Further, it does not explicitly require the state to prove that the defendant was not intoxicated in order to support a finding of guilty.

The reasons for recommending this brief version are based on those articulated by Justice Callow in his dissent in State v. Schulz, 102 Wis.2d 423, 302 N.W.2d 151 (1981). He argued that where a recognized "defense" negates an element of the crime, it is unnecessary to specifically advise the jury that the state must "disprove" the existence of that defense:

> It is elementary that to prove a thing exists one must in effect disprove its nonexistence. Thus when a jury is instructed that the state must prove intent beyond a reasonable doubt, it means there must be no reasonable doubt arising from the defendant's intoxication or any other intent-negating factor.
>
> . . . [w]here the issue is merely the negative or nonexistence of an element of the crime, as it is with intoxication, to first instruct on the state's burden with respect to the elements of the crime and then to instruct on the state's burden as to the nonexistence of an alcohol or drug induced negation of these elements is not only redundant but also, I believe, impermissibly intrusive into the discretion of the state to prosecute its case.

> . . . . If a trial judge . . . decides an intoxication instruction is warranted, the jury need only be advised that in considering whether the defendant possessed the requisite intent to commit the crime, although intoxication alone does not relieve one of criminal responsibility, the fact that the defendant may have been intoxicated should be taken into account.

102 Wis.2d 423, 442-43.

The Committee concluded that the Callow suggestion should be pursued. The state's burden of proving all required elements does not change. Where certain evidence points to a reason why a required element might not be present (e.g., too intoxicated to intend to steal), nothing is to be gained by extensively defining that reason and requiring the state to prove the reason's absence. Rather, that duty is inevitably a part of proving the existence of the element with which the reason is inconsistent. To elaborate on the evidence relating to a particular reason why an element is not present is to increase the possibility for jury confusion and distraction. Rather than focussing on the central issue – did the defendant intend to steal – it is likely that the jury will be concerned with a tangential issue – how drunk was the defendant – which is important only to the extent that it has some effect on the existence of the central issue.

Thus, in the Committee's judgment, the briefer version accomplishes what it ought to accomplish. In a case where evidence has been received on the defendant's intoxicated condition, Wis JI-Criminal 765 puts that evidence into proper perspective by telling the jury that it should consider the evidence when determining whether the defendant had the mental state required for the crime charged. But the instruction does not give the evidence any more or any less emphasis than that, because evidence is only relevant to the extent that it tends to make more or less probable a fact of consequence to the determination of the action – the defendant's mental state. This approach has the additional advantage of avoiding long definitions of the "defense" that risk being interpreted by the jury as imposing a burden of persuasion on the defendant. See, for example, State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981). Compare Barrerra v. State, 109 Wis.2d 324, 325 N.W.2d 722 (1982).

Note that the Schulz case involved a modification of the then-standard intoxication instruction to include language stating that "the defendant must establish" that he was "utterly incapable" of forming the intent required. The court held that this was error, as it created the risk that the jury would understand the instruction as shifting the burden of persuasion to the defendant. [The source of the "utterly incapable" language is State v. Guiden, 46 Wis.2d 328, 174 N.W.2d 488 (1970).] Although three later cases distinguished similar instruction and found no error, the Committee recommends against the use of the "Guiden" language. [See State v. Reynosa, 108 Wis.2d 499, 322 N.W.2d 504 (Ct. App. 1982); State v. Hedstrom, 108 Wis.2d 532, 322 N.W.2d 513 (Ct. App. 1982); State v. Barrerra, 109 Wis.2d 324, 325 N.W.2d 722 (1982).]

Intoxication and crimes of recklessness

The voluntary intoxication instruction is appropriate when supported by the evidence in any case where the crime has a mental state with which intoxication may be inconsistent. An exception is provided for crimes involving recklessness. Although "criminal recklessness" is defined to include "awareness of the risk" – a mental element that intoxication arguably might negate – § 939.24(3) provides that "a voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being." This reaches the same result as prior law. See Ameen v. State, 51

Wis.2d 175, 174 N.W.2d 488 (1971), holding that intoxication was not a defense to second degree murder under the pre-1989 homicide statutes.

The amount of evidence necessary to support an instruction on intoxication – the "burden of production"

It is difficult to describe precisely the extent and nature of evidence that is necessary to entitle the defendant to an instruction on voluntary intoxication. The Wisconsin Supreme Court has identified the following standard: An intoxication instruction is required when, "viewing the evidence in the light most favorable to the defendant, a jury could reasonably have found that he was so intoxicated that he lacked the intent to kill." Larson v. State, 86 Wis.2d 187, 195, 271 N.W.2d 647 (1978). The court has recently emphasized that what is required is evidence that the defendant was intoxicated to an extent that meets the legal standard. That is, there must be evidence that the defendant was intoxicated to an extensive degree; it is not sufficient to have a substantial amount of evidence of a lesser degree of intoxication.

> . . . in order to qualify for an instruction on the defense of voluntary intoxication, the defendant must produce evidence sufficient to raise intoxication as an issue. To do this he must come forward with some evidence of the degree of intoxication which constitutes the defense. An abundance of evidence which does not meet the legal standard for the defense will not suffice. There must be some evidence that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime. A bald statement that the defendant had been drinking or was drunk is insufficient C insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing. In order to merit an intoxication instruction in this case, the defendant must point to some evidence of mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill.

State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100 (1984).

In the Committee's judgment, several aspects of the above standard should be emphasized. First of all, the burden does not always lie with the defendant to produce the evidence relevant to intoxication. Such evidence may be produced as part of the state's case. Second, the standard helpfully stresses that it is not sufficient to simply point to evidence tending to show intoxication. There must be evidence of intoxication that is relevant to the nonexistence of the mental element required for the particular criminal offense. The relevance of evidence of intoxication may vary depending on the mental element involved. For example, intoxication may be much more likely to be inconsistent with the mental element required for theft (knowledge that the property belonged to another person) than it is with, for example, the intent to kill. Third, the way the revised version of Wis JI-Criminal 765 is written should make it more acceptable to give an intoxication instruction rather than invite unnecessary litigation over whether the instruction should have been given. The revised instruction does not require the state to negate intoxication; it simply tells the jury that in determining whether the defendant acted with the required intent or knowledge, they should consider the evidence tending to show that he was intoxicated. The intent or knowledge is always an issue for the jury and they will almost always have heard the testimony regarding intoxication. Simply telling them they may consider the evidence they have already heard, but emphasizing that the mental state is the ultimate issue to which they must direct their attention, should involve very little risk that the jury will be confused or misled into giving inappropriate consideration to the intoxication issue.

