

4.36. Effect of Intoxication upon Liability [Penal Law §§ 15.25, 15.05 (3)]

In any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged except if the culpable mental state of the offense is “recklessly.” In that instance, a person who creates a substantial and unjustifiable risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Note

The rule incorporates Penal Law § 15.25 (Effect of intoxication upon liability) and the exception set forth in Penal Law § 15.05 (3) (Culpability; definitions of culpable mental states).

Penal Law § 15.25 states the general rule that “[i]ntoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.” Normally, the “element” that intoxication may negate is the actor’s culpable mental state (*see People v Newton*, 8 NY3d 460 [2007]).

The exception for the culpable mental state of “recklessly” is set forth in Penal Law § 15.05 (3) (*see People v Register*, 60 NY2d 270, 280 [1983], *overruled on other grounds People v Feingold*, 7 NY3d 288 [2006]).

The Court of Appeals has not decided whether intoxication may negate the element of “depraved indifference to human life,” declared a culpable mental state by *Feingold* and included in the definition of crimes that also require a defendant to act recklessly (*compare People v Wimes*, 49 AD3d 1286, 1287 [4th Dept 2008] [finding that intoxication could have negated the element of “depraved indifference” to human life], *and People v Coon*, 34 AD3d 869, 870 [3d Dept 2006] [finding that intoxication by crack cocaine negated “depraved indifference” to human life], *with People v Wells*, 53 AD3d 181, 193 [1st Dept 2008] [in dicta, the Court opined that intoxication was not a defense because in its view “culpability (for depraved indifference murder) is appropriately assessed at the time defendant made the conscious decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication”]; *see also People v Lessey*, 40 Misc 3d 530 [Sup Ct, NY County 2013]).

Whether the evidence is sufficient to warrant an instruction to the finder of fact to consider the effect of intoxication on a defendant’s mental state depends on

such factors as: “the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether the defendant consumed them on an empty stomach, whether the drinks were high in alcoholic content, and the specific impact of the alcohol upon the defendant’s behavior or mental state. *People v. Gaines*, 83 N.Y.2d 925, 615 N.Y.S.2d 309, 638 N.E.2d 954 (1994) (the defendant’s testimony that he had a couple of drinks and may have lost control, and the testimony of witnesses that the defendant was ‘high’ and had glassy eyes and alcohol on his breath was insufficient to warrant a charge on intoxication); *People v. Rodriguez*, 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 (1990) (since there was no evidence as to when the defendant ingested the narcotics, the quantity ingested or the effect they had on him, a charge on intoxication was not warranted)” (William C. Donnino, Practice Commentary, McKinney’s Cons Laws of NY, Penal Law § 15.25).

Given the requisite showing, a defendant is entitled to the jury instruction: “[I]n determining whether the defendant had the (specify, e.g. intent and/or knowledge), necessary to commit a crime you may consider whether the defendant’s mind was affected by intoxicants to such a degree that he/she was incapable of forming the (specify, e.g. intent and/or knowledge) necessary for the commission of that crime” (CJI2d[NY] General Applicability, Defenses, Intoxication).