770 MISTAKE[1] — § 939.43(1)

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

Mistake

Evidence has been received which, if believed by you, tends to show that the defendant believed that [HERE IDENTIFY THE DEFENDANT'S BELIEF].[3] You must consider this evidence in deciding whether the defendant acted with the (describe mental state) required for this offense.

If an honest error of fact results in a person's not having the (intent) (knowledge)[4] required for a crime, the person is not guilty of that 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).[5]

COMMENT

Wis JI-Criminal 770 was originally published in 1962 and revised in 1984, 1994, 1997, and 2005. This revision was approved by the Committee in June 2009.

The 2009 revision changed the first paragraph of the instruction to follow the approach used in Wis JI-Criminal 765, Voluntary Intoxication. In State v. Ludwig, No. 2008 AP2079-CR, [decided May 28, 2009, not published], the court of appeals held that the previous version of the instruction was in error in stating that the jury "must consider" evidence of the mistake that the defendant claims negated the mental state for the crime. The trial judge changed "must" to "may" and the court of appeals held this was error. But the court also held that the published instruction is in error in using "must." This is the same issue that arose with Wis JI-Criminal 765, Voluntary Intoxication, in 1995, and which was addressed in State v. Foster, 191 Wis.2d 14, 528 N.W.2d 22 (Ct. App. 1995). The 2009 revision of this instruction adopted the same approach as the one adopted for Wis JI-Criminal 765 in light of the Foster decision.

The mistake defense is applicable only to the extent that "an honest error" negates a mental element required for the crime. If a crime lacks a mental element, the defense of mistake is not available. In State v. Lindvig, 205 Wis.2d 100, 555 N.W.2d 197 (Ct. App. 1996), the court held that the defense of mistake was not

available to a defendant charged with a violation of § 940.24, causing injury by the negligent operation of a dangerous weapon. This is because criminal negligence does not require a mental state; it is an objective standard that requires "conduct which the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another." See § 939.25. However, the Committee recommends caution in making any broad statements to the jury in an attempt to communicate this rule. This is because evidence of the defendant's mistaken belief about the circumstances may be relevant to a jury's determination about whether criminal negligence is established. For example, if there is evidence that a defendant believed that no one was present in the area where a dangerous weapon was being handled and if there is a basis for finding that the belief was reasonable, the jury must be allowed to consider that evidence in deciding whether the defendant should have realized that his or her conduct created an unreasonable and substantial risk. This consideration would not be under the label of a mistake defense, but rather would simply be part of the jury's consideration of whether the elements of the crime are established. For discussion of a related problem, see Wis JI-Criminal 926, Contributory Negligence.

In State v. Hemphill, 2006 WI App 185, 296 Wis.2d 199, 722 N.W.2d 393, the issue was whether the defendant was entitled to an instruction on the mistake defense in his prosecution for physical abuse of a child by recklessly causing great bodily harm under § 948.03(3)(a). The court of appeals concluded that the mistake defense did not apply because the crime charged does not require a mental element that the alleged mistake could negate. "Inasmuch as § 948.03 sets out its own unique definition of 'recklessly,' the general definition of criminal recklessness [in § 939.24] does not apply." 2006 WI App 185, ¶11. Note that the general definition of criminal recklessness in § 939.24 does require a mental element: awareness of an unreasonable and substantial risk of death or great bodily harm to another.

1. This is for the defense recognized by § 939.43, which reads as follows:

> (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.
>
> (2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.

Thus, the mistake can be one of fact or of law other than the criminal law. The commentary in the 1953 Report on the Criminal Code is helpful in explaining "mistake." It is included at the end of this Comment.

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 the mistake the defendant claims to have made (e.g., ". . . he had permission to use the automobile" C in a case of "operating without the owner's consent"). (See complete sample instruction in note 5, below.)

4. The mental state for most crimes is either intent (e.g., "intent to cause bodily harm") or knowledge (e.g., "knew that the owner did not consent").

5. Here insert the mental state required for the crime charged (e.g., "knew the taking and driving of the automobile was without the owner's consent" C in a case of "operating without the owner's consent").

In a case involving a violation of § 943.23(2), taking and driving a vehicle without the owner's consent, the instruction would read as follows:

> Evidence has been received which, if believed by you, tends to show that the defendant believed that he had the permission of the owner to use the vehicle. You must consider this evidence in deciding whether the defendant knew that the owner did not consent to the taking and driving the vehicle.
>
> If an honest error of fact results in a person not having the knowledge required for a crime, the person is not guilty of that crime.
>
> Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant knew that the taking and driving of the automobile was without the owner's consent.

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The commentary from the 1953 Report on the Criminal Code follows.

COMMENT. Criminal intent or any other mental element of crime is nearly always proved circumstantially, by inference from the actor's conduct. Mistake is a defense when it rebuts the inference of criminal intent or some other mental element necessary for the particular crime in question. Aside from this, there is no saving power in mistake. Two conclusions can be drawn immediately: (1) In crimes which do not require proof of a mental element, mistake is no defense; and (2) in crimes which require proof of a mental element, any mistake other than a mistake of criminal law which rebuts the inference of the existence of that mental element is a defense.

The defendant who raises the defense of mistake basically is contending that the state cannot establish a mental element essential to the crime charged. Since that mental element generally is criminal intent, it follows that the defense of mistake is closely related to the definition of criminal intent. A mistake as to the existence or constitutionality of the section under which the actor is prosecuted or as to the scope or meaning of the terms used in that section is not a defense because, as stated in the section on criminal intent, proof of knowledge of those things is not necessary for proof of criminal intent. For the same reason, a mistake as to the age of a minor is not a defense, although in the absence of the special provision in the section defining criminal intent making proof of knowledge of the age of a minor unnecessary, the state would generally have to prove that the actor knew the victim was under a certain age. On the other hand, if proof of knowledge of certain facts or law is necessary for proof of criminal intent, ignorance or mistake as to such facts or law (other than criminal law) is a defense.

An example may help to clarify the explanation. Assume that a statute provides that it is a crime to "intentionally cause physical damage to any property of another without his consent" and that "property of another" is defined to mean property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair. Assume as facts that the United States government when it first surveyed the land now belonging to the actor put thereon a stone slab as a survey marker and that the actor destroys this

marker for the purpose of better utilizing his land. He may do so under any of several different beliefs which will have a bearing upon the defense of mistake:

Case 1. He destroys the marker, mistakenly believing that there is no statute prohibiting damage to property of another. Such a mistake is no defense for criminal intent does not require proof of knowledge of the existence of the statute under which the actor is prosecuted.

Case 2. He destroys the marker, mistakenly believing that the statute prohibiting damage to property of another is unconstitutional. Such a mistake is no defense, for criminal intent does not require proof of knowledge of the constitutionality of the statute under which the actor is prosecuted.

Case 3. He destroys the marker, mistakenly believing that the term "property of another" does not include property belonging to the United States government. Such a mistake is no defense, for criminal intent does not require proof of knowledge of the scope or meaning of terms used in the statute under which the actor is prosecuted.

Case 4. He destroys the marker, mistakenly believing that when he purchased the land he got title to the marker also. Such a mistake is a defense, for criminal intent requires proof of all those facts set forth after the word "intentionally" and which must be proved to exist in order to make out the objective part of the crime. If the actor believed the property to be his own, he could not have known it to be property of another. The fact that the actor's erroneous conclusion as to his property rights may have been based upon a mistake of law is immaterial.

Case 5. He destroys the marker, mistaking it for an ordinary rock. Such a mistake is a defense for the same reason that his mistake in Case 4 is a defense. In both cases, the mistake renders it impossible for the state to establish that he knew it was property of another that he damaged.

The above analysis shows that the efficacy of mistake as a defense does not depend entirely on whether the mistake is one of fact or one of law. In both Case 3 and Case 4, the mistake is one of law; in Case 3, the mistake is not a defense while in Case 4 it is. The distinction between the two is that in Case 3, the mistake goes to the meaning of a term used in the statute under which the actor is prosecuted, while in Case 4, the mistake is as to nonpenal or property law which under the particular statute is an essential basis for a factual conclusion necessary for criminal intent.

The claim of mistake must of course be honest rather than spurious. The use of the term "honest error" in the section is merely for the purpose of emphasizing that point. However, if the mistake is real and it negatives a state of mind essential to the crime, the actor is entitled to the defense even though the mistake is unreasonable. It may be difficult for a defendant to raise a reasonable doubt that his mistake was real if it appears to be unreasonable, but this is a problem of proof and not a matter of substantive law.

