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Criminal Law—Defense of Voluntary Intoxication No Longer Available to Disprove Intent

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NOTES

CRIMINAL LAW—DEFENSE OF VOLUNTARY INTOXICATION NO LONGER AVAILABLE TO DISPROVE INTENT. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Charles Lee White was charged with first degree murder for the January 15, 1985 beating death of his wife. At his trial, in the Greene County Circuit Court, White invoked the defense of voluntary intoxication. The trial judge decided that, since the lesser included offense of second degree murder did not require a "specific intent" on the part of the defendant, it was not subject to the defense of voluntary intoxication. The jury was instructed accordingly and White was thereafter convicted of second degree murder. The trial judge's decision was in accord with previous holdings of the Arkansas Court of Appeals.¹ The court of appeals had previously held that crimes, including second degree murder, that required "knowingly," as opposed to "purposefully" as the requisite mental state, do not require a showing of specific intent, and are not amenable to the defense of voluntary intoxication.² White appealed the trial court's decision to the Arkansas Supreme Court. On appeal, he maintained that the trial court erred in instructing the jury that voluntary intoxication was not a defense to second degree murder. The Arkansas Supreme Court did not reach this question, finding instead that the defense no longer exists in Arkansas, regardless of the mental state required for a particular crime. *White v. State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

Historically, the defense³ of voluntary intoxication has been accorded a hostile reception. In the fourth century B.C., Aristotle wrote that "penalties are doubled in the case of drunkenness, for the moving principle is in the man himself, since he had the power of not getting

1. *Bowen v. State*, 268 Ark. 1088, 598 S.W.2d 447 (Ark. Ct. App. 1980).

2. *Id.*

3. The term "defense" will be used throughout as a convenient method of describing an assertion by a defendant that his voluntary intoxication precluded his forming the requisite degree of intent necessary for conviction under a particular criminal statute. The word "defense" is actually a misnomer due to the fact that such an assertion is not really a defense, but is an assertion that the requisite elements of the crime charged do not exist.

drunk and his getting drunk was the cause of his ignorance."⁴ The ethical opinions of Aristotle in this regard were referred to in the first recorded case on the issue of voluntary intoxication as a criminal defense. In 1551, the court in *Reniger v. Fogossa*⁵ stated:

If a person that is drunk kills another, this shall be felony, and he shall be imprisoned for it, and yet he did it through ignorance, for when he was drunk he had not understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.⁶

During the early history of the law, not only was voluntary intoxication not a defense to a crime, but courts were prone to hold that it was an "aggravation" of the offense since "it is a great offence in itself."⁷ Exception was soon taken to the common law's rigid stand on the issue in situations in which permanent insanity had resulted from a defendant's habitual intoxication or in which the intoxication was involuntary.⁸ The defense was initially allowed only in these limited situations. It was not until the nineteenth century, however, that any amelioration of the inflexible common law rule regarding self-induced intoxication was attempted.⁹

Apparently, the earliest case allowing for any modification of the old common law rule was *Rex v. Grindley*,¹⁰ in 1819. The court in *Grindley* decided that, although voluntary intoxication is not a defense to a crime, it is relevant in determining whether an act was premeditated.¹¹ Similarly, in the 1849 case of *Reg v. Monkhouse*,¹² the judge instructed the jury that voluntary intoxication was available as a partial answer to a charge of wounding with intent to murder when "the

4. ARISTOTLE, *ETHICA NICOMACHEA*, bk. 3, ch. 5, in 9 *THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH* 1113b (W.D. Ross trans. 1st ed. 1915).

5. 1 Plowden 1, 75 Eng. Rep. 1 (K.B. 1551).

6. *Id.* at 19, 75 Eng. Rep. at 31 (footnotes omitted).

7. *Beverley's Case of Non Compos Mentis*, 4 Co. Rep. 123b, 76 Eng. Rep. 118 (K.B. 1603). "Aggravation" may not have meant that the law would deal more harshly with the intoxicated offender. The term "aggravation" is likely to have meant only that the law would not excuse a voluntarily intoxicated offender, due to the absence of the requisite mental state, as it would an infant or an idiot. See Beck and Parker, *The Intoxicated Offender—A Problem of Responsibility*, 44 *CANADIAN B. REV.* 563, 574 n.56 (1966).

8. 1 HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 31-32 (1847). Sir Matthew Hale was the Lord Chief Justice of the Court of King's Bench in the 17th century.

9. 8 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 442 n.4 (2d ed. 1937).

10. *Id.* See Annotation, *Voluntary Intoxication as a Defense to Homicide*, 12 *A.L.R.* 861, 867 (1921); 1 W. RUSSELL, *A TREATISE ON CRIMES AND MISDEMEANORS* 12 n.(t) (C. Greaves 4th ed. 1865) (1979).

11. 1 RUSSEL, *supra* note 10, at 12.

12. *Id.* at 13.

intoxication was such as to prevent [the defendant from] restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."¹³

In the United States, the early common law decisions enunciated the rule that voluntary intoxication, though not a defense, is relevant to the issue of whether a defendant was capable of forming the degree of intent required for a particular crime.¹⁴ This common law rule is still followed in the majority of jurisdictions today. Presently, twenty-seven states give statutory recognition to a showing of voluntary intoxication for the purpose of negating intent.¹⁵ These states are generally in accord with section 2.08 of the Model Penal Code.¹⁶ Two states, Hawaii and Iowa, allow a defendant to present evidence of self-induced intoxication for the purpose of negating any element of a crime.¹⁷ Conversely, the Texas and Pennsylvania statutes specifically preclude evidence of voluntary intoxication for the purpose of negating intent.¹⁸

13. *Id.* (quoting Reg. v. Monkhouse, 4 Cox C.C. 55).

14. See *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891); *Crosby v. People*, 137 Ill. 325, 27 N.E. 49 (1891). At least two states, California and New York, gave statutory recognition to the common law rule by the late 19th century. See *People v. Hill*, 123 Cal. 47, 49, 55 P. 692, 693 (1898); *People v. Corey*, 148 N.Y. 476, 490-91, 42 N.E. 1066, 1071 (1896).

15. ALA. CODE § 13A-3-2 (1982); ALASKA STAT. § 11.81.630 (1983); ARIZ. REV. STAT. ANN. § 13-503 (Supp. 1986); CAL. PENAL CODE § 22 (West Supp. 1987); COLO. REV. STAT. § 18-1-803 (1986); CONN. GEN. STAT. ANN. § 53a-7 (West 1985); IDAHO CODE § 18.116 (1979); ILL. ANN. STAT. ch. 38, para. 6-3 (Smith-Hurd 1972); IND. CODE ANN. § 35-41-3-5 (Burns 1985); KAN. STAT. ANN. § 21-3208 (1981); KY. REV. STAT. ANN. § 501-080 (Baldwin 1984); LA. REV. STAT. ANN. § 14.15 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 37 (1983); MINN. STAT. ANN. § 609.075 (West 1964); MO. ANN. STAT. § 562.076 (Vernon Supp. 1987); MONT. CODE ANN. § 45-2-203 (1985); NEV. REV. STAT. § 193.220 (1985); N.H. REV. STAT. ANN. § 626.4 (1986); N.J. STAT. ANN. § 2c:2-8 (West Supp. 1986); N.Y. PENAL LAW § 15.25 (McKinney 1975); N.D. CENT. CODE ANN. § 12.1-04-02 (1985); OR. REV. STAT. § 161.125 (1985); S.D. CODIFIED LAWS ANN. § 22-5-5 (Rev. 1979); UTAH CODE ANN. § 76-2-306 (1978); WASH. REV. CODE ANN. § 9A.16.090 (1977); WIS. STAT. ANN. § 939.42 (West 1982); WYO. STAT. § 6-1-202 (1977). These states vary upon the extent to which voluntary intoxication may be used to negate the mental state of a defendant. For example, the Alabama statute states that voluntary intoxication may not be used to negate a "knowing" mental state. Colorado, among others, has refused to extend the defense to a "knowing" mental state through its case law decisions, though the state statute is not specific in this regard. See *Hendershott v. People*, 653 P.2d 385, 396 (Colo. 1982), *cert. denied*, 459 U.S. 1225 (1983). Some of the statutes specifically state that voluntary intoxication may only be used to negate a specific intent, while others are more general, referring only to negation of intent, or mental state.

16. MODEL PENAL CODE § 2.08(1) (1985), states that "intoxication of the actor is not a defense unless it negatives an element of the offense." All of the above statutes were not necessarily modeled after this Model Penal Code provision. They are all in agreement with the Code, however, in that voluntary intoxication is not a defense except to the extent that it serves to negative an element of the offense.

17. HAWAII REV. STAT. § 702-230 (1976); IOWA CODE ANN. § 701.5 (West 1979).

18. TEX. PENAL CODE ANN. § 8.04 (Vernon 1974) (such evidence may be introduced in order to show that temporary insanity resulted from the intoxication. Such a showing will only bear on

The statutes in Georgia and Oklahoma simply provide that voluntary intoxication is not a defense to a criminal charge.¹⁹ Under the case law of these states, however, evidence of such intoxication is permitted for the purpose of negating intent.²⁰ The Delaware statute²¹ is textually similar to those of Georgia and Oklahoma. Two months after the Arkansas Supreme Court decided *White v. State*,²² however, Delaware also adopted the position that voluntary intoxication may not be used in any respect to exculpate a defendant from a criminal charge.²³

The remaining fifteen states have either repealed or have not enacted statutes specifically providing that voluntary intoxication may or may not be shown by a defendant in order to mitigate criminal liability.²⁴ The majority of these fifteen states allow the defendant to show evidence of voluntary intoxication to negative intent. They adhere to the prevailing formulation of the common law rule in which a distinction is drawn between those crimes requiring specific intent and those requiring only a general intent.²⁵ In these states, voluntary intoxication may be asserted to negative the existence of a specific intent, but is inapplicable to crimes of general intent.²⁶ This distinction between spe-

mitigation of the punishment). PA. STAT. ANN. tit. 18, § 308 (Purdon 1983) (exception allowed for first degree murder).

19. GA. CODE ANN. § 16-3-4 (1984); OKLA. STAT. ANN. tit. 21, § 153 (West 1983).

20. See *Williams v. State*, 180 Ga. App. 854, 350 S.E.2d 837 (1986); *Grayson v. State*, 687 P.2d 747 (Okla. Crim. App. 1984).

21. DEL. CODE ANN. tit 11, § 421 (1979).

22. 290 Ark. 130, 717 S.W.2d 784 (1986).

23. *Wyant v. State*, 519 A.2d 649 (Del. 1986).

24. These fifteen states are Florida, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, Virginia and West Virginia.

25. A general intent exists when the defendant possesses the ability to foresee that a certain result might occur from his engaging in a particular course of conduct. Specific intent, on the other hand, requires not only that the result have been merely foreseeable, but such a result must have actually been intended by the defendant when he engaged in the particular course of conduct. M. BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 178-79 (1978).

26. See, e.g., *Burnham v. State*, 497 So. 2d 904 (Fla. 1986); *Avey v. State*, 249 Md. 385, 240 A.2d 107 (1968); *People v. Watts*, 133 Mich. App. 80, 348 N.W.2d 39 (1984); *State v. Privett*, 104 N.M. 79, 717 P.2d 55 (1986); *State v. Hurst*, 82 N.C. App. 1, 346 S.E.2d 8 (1986); *State v. Fox*, 68 Ohio St. 2d 53, 428 N.E.2d 410 (1981); *State v. McGehearty*, 121 R.I. 55, 394 A.2d 1348 (1978); *State v. D'Amico*, 136 Vt. 153, 385 A.2d 1082 (1978). West Virginia allows voluntary intoxication to be shown to reduce the degree of a crime or negative specific intent. See *State v. Keeton*, 272 S.E.2d 817 (W. Va. 1980). Virginia allows negation of specific intent for first degree murder, but for no other crimes. See *Essex v. Commonwealth*, 228 Va. 273, 322 S.E.2d 216 (1984). Nebraska permits evidence of voluntary intoxication to show that the defendant was "wholly deprived of reason so as to prevent the requisite criminal intent." See *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193, 197 (1978). Massachusetts, Mississippi, and South Carolina do not allow the defense to negate specific intent. *Commonwealth v. Stewart*, 359 Mass. 671, 679, 270 N.E.2d 811, 816 (1971), *vacated as to death penalty*, 408 U.S. 845 (1972) (per curiam); *McDan-*

cific and general intent is also followed in most states that have codified the common law rule²⁷ on the subject.²⁸

For approximately one hundred years, Arkansas held in accord with the majority of state common law decisions on the issue of voluntary intoxication.²⁹ The decision of the Arkansas Supreme Court in the 1879 case of *Wood v. State*³⁰ parallels the modern holdings in this regard.³¹ In *Wood* the court held that as a general doctrine, voluntary intoxication furnished no excuse for a crime, but for crimes requiring specific intent, it may be asserted in order to show absence of such intent.³² According to this view, which is followed under the case law or statutes of the majority of American jurisdictions today, such an assertion is not actually a defense to a crime once committed, but is an allegation that, due to the non-existence of the requisite mental state, the particular crime charged has not occurred.³³ In light of this fact, it is understandable that most state statutes that allow voluntary intoxication to be shown for the purpose of negating intent also state that such intoxication is not a defense to criminal conduct.³⁴

Prior to the adoption of the 1976 Criminal Code, the Arkansas statutes contained a variety of amorphous terms to define the mental state required for a particular act to be considered criminal.³⁵ Various terms employed in defining the particular requisite mental state included "evil design," "implied malice," "cruel," "wanton," and "deliberate."³⁶ From these abstract terms, it was the duty of the courts to determine whether a particular crime required a specific intent or simply a general intent. The courts' task of determining into which cate-

iel v. State, 356 So. 2d 1151 (Miss. 1978) (allowed the defense to show that defendant did not "know right from wrong"); *State v. Vaughn*, 268 S.C. 119, 232 S.E.2d 328 (1977) (allowed the defense if permanent insanity produced).

27. The "common law rule" referred to herein is the general view that voluntary intoxication is not a defense to a crime, but may be asserted in order to negative the element of intent.

28. See, e.g., *Coon v. State*, 494 So. 2d 184 (Ala. Ct. App. 1986); CAL PENAL CODE § 22 (West Supp. 1987).

29. See *Myrick v. State*, 244 Ark. 1157, 428 S.W.2d 241 (1968); *High v. State*, 197 Ark. 681, 120 S.W.2d 24 (1938); *Bennett v. State*, 161 Ark. 496, 257 S.W. 372 (1923); *Alford v. State*, 110 Ark. 300, 161 S.W. 497 (1913); *Chowning v. State*, 91 Ark. 503, 121 S.W. 735 (1909); See also Comment, *Intoxication as a Defense to Criminal Actions in Arkansas*, 11 ARK. L. REV. 160 (1956-57).

30. 34 Ark. 341 (1879).

31. See R. LAFAVE & A. SCOTT, CRIMINAL LAW 39 n.28 (2d Ed. 1986).

32. 34 Ark. 341 (1879).

33. See 22 C.J.S. *Criminal Law* § 68 (1961 & 1986 Cum. Supp.) and cases cited therein.

34. See, e.g., ALASKA STAT. § 11.81.630 (1983); CONN. GEN. STAT. ANN. § 53a-7 (West 1972).

35. ARK. STAT. ANN. § 41-203 commentary (1977).

36. *Id.*

gory a particular crime fell was simplified with the adoption of the 1976 Criminal Code.³⁷ The new Code enunciated and defined four mental states to be associated with particular crimes.³⁸ Arkansas Statutes Annotated section 41-203 lists these mental states as "purposely," "knowingly," "recklessly," and "negligently."³⁹

Also included in the 1976 Criminal Code was Arkansas Statutes Annotated section 41-207(a), which provided that "[s]elf-induced intoxication is an affirmative defense to a prosecution if it negates the existence of a purposeful or knowing mental state."⁴⁰ This provision, coupled with the simultaneous enactment of the provision regarding culpable mental states, would seem to have added clarity to this area of the law in Arkansas. The apparent clarity was short-lived. In 1977 the provision relating to self-induced intoxication was repealed.⁴¹ Act 101 of 1977, which repealed section 41-207(a), was entitled "An Act to Eliminate Self-Induced Intoxication as a Defense to Criminal Prosecution,"⁴² and was designated as an emergency act that was to take effect

37. Act of Mar. 3, 1975, No. 280, 1975 Ark. Acts 500.

38. Act of Mar. 3, 1975, No. 280, § 203, 1975 Ark. Acts 519 (codified at ARK. STAT. ANN. § 41-201 (1977)).

39. ARK. STAT. ANN. § 41-203 (1977) defines these mental states as follows:

- (1) "Purposely." A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result.
- (2) "Knowingly." A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.
- (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
- (4) "Negligently." A person acts negligently with respect to attendant circumstances or result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

40. Act of Mar. 3, 1975, No. 280, § 207, 1975 Ark. Acts. 523 (codified as amended at ARK. STAT. ANN. § 41-207 (1977)).

41. Act of Feb. 4, 1977, No. 101, 1977 Ark. Acts 125 (codified at ARK. STAT. ANN. § 41-207 (1977)).

42. 1977 Ark. Acts 125. The full title of this act is "An Act to Amend Section 207 of Act 280 of 1975 to Eliminate Self-Induced Intoxication as a Defense to Criminal Prosecution; and for Other Purposes."

immediately upon its passage.⁴³ The repeal of section 41-207(a) presented what seemed to be a paradox. On the one hand, prosecution of offenses required proof of conduct coupled with a culpable mental state. On the other hand, after the enactment of Act 101 of 1977, a defendant was prohibited from showing an absence of the requisite mental state, if he were planning to contend that his intoxication prevented him from forming an intent to commit the crime with which he was charged.

The Arkansas Supreme Court avoided the paradox, for the time being, in *Varnedare v. State*.⁴⁴ In *Varnedare* the court held that the 1977 legislative repeal of section 41-207(a) eliminated only the statutorily based defense, leaving intact the prior common law holdings on the subject.⁴⁵ The court noted that the case law on the subject remained as stated in *Olles v. State*,⁴⁶ in which the court held that the defense of self-induced intoxication was available if it rendered the defendant incapable of forming the intent that was a necessary element of the crime.⁴⁷

Since the defendant in *Varnedare* raised the voluntary intoxication defense to negative the existence of a "purposeful" mental state, the question was still open whether such a defense was also available when the particular criminal charge required only "knowingly" as the culpable mental state. The Arkansas Court of Appeals addressed this question in *Bowen v. State*.⁴⁸ The court in *Bowen* followed the reasoning of the Idaho Supreme Court in *State v. Booten*,⁴⁹ in which the court stated that "knowingly" refers to general criminal knowledge and intent that can be inferred from the facts and circumstances surrounding

43. *Id.* Section 3 of Act 101 of 1977 stated:

It is hereby found and determined by the General Assembly that the defense of voluntary intoxication is detrimental to the welfare and safety of the citizens of this State in that criminals are at times excused from the consequences of their criminal acts merely because of their voluntary intoxication and that this Act is necessary to eliminate the defense of self-induced or voluntary intoxication. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in effect from the date of its passage and approval.

1977 Ark. Acts 125, 126.

44. 264 Ark. 596, 573 S.W.2d 57 (1978).

45. *Id.*

46. 260 Ark. 571, 542 S.W.2d 755 (1976).

47. *Id.* at 577, 542 S.W.2d at 759. The court in *Olles* cited *Robertson v. State*, 212 Ark. 301, 206 S.W.2d 748 (1947) and *Wood v. State*, 34 Ark. 341 (1879) as authority for the holding.

48. 268 Ark. 1088, 598 S.W.2d 447 (Ark. Ct. App. 1980).

49. 85 Ida. 51, 375 P.2d 536 (1962).

the crime itself.⁵⁰ In *Bowen*, the court of appeals held that the defense of voluntary intoxication was not available to disprove the "knowingly" mental state.⁵¹

Subsequent to the decision in *Bowen*, Professor Ellen Liebman⁵² argued that the voluntary intoxication defense should be available to disprove a "knowing" mental state.⁵³ This contention was grounded on the assertion that although "knowingly" does not fit neatly into either side of the general intent/specific intent dichotomy, the determination of whether something was done "knowingly" is an issue to which the question of intoxication is relevant.⁵⁴ It was argued that voluntary intoxication should be allowed as a defense to a crime with "knowingly" as the requisite intent because "[i]f the mental state which is the basis of the law's concern does not exist, the reason for its non-existence is quite plainly immaterial."⁵⁵

In 1985, in *Mosier v. State*,⁵⁶ the Arkansas Supreme Court, citing Professor Liebman, acknowledged that there was present confusion surrounding the defense of voluntary intoxication.⁵⁷ The court in *Mosier* expressed a willingness to re-examine the law in the area at a time when adversary briefs on the subject were presented before it.⁵⁸ In October 1986, *White v. State*,⁵⁹ provided this opportunity.

In *White v. State*, the Arkansas Supreme Court's brief treatment of the intoxication issue was straightforward and based solely on an analysis of legislative intent. After summarizing the history of the voluntary intoxication defense in Arkansas, the court turned to an examination of the legislature's purpose in repealing section 41-207(a) of the 1976 Criminal Code relating to voluntary intoxication. The court began by noting that "[i]t is a principle of statutory construction that a statute will not be construed as overruling a principle of common law 'unless it is made plain by the act that such a change in the established

50. 268 Ark. at 1092, 598 S.W.2d at 449 (quoting *State v. Booten*, 85 Ida. at 56, 375 P.2d at 538-39).

51. 268 Ark. 1088, 598 S.W.2d 447 (Ark. Ct. App. 1980).

52. Ellen Liebman is a former assistant professor at the University of Arkansas, Fayetteville, School of Law.

53. Liebman, *Voluntary Intoxication as a Defense to Crime*, 1983 ARK. L. NOTES 29.

54. *Id.* at 31.

55. *Id.* at 31 (quoting MODEL PENAL CODE § 2.08 comment 3, at 9 (Tent. Draft No. 9, 1959)).

56. 285 Ark. 67, 684 S.W.2d 810 (1985).

57. *Id.* at 68-69, 684 S.W.2d at 811.

58. *Id.*

59. 290 Ark. 130, 717 S.W.2d 784 (1986).

law is intended.'"⁶⁰ In ascertaining the intention behind the repealing act,⁶¹ the court placed emphasis upon the fact that the repealing act was designated an emergency act that was intended to take effect immediately upon its passage.⁶² In light of this fact, the court declared that *Varnedare v. State*⁶³ was an erroneous decision, and held that the legislative intent underlying the passage of the emergency act was to eliminate entirely the defense of self-induced intoxication in criminal prosecutions.⁶⁴ In conclusion, the court stated that "[b]y reinstating the common law rule, which permitted voluntary intoxication as a defense to crimes requiring a specific intent, this court has perpetuated a rule of law which the legislature effectively repealed."⁶⁵

The decision in *White v. State* seems to preclude the introduction of all evidence of a defendant's voluntary intoxication. Prior to *White* such evidence was only relevant when introduced for the purpose of negating intent. This sole purpose was invalidated through the decision. The court in *White* did not venture beyond an analysis of the legislative intent surrounding the passage of the 1977 amendment to the Arkansas voluntary intoxication statute in order to consider whether an absolute refusal to allow proof which tends to negative an element of a crime might be constitutionally suspect. Since the prosecution is required to prove each element of an offense beyond a reasonable doubt,⁶⁶ it is questionable whether a state may absolutely bar the introduction of negating evidence which tends to cast doubt upon the existence of a particular element.

Courts dealing with the issue of voluntary intoxication have generally operated under the assumption that voluntary intoxication is an affirmative, gratuitous defense that may be allowed, disallowed, or pro-

60. *Id.* at 136, 717 S.W.2d at 787 (quoting *Starkey Constr. Inc. v. Elcon Inc.*, 248 Ark. 958, 457 S.W.2d 509 (1970)).

61. 1977 Ark. Acts 125.

62. *Id.*

63. 264 Ark. 596, 573 S.W.2d 57 (1978).

64. *White*, 290 Ark. at 135-37, 717 S.W.2d at 787.

65. *Id.* at 136-37, 717 S.W.2d at 787.

66. *Patterson v. New York*, 432 U.S. 197, 210 (1977). The Court in *Patterson* stated that the "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Id.* In re *Winship*, 397 U.S. 358, 364 (1970), held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* The difference between the Court's use of the word "elements" in *Patterson*, as opposed to its use of the word *fact* in *Winship* is probably insignificant in light of the fact that the Court, in using the above language in *Patterson* stated that the rule derives from "previous cases." 432 U.S. at 210. *Winship* would undoubtedly be the primary *previous case* to which the Court was referring.

cedurally manipulated in any manner that the state deems appropriate.⁶⁷ Reliance upon this assumption is misplaced. As the defense of voluntary intoxication serves *exclusively* as a negating defense, the decisions of the United States Supreme Court preclude it from being constitutionally classified so as to allow the prosecution to escape its duty to prove each element included within the definition of an offense beyond a reasonable doubt.⁶⁸ When a negating defense is classified as affirmative, and the state seeks to place the burden of proof of the defense upon the defendant, the prosecution escapes this duty.⁶⁹ This was recognized by the United States Supreme Court in *Patterson v. New York*,⁷⁰ as well as in the recent decision of *Martin v. Ohio*.⁷¹

67. See, e.g., *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3d Cir. 1980), cert. denied, 449 U.S. 844 (1980); *Wyant v. State*, 519 A.2d 649 (Del. 1986); *Wyant*, decided approximately two months after *White*, held that a defendant charged with robbery, kidnapping and rape, could not introduce evidence of voluntary intoxication to prove that it was not his "conscious object to engage in conduct of that nature or to cause that result." 519 A.2d at 659. The prosecution was required to prove such a "conscious object" as an element of the crimes with which the defendant in *Wyant* was charged. *Id.* The court stated that the defendant's due process argument that he should not be precluded from presenting evidence of voluntary intoxication for the purpose of negating intent was premised upon the "erroneous assumption that voluntary intoxication is a constitutionally protected defense to criminal conduct." *Id.* at 660. *Goddard* was cited as authority for this statement. *Id.* The court in *Goddard*, in holding that the defendant could be forced to bear the burden of proof upon the issue of voluntary intoxication, stated that voluntary intoxication is an affirmative, "gratuitous" defense that is not constitutionally required. 614 F.2d at 935.

68. See *Martin v. Ohio*, 107 S.Ct. 1098 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

69. To understand why this is so, consider a situation in which there is an element (*A*), with only three defenses (*X*, *Y*, and *Z*) that served to negate that element. For the prosecution to prove *A*, it is necessary that it prove "not *X*," "not *Y*," and "not *Z*" inclusive, for the burden of proving the element beyond a reasonable doubt to be met. If either *X*, *Y*, or *Z* are required to be proved by the defendant, the prosecution is relieved of this burden. See *infra* note 70.

70. 432 U.S. 197 (1977). *Patterson* dealt with the question of whether a state could constitutionally classify "extreme emotional disturbance" as an affirmative defense to the crime of murder. In upholding such a classification the Court noted:

This affirmative defense, which the Court of Appeals described as permitting "the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them" . . . does not serve to negative any facts of the crime which the State is required to prove in order to convict of murder. It constitutes a separate issue upon which the defendant is required to carry the burden of persuasion.

432 U.S. at 206-07 (citation omitted) (quoting *People v. Patterson*, 39 N.Y.2d 288, 302, 347 N.E.2d 898, 907 (1976)).

71. 107 S.Ct. 1098 (1987). *Martin* dispelled the notion that an affirmative defense could not be classified as such merely because certain proof offered in support of the defense might also serve to negative an element of the crime. In holding that Ohio could constitutionally classify self-defense as an affirmative defense to aggravated murder the Court stated:

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the

The refusal of a state to allow evidence of voluntary intoxication for the purpose of negating intent effectively relieves the prosecution of its duty to prove the element beyond a reasonable doubt.⁷² If a state chooses to include a particular element within the definition of an offense, the state is not free to carve out "segments" of that element to which the *In re Winship*⁷³ standard for burden of proof is inapplicable. Furthermore, the logic that would allow a state to refuse to consider evidence of voluntary intoxication for the purpose of negating intent would just as easily allow the state to refuse to hear evidence tending to show that an act occurred by accident and thus was not intentional. If a state is allowed to completely eliminate negating defenses, the state could ultimately refuse to allow any defense that could conceivably serve to negative a particular element, thus preventing the defendant from attempting to counter any proof offered by the prosecution in regard to that element. A state should not be allowed to thwart the *Win-*

state's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance of the evidence standard. Such instruction would relieve the state of its burden and plainly run afoul of *Winship's* mandate.

Id. at 1102 (citing *Winship*, 397 U.S. at 364).

Martin seems to mean that, to the precise extent that a defense serves to negative an element, such a defense may not be treated as affirmative. Given this meaning, the holding of *Martin* would appear to be that to the extent that self-defense serves to negative an element of the crime of murder, the defendant need only present evidence sufficient to raise a reasonable doubt as to the existence of the element. The burden of proof as to the "negating portion" of the affirmative defense of self-defense may not be placed upon the defendant. Only the "portion" of evidence presented in support of the defense that does not serve to negative any element of the crime of murder may be constitutionally treated as an affirmative defense. Unlike the affirmative defense of self-defense under consideration in *Martin*, evidence proffered in support of the defense of voluntary intoxication is not divisible into portions consisting of non-negating evidence and negating evidence. The defense is only recognized for the exclusive purpose of negating the element of intent. All evidence properly admitted in support of the defense is by definition negating evidence.

72. To understand why this is so, consider again the hypothetical situation referred to in note 68, *supra*. As noted, for the prosecution to prove element *A* in the hypothetical, it is necessary for it to prove "not *X*", "not *Y*," and "not *Z*." If the prosecution is required to prove "not *X*", for example, but the defendant is precluded from introducing evidence of *X*, the prosecution is in effect "given" that portion of the element.

The truth of the proposition that refusal to allow negating evidence relieves the prosecution of its burden of proof is illustrated by the statement of the Delaware Supreme Court in *Wyant v. State*, 519 A.2d at 660, that "[t]he elimination of voluntary intoxication as a defense did not relieve the state of its burden of proving that defendant *otherwise* possessed the requisite intent." (Emphasis added). In *Patterson v. New York*, the United States Supreme Court held that the prosecution is required to prove each element of an offense beyond a reasonable doubt. 432 U.S. at 210. *Patterson* did *not* hold that the prosecution must prove each element beyond a reasonable doubt *except as otherwise provided by the state*.

73. 397 U.S. 358 (1970).

*ship*⁷⁴ standard of proof beyond a reasonable doubt by refusing to allow evidence tending to cast such a doubt upon that which the prosecution is required to prove.

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74. *Id.*