

302.10 AUTOMATISM OR UNCONSCIOUSNESS.¹

You may find there is evidence which tends to show that the defendant was physically unable to control *his* physical actions because of automatism or unconsciousness²; that is a state of mind in which a person, though capable of action, is not conscious of what the person is doing at the time the crime was alleged to have been committed.

In this case, one element that the State must prove beyond a reasonable doubt is that the act charged be done voluntarily. Therefore, unless you find from the evidence beyond a reasonable doubt that at that time the defendant was able to exercise conscious control of the defendant's physical actions, the defendant would not be guilty of the crime.

If the defendant was unable to act voluntarily the defendant would not be guilty of any offense.

NOTE WELL: Choose one of the following depending on the evidence.³ In the case where the defendant offers evidence of unconsciousness, choose subsection a. In the case where the evidence of unconsciousness arises out of the State's evidence, choose subsection b.

a. [The burden of persuasion rests on the defendant to establish this defense to the satisfaction of the jury. However, unlike the State, which must prove all the other elements beyond a reasonable doubt, the defendant need only prove the defendant's unconsciousness to your satisfaction. That is, the evidence taken as a whole must satisfy you, not beyond a reasonable doubt but simply to your satisfaction, that the defendant was unconscious at the time of the alleged offense.]

b. [The burden is on the State to prove beyond a reasonable

doubt that the defendant was able to exercise conscious control of the defendant's physical action.^{4]}

NOTE WELL: Incorporate instructions on automatism or unconsciousness into the mandate of the instruction on the offense charged, as follows:

(1) *Each time you come to the phrase, ". . ., it would be your duty to return a verdict of guilty of (the offense charged or a lesser included offense)", add the phrase, ". . ., unless you are satisfied that the defendant was not guilty by reason of unconsciousness."*

(2) *At the end of the final mandate, insert the following as the final sentence: "If the State has failed to satisfy you beyond a reasonable doubt that the defendant was conscious, it would be your duty to return a verdict of not guilty by reason of unconsciousness."⁵*

1. This instruction is not applicable to those cases in which the crime charged can be committed recklessly or negligently and the defendant, knowing of his tendency to black out, put himself in a position where a manifestation of this tendency would be especially dangerous, such as driving an automobile alone.

2. Robert L. Farb, *N.C. Crimes Guidebook* Ch. 2 (2001).

3. See *State v. Tyson*, 195 N.C. App. 327, 672 S.E.2d 700 (2009).

4. *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975), held that unconsciousness is an affirmative defense which must be proved to the jury's satisfaction. *State v. Boone*, and *State v. Fisher*, 336 N.C. 684, 445 S.E.2d 866 (1994) 307 N.C. 198, 297 S.E.2d 585 (1982), *State v. Williams*, 296 N.C. 693, 252 S.E.2d 739 (1979), held that an instruction on unconsciousness need not be given if it results from voluntary consumption of intoxicating liquor or drugs.

5. Failure to include the defense of unconsciousness as a possible verdict in the final mandate is plain error. See *State v. Tyson*, 195 N.C. App. 327, 672 S.E.2d 700 (2009).