# The defenses of voluntary intoxication, diminished capacity and unconsciousness

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## VOLUNTARY INTOXICATION

- To get an instruction, there must be evidence that D's intoxication rendered him "utterly incapable" of forming specific intent. Must view evidence in light most favorable to the defendant, so where evidence is equivocal, D is entitled to instruction. *State v. Mash,* 323 N.C. 339, 372 S.E.2d 532 (1988); *State v. Spencer,* 154 N.C. App. 666, 572 S.E.2d 815 (2002). D may rely on the state's evidence if it is sufficient to establish the defense. *State v. Long,* 354 N.C. 534, 557 S.E.2d 89 (2001).
- Jury must only be instructed in accord with 305.10/305.11, "if you find that the D was intoxicated, you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder....you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual, specific intent to kill formed after premeditation and deliberation." *Id.* IT IS ERROR TO INSTRUCT THE JURY THAT THEY MUST FIND D "UTTERLY INCAPABLE". *Mash.*
- Courts are confusing the sufficiency standard for overcoming a motion to dismiss with sufficiency for getting a jury instruction. Per *Mash*, whether to get an instruction, evidence must be viewed in light most favorable to defendant, whereas on a motion to dismiss, evidence is viewed in light most favorable to the state.

Below are the results of a survey of 186 cases from a Westlaw search "voluntary intoxication". The three cases shown below are the only results from this search where a defendant was awarded a new trial on the grounds that the trial court improperly refused to give an instruction on voluntary intoxication. The cases under "not sufficient" are a sampling of the dozens where our appellate courts found the evidence to be insufficient to warrant the instruction. (After 75, I stopped reading the facts of the "not sufficient" cases; I got the point that your guy is screwed.)

| "SUFFICIENT" CASES | "NOT SUFFICIENT" CASES |
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| *State v. Keitt,* 153 N.C. App. 671 (2002) | *State v. Long,* 354 N.C. 534 (2001) First |

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| New trial ordered in first-degree burglary case for failing to instruct on voluntary intoxication. W testified that, 5 hours before the burglary, Δ was so drunk he couldn't ride a bike or walk on his own; brother testified that when W brought Δ home, he could barely stand on his own; V testified she smelled alcohol on Δ and Δ had trouble navigating when he was trying to leave; LEO smelled alcohol on Δ next morning when he went to arrest him. (Compare with cases that rely on evidence that Δ was able to do other things, such as drive or communicate, so not given the instruction. In *Keitt*, in addition to the intoxication evidence, there was also evidence that entry was gained into the V's house by standing on a bucket, climbing onto an oil tank, and removing a screen window.)<br><br>*State v. Golden,* 143 N.C. App. 426 (2001) felony murder by RWDW; error not to instruct on voluntary intoxication as to the RWDW where substantial evidence indicated that defendant was intoxicated from consuming a number of beers, a 1/2 of a fifth of gin and two rocks of crack cocaine in roughly four hours, couldn't remember the details of the killing or what he did afterwards; expert in fields of addiction medicine and psychiatry testified that this amount of alcohol, combined with defendant's past alcohol abuse, drug use and low I.Q. would impair defendant's ability to form the specific intent to rob. Prejudice arose from fact that jury was instructed on voluntary intoxication as to P&D murder and jury acquitted of P&D murder.<br><br>***State v. Mash,* 323 N.C. 339 (1988)** Jury has only to conclude that either defendant did not form specific intent because of intoxication or at least has reasonable doubt about it, NOT that | degree murder; evidence that Δ was "substantially impaired" when found; Δ presented no evidence of his condition at the time of the murder and V had been dead for several hours when found. Evidence also suggested that Δ tried to hide his actions; if could think that rationally, then not so intoxicated as to negate specific intent.<br><br>*State v. Muhammad*, ___N.C. App. ___, 651 S.E.2d 569 (2007) Testimony that Δ drank straight tequila from bottle, 3-4 beers over 1 ½ hour period, but evidence also showed that he was able to drive and communicate with other people<br><br>*State v. Yang*, 174 N.C. 755 (2005) No plain error not to instruct in attempted voluntary manslaughter case where evidence showed that Δ had taken ecstasy the night before and Δ's theory was that he was acting in self-defense<br><br>*State v. Torres*, 171 N.C. App. 419 (2005) No error in failing to instruct in RWDW case where evidence showed that Δ had been drinking and taking drugs intermittently hours b/f the robbery, but also that Δ said he and accomplice had been driving around looking for someone to rob<br><br>*State v. Harris*, 171 N.C. App. 127 (2005) Not a defense to failing to register as a sex offender b/c not a specific intent crime<br><br>*State v. Spencer,* 154 N.C. App. 666 (2002) Not warranted in AWDWIKISI where Δ consumed crack and beer and psychologist testified that Δ's conduct was impulsive, that it was an "act without thinking"; evidence unclear as to how much had been consumed; evidence that Δ told LEOs in detail about events leading to assault suggests that he was not incapable of |

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| intoxication rendered him utterly incapable of forming intent; evidence sufficient to warrant instruction where Δ had been seen drinking periodically from around 4 p.m. until 11 p.m. on the day of the murder. During that afternoon defendant appeared "high" while drinking more beer and by early evening he was drinking a mixture of 190 proof grain alcohol and punch. Witnesses described defendant as "definitely drunk" and "pretty high" by 9:30 p.m. He swerved while driving his automobile to obtain more beer. Δ left by himself for thirty or forty minutes. Upon returning, he appeared "changed all the way around" and "drunker, wilder and out of control." Δ's eyes were dilated, his complexion had changed, he was sweating and had difficulty speaking or walking. Unprovoked, he inexplicably and viciously assaulted a girlfriend and several strangers. The fatal assault was likewise unprovoked and inexplicable. The manner of the assault and defendant's actions immediately before and after it were, themselves, equivocal on the question of whether Δ actually deliberated and premeditated his intent to kill V. | forming intent to kill<br><br>*State v. Kornegay*, 149 N.C. App. 390 (2002) First degree murder; not entitled to instruction where evidence showed he told LEO he was drunk and high from coke and coming down from the night before; no evidence to suggest that he was intoxicated at the time he committed the murder; Δ remembered details surrounding the murder, he disposed of the weapon and bags of stolen property, behavior indicative of capacity to form P&D<br><br>*State v. Cheek,* 351 N.C. 48 (1999) Capital murder case; Δ not entitled to voluntary intoxication instruction where Δ testified that he'd taken 2 hits of acid earlier and other evidence showed that he drove stolen taxicab from Jacksonville to Wilmington on day of murder and discussed in detail the events which occurred before and after he arrived in Wilmington.<br><br>*State v. Hunt,* 345 N.C. 720 (1997) No error in not instructing on voluntary intoxication. Δ drank continuously on the day of the killing, shared 3 half-cases of beer and some liquor with 5 others, shared a half-case of beer and a 1/5 of Jim Beam w/ 2 others, smoked marijuana; evidence showed "only that defendant was intoxicated", not that he was "utterly incapable of" P&D; no expert testimony and evidence showed that Δ was not acted erratically b/f killing<br><br>*State v. Lancaster,* 137 N.C. App. 37 (2000) (DIM CAP/VOL INTOX) RWDW case; not entitled to either instruction where Δ testified that he smoked crack and drank 3 0r 4 beers over the course of the night expert testified that Δ "could have" been impaired at time of RWDW, but that he could not testify about Δ's ability to think, |

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| | make judgments or distinguish right from wrong and V testified that Δ did not appear impaired |

## DIMINISHED CAPACITY

- Easier to get an instruction than for voluntary intoxication. "An instruction on diminished capacity is warranted where the evidence of the defendant's mental condition is sufficient to raise a reasonable doubt in the mind of a rational trier-of-fact as to whether the defendant had the ability to form the necessary specific intent to commit the crimes for which he is charged." *State v. Clark,* 324 N.C. 146, 377 S.E.2d 54 (1989).
- Courts consider requests for diminished capacity even where the lack of capacity is, in part, result of drugs or alcohol. (*See Duncan, Garcia*)
- Diminished capacity is not a defense to malice, so not a defense to second degree murder. *State v. West,* ____ N.C. App. ___, 638 s.E.2d 508 (2006).

Westlaw results returned on a search of "diminished capacity" "lack of mental capacity". Below are the results regarding cases in which the evidence was sufficient, or not, to warrant an instruction.

| **"SUFFICIENT" CASES** | **"NOT SUFFICIENT" CASES** |
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| *State v. Duncan,* __ N.C. App.___, 656 S.E.2d 597 (2008) (J. Hunter, dissenting) IAC in non-capital first degree murder case for trial counsel to fail to request an instruction on diminished capacity where evidence showed that defendant had drunk a pint of wine and 40 oz of beer, had a history of hospitalization for "nerves" and was on nerve medication, and testimony by witnesses described mental infirmity<br><br>*State v. Bush,* 164 N.C. App. 254 (2004) [ALSO AN UNCONSCIOUSNESS CASE] Child sex abuse case; Δ awarded a new trial for trial court's failure to instruct on "unconsciousness/diminished capacity" | *State v. Lancaster,* 137 N.C. App. 37 (2000) (DIM CAP/VOL INTOX) RWDW case; not entitled to either instruction where Δ testified that he smoked crack and drank 3 0r 4 beers over the course of the night expert testified that Δ "could have" been impaired at time of RWDW, but that he could not testify about Δ's ability to think, make judgments or distinguish right from wrong and V testified that Δ did not appear impaired<br><br>*State v. Garcia,* 74 N.C. App. 498 (2005) Δ charged with breaking and entering, not entitled to instruction on diminished capacity. Δ testified that he had taken 5 |

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| where evidence showed that Δ sexually assaulted his girlfriend's 12-year-old daughter while she was sleeping in same bed as Δ, girlfriend, and another daughter; daughter testified that no one moved or appeared to be awake at the time the alleged touching occurred, and she further testified that Δ did not speak at all during the alleged touching nor did he react to the jerky movements she made in response to the touching<br><br>*State v. Connell,* 127 N.C. App. 685 (1997) [ALSO AN UNCONCIOUSNESS CASE] Δ charged with indecent liberties. New trial awarded for trial court's failure to instruct on unconsciousness and diminished capacity, even where Δ did not request the instruction. There was no direct evidence that the Δ was awake at the time of the alleged touching; the victim admitted she did not know whether the Δ was asleep or awake. "[O]ur research discloses no case law as to whether being asleep is an appropriate circumstance that requires an unconsciousness or diminished capacity instruction, we conclude that on this record both instructions would be proper."<br><br>*State v. Williams,* 116 N.C. App. 255 (1994) Second degree murder and AWDWITKISI. Δ was entitled to jury instruction on diminished capacity as to AWDWITKISI where experts testified that defendant was incapable of forming specific intent to kill.<br><br>*State v. Rose,* 323 N.C. 455 (1988) First degree murder; life. Δ entitled to jury instruction focusing on his mental condition as it pertained to his ability to premeditate and deliberate murder in light of expert testimony from forensic psychiatrist that, in his opinion, Δ could not have formed specific intent to kill his victims; Δ's state of mind was central issue | Demerol and steroids, prescribed by his oncologist; that he felt "in a fog...numb"<br><br>*State v. Staten,* 172 N.C. App. 673 (2005) First degree felony murder. Evidence showed that, after Δ's arrest on day of murder, he gave detailed statement to police describing how he pulled victim out of his car and left him lying beside road as he drove away in victim's car; examining forensic psychiatrist testified that when Δ took victim's car he knew he could get away faster in car than on foot, knew he was taking a car, knew he was on a highway, and knew he had just spoken with police officer, and Δ was able to recount the sequence of events at trial.<br><br>*State v. Page,* 346 N.C. 689 (1997) First degree capital murder. No error in failing to instruct on diminished capacity as to second degree murder where diminished capacity did not rise to level of insanity as diminished capacity is not a defense to malice. Same for failing to give the instruction on the assault on LEO charge; general intent crime. Trial court did instruct on diminished capacity as to specific intent as to P&D murder.<br><br>*State v. Daughtry,* 340 N.C. 488 (1995) First degree capital murder by P&D and felony murder and first degree sex offense. No error to refuse to instruct on diminished capacity as to the sex offense because it is not a specific intent crime.<br><br>*State v. Clark,* 324 N.C. 146 (1989) First degree murder, non-capital. Δ not entitled to instruction that jury could consider evidence of defendant's mental disorder as rendering her incapable of forming a specific intent to kill where the only testimony offered by defendant concerned an endemic mental condition without any suggestion that defendant's disorder might |

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| and instruction might have resulted in different verdict. | render her incapable of forming a premeditated and deliberate specific intent to kill. |

## CASES WHERE COURT IS CONFUSING DIMINISHED CAPACITY WITH VOLUNTARY INTOXICATION, OR FAILING TO DISTINGUISH THE TWO:

*State v. Andrews,* 170 N.C. App. 68 (2005) First degree felony murder, conspiracy to commit RWDW and RWDW. COA held that, because evidence of Δ's low I.Q. and smoking marijuana over the course of the evening "was not overwhelming" and there was testimony that he didn't appear intoxicated, then not entitled to a voluntary intoxication instruction. However, it appears that the error assigned was to failure to give diminished capacity instruction. COA seems to use the two terms interchangeably, without acknowledging that there are two different evidentiary standards to meet.

## UNCONSCIOUSNESS

- Defendant's are entitled to an instruction on unconsciousness/automatism where the evidence shows he acted while asleep OR where there is no direct evidence that the defendant was awake. State v. Bush___, *State v. Connell*, 127 N.C. App. 685 (1997).
- Instruction also warranted where evidence that defendant was in a "disassociative" state, in cases of somnambulism, epilepsy, a blow to the head, or involuntary intoxication from drugs or alcohol. *State v. Mercer,* 275 N.C. 108 (1969).
- It is a complete, affirmative defense. The burden is on the defendant to establish the defense "to the satisfaction of the jury"; evidence may arise from the state's evidence. *State v. Caddell,* 287 N.C. 266 (1975).
- Is a complete defense because it precludes the existence of any specific mental state and the possibility of a voluntary act, without which there can be no criminal liability. *State v. Mercer,* 275 N.C. 108 (1969).

| "SUFFICIENT" CASES | "NOT SUFFICIENT" CASES |
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| *State v. Fields,* 324 N.C. 204 (1989) First degree murder case; new trial awarded. Psychiatrist's testimony that defendant was unable to exercise conscious control of his physical actions at moment of fatal shooting, coupled with family member's testimony that defendant frequently acted as if he were "in his own world," required instruction on unconsciousness defense in first-degree murder prosecution; doctor | *State v. McLean,* 158 N.C. App. 314 (2003) Δ not entitled to unconsciousness instruction where unconsciousness was based on voluntary intoxication and the defense is available for involuntary intoxication only.<br><br>*State v. Andrews,* 154 N.C. App. 553 (2002) 2 counts of attempted first degree murder and other charges. No error not to |

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| testified that defendant suffered from posttraumatic stress disorder and that certain of his behavior was characteristic of disassociative state.<br><br>*State v. Snyder,* 70 N.C. App. 335 (1984) New trial; 3 counts of second-degree murder. Evidence that Δ had several drinks, went to a bar, got in a fight where Δ was hit above the eye and fell and hit his head on the door; Δ left, drove through red light, hit car, and killing occupants. Δ had a BAC of .32 at the hospital after the accident. Evidence of unconsciousness was improperly excluded.<br><br>*State v. Bush,* 164 N.C. App. 254 (2004) [ALSO A DIMINISHED CAPACITY CASE] Child sex abuse case; Δ awarded a new trial for trial court's failure to instruct on "unconsciousness/diminished capacity" where evidence showed that Δ sexually assaulted his girlfriend's 12-year-old daughter while she was sleeping in same bed as Δ, girlfriend, and another daughter; daughter testified that no one moved or appeared to be awake at the time the alleged touching occurred, and she further testified that Δ did not speak at all during the alleged touching nor did he react to the jerky movements she made in response to the touching<br><br>*State v. Connell,* 127 N.C. App. 685 (1997) [ALSO A DIMINISHED CAPACITY CASE] Δ charged with indecent liberties. New trial awarded for trial court's failure to instruct on unconsciousness and diminished capacity, even where Δ did not request the instruction. There was no direct evidence that the Δ was awake at the time of the alleged touching; the victim admitted she did not know whether the Δ was asleep or awake. "[O]ur research discloses no case law as to whether being asleep is an appropriate circumstance that requires an | instruct on unconsciousness or automatism. Physician's testimony on Δ suffering from a condition known as serotonergic syndrome was not sufficient to create an inference that defendant acted unconsciously or was unable to control his actions when he tried to kill his estranged wife and her friend. Trial court did instruct on voluntary intoxication.<br><br>*State v. Morganherring,* 350 N.C. 701 (1999) Capital murder conviction. Δ not entitled to instruction on automatism; trial court instructed on voluntary intoxication and the 2 defenses are inconsistent. No evidence that Δ was either unconscious or not conscious of his actions.<br><br>*State v. Boyd,* 343 N.C. 699 (1996) No error in refusing to instruct on unconsciousness or automatism in murder case where Δ pointed only to his own self-serving testimony at trial that he had difficulty recalling events and actions surrounding murders, testimony that was wholly contradicted by statement he gave to police within hours of committing murders in which he was able to recall many graphic details; moreover, at no point in statement did defendant attribute his actions to blackouts, amnesia, or automatism, and statement demonstrated a very complete and detailed recollection of his actions.<br><br>*State v. Fisher,* 336 N.C. 684 (1994) Capital murder case. Not entitled to unconsciousness instruction while Δ claimed to have no recollection of event, he testified as to altercation immediately preceding event and also admitted to having consumed alcohol and drugs, and unconsciousness caused by voluntary ingestion of substances would not count as defense. |

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| unconsciousness or diminished capacity instruction, we conclude that on this record both instructions would be proper."<br><br>*State v. Jerrett,* 309 N.C. 239 (1983) Trial court should have instructed on unconsciousness where corroborating evidence tending to support the defense of unconsciousness. In addition to the testimonial corroborating evidence, defendant's very peculiar actions in permitting the kidnapped victim to repeatedly ignore his commands and finally lead him docilely into the presence and custody of a police officer lends credence to his defense of unconsciousness. (Overruled on other grounds by *State v. Shank* [on issue of diminished capacity as to P&D]). | |

Below are cases dealing with issues other than sufficiency for instruction:

*State v. Gillespie*, 362 N.C. 150 (2008). Affirmed the Court of Appeals decision (___ N.C. App.___, 638 S.E.2d 481 (2006)) awarding a new trial where the trial court exceeded its authority in sanctioning the defendant by excluding the testimony of his two mental health experts. Defendant had given notice of insanity and diminished capacity. Defense experts failed to comply with court order.

*State v. Jones,* 344 N.C. 722 (1996). New trial ordered in non-capital P&D murder case. Trial court erred in denying Δ's motion for appointment of psychiatric expert where Δ demonstrated to the hearing court that the only defense he could raise was diminished capacity; sufficient evidence before the hearing court in the form of doctor notes to indicate that Δ suffered from mental illness, had suicidal inclinations, was being treated w/ Prozac and other meds for more than 5 months before the killing, no history of prior violence.

*State v. Wilson,* 340 N.C. 720 (1995) Non-capital first degree murder charge. Evidence of intoxication as well as "depression...and being out of touch with reality". Trial court instructed on voluntary intoxication; Δ also requested diminished capacity instruction. Trial court only gave voluntary intoxication and Δ did not object after the jury charge. Supreme Court found the issue had not been preserved for appellate review because no objection by trial counsel and not specifically alleged as plain error by appellate counsel.

*State v. Holder,* 331 N.C. 462 (1992) First degree murder. No error to refuse to give separate instruction on diminished capacity as to P&D where instruction was given as to specific intent because of the interrelatedness of P&D with specific intent.

*State v. Shank*, 322 N.C. 243 (1988) New trial. Error to exclude expert testimony that defendant did not have the ability to plan his activities or to make or carry out plans at the time that he killed his former wife and that he was under mental or emotional disturbance was prejudicial.

*State v. Jones,* 137 N.C. App. 221 (2000) Not unconstitutional to require Δ to prove affirmative defenses of unconsciousness and automatism.

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The following references are available on the IDS Website located at www.ncids.org under Training and Reference Materials/ Indexed by Subject/ Defenses:

John Rubin, *The Diminished Capacity Defense*, Administration of Justice Bulletin No. 92/01 (September 1992)

John Rubin, *The Voluntary Intoxication Defense*, Administration of Justice Bulletin No. 93/01 (April 1993)