

772 ACCIDENT

ADD THE FOLLOWING TO THE INSTRUCTION ON THE OFFENSE CHARGED IMMEDIATELY AFTER THE DESCRIPTION OF THE ELEMENT TO WHICH THE EVIDENCE OF ACCIDENT RELATES.¹

Accident

The defendant contends that (he) (she) did not act with (describe mental state),² but rather that what happened was an accident.

If the defendant did not act with the (describe mental state) required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of (name charged crime),³ the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

COMMENT

Wis JI-Criminal 772 was originally published in 2002. This revision was approved by the Committee in December 2004.

This instruction is intended to provide a suggested format for instructing the jury on the defense of "accident." In State v. Watkins, 2002 WI 101, 255 Wis.2d 265, 647 N.W.2d 244, the Wisconsin Supreme Court recognized that "'[a]ccident' is a defense to homicide recognized at common law and specifically recognized in Wisconsin statutes dating back to 1849." 2002 WI 101, &33. The defense survived the revision of the homicide statutes in the 1950's as "a defense that negates intent, and may negative lesser mental elements." 2002 WI 101, &41. Because the significance of evidence of accident is its tendency to negate an element C usually, the mental element C the state overcomes the defense by proving that element beyond a reasonable doubt.

Watkins involved a death caused by the discharge of a firearm during an encounter between the defendant and the victim. The incident occurred in a motel room with no witnesses present. The defendant was charged with first degree intentional homicide and raised the defense of accident. That is, the defendant claimed he did not cause the death with intent to kill because the firearm discharged accidentally. If the format suggested by Wis JI-Criminal 772 was used to instruct the jury on this claim, it would read as follows:

The defendant contends that he did not act with the intent to kill, but rather that what happened was an accident.

If the defendant did not act with the intent required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant acted with the intent to kill.

Because evidence tending to show accident is significant only to the extent that it negates an element of the crime, it can be argued that a special jury instruction is not necessary. A jury finding that the element is established necessarily establishes that evidence of accident is not sufficient to negate that element. However, this is also true with the statutorily-recognized defenses of voluntary intoxication, see § 939.42(2) and Wis JI-Criminal 765, and mistake, see § 939.42(2) and Wis JI-Criminal 770. The Committee concluded that where the evidence has referred to "accident" as a defense, the jury's understanding will be aided by an instruction that puts the evidence in its proper context.

1. The Committee recommends that this instruction be combined with the instruction on the crime charged. Specifically, it should be inserted at the point where the element to which evidence of accident relates is defined. Usually, this will be the mental state required for the crime, but other elements could be involved. The test should simply be one of relevance: does the evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See, § 904.01.

2. Here describe the element to which the evidence of accident relates. This will usually be the mental state, such as, intent to kill. For cases involving recklessness, the relevant mental state would be "awareness of the risk."

3. The Committee suggests identifying the crime to which the defense of accident relates because in some cases lesser included offenses may be submitted for which the evidence of accident might not be relevant. For example, evidence that a firearm discharged accidentally would tend to show the absence of intent to kill [required for intentional homicide] but may not tend to show the absence of awareness of the risk of death or great bodily harm [required for reckless homicide]. The relevance of the evidence must be analyzed separately for each crime that is to be submitted to the jury.