

2009

## CRIMINAL LAW—The Wyoming Supreme Court's Confusion on Voluntary Act: Automatic Jury Instruction on the Voluntary Act Requirement?; *Seymore v. State*, 152 P.3d 401 (Wyo. 2007)

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### Recommended Citation

Birthe S. Christensen, *CRIMINAL LAW—The Wyoming Supreme Court's Confusion on Voluntary Act: Automatic Jury Instruction on the Voluntary Act Requirement?; Seymore v. State*, 152 P.3d 401 (Wyo. 2007), 9 WYO. L. REV. 625 (2009).

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## CASE NOTE

### CRIMINAL LAW—The Wyoming Supreme Court’s Confusion on Voluntary Act: Automatic Jury Instruction on the Voluntary Act Requirement?; *Seymore v. State*, 152 P.3d 401 (Wyo. 2007).

*Birthe S. Christensen\**

#### INTRODUCTION

During a hearing for a felony conviction, the judge placed the defendant-appellant, Brian Seymore, in detention with Frontier Corrections System (“FCS”).<sup>1</sup> Under FCS rules, a failure to return to FCS at the required time constitutes escape.<sup>2</sup> On July 2, 2004, Seymore left the facility at 5:00 p.m., but failed to return as required by 10:00 p.m.<sup>3</sup> Aware of his violation, Seymore attempted to turn himself in the following morning; however, the jail refused to take him without an arrest warrant.<sup>4</sup> About a month-and-a-half later, authorities arrested Seymore and charged him with escape.<sup>5</sup> Following trial, a jury found Seymore guilty of escape.<sup>6</sup>

The escape statute, which Seymore allegedly violated, makes no reference to a *mens rea* requirement and simply describes the offense of escape.<sup>7</sup> Consequently,

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<sup>1</sup> *Seymore v. State*, 152 P.3d 401, 403, 405 (Wyo. 2007). The Frontier Corrections facility detaining Seymore is an “adult community corrections facility.” *Id.* at 405. Such a facility

provides housing and case management services for probationers, parolees, inmates, and Intensive Supervision Program violators who are administratively sanctioned by Field Services to participate in the ACC program as an alternative to probation or parole revocation. The facilities provide the courts, Parole Board, and the WDOC an alternative to incarceration or traditional probation/parole supervision and they provide a transition option for inmates who are preparing to reenter Wyoming communities.

Department of Corrections, *available at* <http://corrections.wy.gov/services/adult.html> (last visited Feb. 1, 2009).

<sup>2</sup> *Seymore*, 152 P.3d at 403.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Seymore*, 152 P.3d at 404. The Wyoming escape statute provides that:

(a) An offender, parolee or an inmate is deemed guilty of escape from official detention and shall be punished as provided by W.S. 6-5-206(a)(i) if, without proper authorization, he: (i) Fails to remain within the extended limits of his confinement or to return within the time prescribed to an adult community correctional facility to which he was assigned or transferred; or (ii) Being a participant in a program

the trial judge did not instruct the jury as to the *mens rea* requirement and the jury found Seymore guilty of escape without considering intent.<sup>8</sup> On appeal, Seymore argued reversible error occurred when the trial judge did not instruct the jury on the *mens rea* element of the crime of escape and specifically argued the trial judge failed to instruct the jury on the “specific intent element of escape.”<sup>9</sup>

First, the Wyoming Supreme Court reviewed this case under the plain error standard because Seymore did not object to the jury instructions at trial.<sup>10</sup> Second, the court disagreed with Seymore’s argument regarding the trial court’s exclusion of a specific intent element in the jury instructions, because escape is a general intent crime, and not a specific intent crime.<sup>11</sup> Nevertheless, the court found the jury instructions inadequate because even for a general intent crime the state must prove the voluntariness of the actor’s criminal conduct.<sup>12</sup> The court held the state was required to prove whether Seymore had voluntarily failed to return to FCS.<sup>13</sup>

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established under the provisions of this act he leaves his place of employment or fails or neglects to return to the adult community correctional facility within the time prescribed or when specifically ordered to do so.

WYO. STAT. ANN. § 7-18-112 (West 2008). The Wyoming Supreme Court further articulated that “[*m*]ens rea is the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness.” *Seymore*, 152 P.3d at 405 (quoting BLACK’S LAW DICTIONARY 1006 (8th ed. 2004)).

<sup>8</sup> *Seymore*, 152 P.3d at 405.

<sup>9</sup> *Id.* at 405–06.

<sup>10</sup> *Id.* at 404. The court applies the plain error standard when an appellant fails to object to the jury instructions at trial, or when an appellant requests for “a certain instruction [to] be included.” *Id.* In order to prevail under the plain error standard the Wyoming Supreme Court considers three elements:

First, the record must clearly present the incident alleged to be error. Second, appellant must demonstrate that a clear and unequivocal rule of law was violated in a clear and obvious, not merely arguable, way. Last, appellant must prove that he was denied a substantial right resulting in material prejudice against him.

*Id.*

<sup>11</sup> *Id.* at 406. The Wyoming Supreme Court explained general and specific intent crimes as follows:

When the statute sets out the offense with only a description of the particular unlawful act, without reference to intent to do a further act or achieve a future consequence, the trial judge asks the jury whether the defendant intended to do the outlawed act. Such intention is general intent. When the statutory definition of the crime refers to an intent to do some further act or attain some additional consequence, the offense is considered to be a specific intent crime and then that question must be asked of the jury.

*Id.*

<sup>12</sup> *Id.* (quoting *Rowe v. State*, 974 P.2d 937, 939 (Wyo. 1999)) (stating “even a general intent crime requires a showing that the prohibited conduct was undertaken voluntarily”).

<sup>13</sup> *Seymore*, 152 P.3d at 406. Specifically, the court stated

The law of intent, as applied to the facts of this case, required the State to prove that the appellant *voluntarily* failed to return to FCS at the required time.

The Wyoming Supreme Court came to this conclusion because the court equated voluntariness with *mens rea* and noted that every crime generally contains two essential elements: *actus reus* and *mens rea*.<sup>14</sup> Failure to instruct the jury on an essential element of the crime constitutes a “fundamental error” and requires reversal.<sup>15</sup> Accordingly, the state must prove, and the trial judge must instruct on, the essential element of voluntariness; otherwise, the court will overturn the conviction.<sup>16</sup> Consequently, *Seymore* implicitly stands for the requirement of an automatic jury instruction on voluntariness in each and every case.<sup>17</sup> The Wyoming Supreme Court reversed and remanded to the trial court for a new trial because reversible error concerning the jury instructions occurred.<sup>18</sup>

The *Seymore* court erred in holding a judge must automatically instruct a jury on the requirement of a voluntary act.<sup>19</sup> This note will first explain a voluntary act and will thereafter examine the settled law prior to the *Seymore* decision.<sup>20</sup> Next, this note will look at the principal case and the court’s rationale in overruling the trial court.<sup>21</sup> Finally, this note will analyze and critique the court’s holding that a

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Unfortunately, the jury was not instructed that it had to find the failure to return to have been voluntary. Without voluntary conduct, there is no *mens rea*.

*Id.* (emphasis in original).

<sup>14</sup> *Id.* at 405.

<sup>15</sup> *Id.* at 406–07. *But see infra* note 18 and accompanying text (discussing failure to instruct on an essential element is no longer an “error per se” and, in order to get case reversed on appeal, the defendant must show that he was prejudiced by the non-instruction on the essential element).

<sup>16</sup> *See supra* notes 12–15 and accompanying text.

<sup>17</sup> *See supra* notes 12–16 and accompanying text.

<sup>18</sup> *Seymore*, 152 P.2d at 411. The court held error occurred because the jury did not receive adequate instruction “as to the *mens rea* element of the crime charged.” *Id.* After *Seymore*, the Wyoming Supreme Court decided *Granzer v. State*, 193 P.3d 266 (Wyo. 2008). That case turned on “[w]hether the trial court committed reversible error by omitting statutory language from the instruction on the elements of child endangerment” thereby requiring reversal based on the second prong of the plain error test. *Id.* at 268; *see also supra* note 10 and accompanying text (discussing the plain error test). The court discussed how its precedent suggested automatic reversal once a fundamental error occurs, such as when the trial court fails to instruct on an essential element, and “once an error is established, reversal is warranted without regard to whether the error prejudiced the defendant.” *Granzer*, 193 P.3d at 270. But the court went on to hold that a fundamental error is no longer an “error per se” and “the defendant must show prejudice in order to warrant a reversal of his conviction.” *Id.* at 271–72. Furthermore, “failure to instruct properly on an element of a crime does not constitute plain error where that element is not contested at trial, or where the evidence of the defendant’s guilt is overwhelming.” *Id.* at 270–71. However, the ruling in *Granzer* does not abrogate the overall holding of *Seymore*. *Id.* at 268–72. Indeed, a failure to instruct on voluntariness is still a violation of “a clear and unequivocal rule of law,” because the Wyoming Supreme Court holds voluntariness to be an essential element. *Seymore*, 152 P.3d at 404–06. *Granzer* simply states that, on appeal, the defendant must now show the added requirement of prejudice in order to reverse his conviction. *Granzer*, 193 P.3d at 272.

<sup>19</sup> *See infra* notes 24–168 and accompanying text.

<sup>20</sup> *See infra* notes 24–96 and accompanying text.

<sup>21</sup> *See infra* notes 97–121 and accompanying text.

trial judge must automatically instruct on voluntary act.<sup>22</sup> Specifically, this note will argue that the court came to the wrong conclusion and articulate why, as a general rule, trial judges do not automatically instruct jurors on a voluntary act.<sup>23</sup>

## BACKGROUND

### *Explanation of a Voluntary Act*

Regardless of how commentators define voluntariness, the Wyoming Supreme Court, as well as other courts, agree the law does not punish individuals for involuntary bodily movements.<sup>24</sup> Without a doubt, Wyoming, as well as other courts, recognizes a voluntary act as an indispensable prerequisite to criminal liability.<sup>25</sup> The notion of a voluntary act begins when the actor commits a crime, because, in order to do so, the actor must do an act, or fail to do an act.<sup>26</sup> Furthermore, the act or omission must be voluntary; otherwise, the defendant may avoid liability.<sup>27</sup> Voluntariness arises from “volition” which simply means “a willed bodily movement.”<sup>28</sup> Therefore, voluntariness exists as a minimum

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<sup>22</sup> See *infra* notes 122–68 and accompanying text.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *Fulcher v. State*, 633 P.2d 142, 145 (Wyo. 1981) (holding a person who acts involuntarily “does so without intent, exercise or free will, or knowledge of the acts”); *Nelson v. State*, 927 P.2d 331, 333 n.3 (Alaska Ct. App. 1996) (stating “[e]very criminal offense must be premised on some voluntary act or omission of the defendant”); *Mooney v. State*, 105 P.3d 149, 154 (Alaska Ct. App. 2005) (holding “a person cannot be held criminally liable unless that person has performed a voluntary act”).

<sup>25</sup> See *supra* note 24 and accompanying text.

<sup>26</sup> Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 380 (2008) (stating that by “doing something” the “actor increase[s] the risk of harm to others” and the “crime occurs when [the act] results in the [harm]”); see also JOSHUA DRESSLER ET AL., *CASES AND MATERIALS ON CRIMINAL LAW* 126 (4th ed. 2007) (articulating that “*actus express[es]* the voluntary physical movement in the sense of conduct and *reus express[es]* the fact that this conduct results in a certain proscribed harm, i.e., that it ‘causes’ an injury to the legal interest protected in that crime”) (quoting Albin Eser, *The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 386 (1965)).

<sup>27</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-201 (West 2008) (articulating “[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or omission to perform a duty by law which the person is physically capable of performing”); ALA. CODE § 13A-2-3 (2008) (stating “[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing”); HAW. REV. STAT. ANN. § 702-200(1) (West 2008) (allowing a defense for any involuntary conduct or any involuntary omission); COLO. REV. STAT. ANN. § 18-1-502 (West 2008) (stating “[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing”).

<sup>28</sup> See, e.g., Alexander & Ferzan, *supra* note 26, at 381 (articulating that “volition [means] the defendant wills the movement of her body”); BLACK’S LAW DICTIONARY 1309 (8th ed. 2005) (stating that volition simply means “the ability to make a choice or determine something”); Takacs v. Engle,

threshold for the imposition of criminal liability, and a willed bodily movement satisfies the requirement of voluntariness.<sup>29</sup>

For example, if A practices target shooting at a shooting range and pulls the trigger of his gun, and at the same time B walks in front of the gun and A's bullet strikes and kills B, A has committed the voluntary act of pulling the trigger, regardless of whether he intended to kill B.<sup>30</sup> By simply pulling the trigger, A wills his bodily movement and thereby engages in a voluntary act.<sup>31</sup> But a voluntary act also encompasses a level of awareness and not only the physical act.<sup>32</sup> Actually, the law *assumes* a level of awareness on behalf of the actor and a capability on behalf of the actor to will and control his actions, or refrain from acting.<sup>33</sup> Thus, when A pulls the trigger, an assumption exists that A chose to pull the trigger because of A's capability to control his action.<sup>34</sup>

Difficulties in defining voluntariness have led some authorities to define voluntariness negatively, by stating what actions do not constitute a voluntary act.<sup>35</sup> For example, if the defendant causes harm due to reflexes, convulsions, or while sleeping, a voluntary act has not been committed because these actions are not a "product" of the defendant's mind.<sup>36</sup> To illustrate, in *Martin v. State*, the prosecutor charged Martin with appearing intoxicated in public; however, the arresting police officers "forcibly" carried the intoxicated Martin to a public area.<sup>37</sup> Consequently, the Alabama Court of Criminal Appeals reversed Martin's case because the manifestation of his drunkenness in public resulted from the

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768 F.2d 122, 126 (Ohio 1985) (discussing that "[r]eflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts" (emphasis added)).

<sup>29</sup> HAW. REV. STAT. ANN. § 702-200, cmt. (West 2008) (stating the "minimum basis for the imposition of penal liability . . . includes a voluntary act or voluntary omission"); *see also supra* note 27 and accompanying text.

<sup>30</sup> DRESSLER ET AL., *supra* note 26, at 133 n.5.

<sup>31</sup> *See id.*; *see also supra* notes 26–30 and accompanying text.

<sup>32</sup> Nita A. Farahany & James E. Coleman, Jr., *Genetics and Responsibility: To Know the Criminal from the Crime*, 69 LAW & CONTEMP. PROBS. 115, 142 (2006).

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> *See supra* notes 28–33; *see also* ARIZ. REV. STAT. ANN. § 13-105(41) (defining a voluntary act as "a bodily movement performed consciously and as a result of effort and determination"); KY. REV. STAT. ANN. § 501.010 (Banks-Baldwin 2008) (stating "voluntary act means a bodily movement performed consciously as a result of effort or determination").

<sup>35</sup> *See infra* notes 36–39 and accompanying text.

<sup>36</sup> *See, e.g.*, MODEL PENAL CODE § 2.01(2) (West 2008) (defining what are not voluntary bodily movements: "(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual").

<sup>37</sup> 17 So. 2d 427, 427 (Ala. Ct. App. 1944).

police officers carrying him there and not from Martin's voluntary determination to appear in public.<sup>38</sup> As a result, if the accused does not act voluntarily, he acts due to "compulsion" and not from individual choice or control.<sup>39</sup>

### *Jury Instructions on Voluntary Act*

According to existing practice in Wyoming, courts generally do not instruct juries on a voluntary act.<sup>40</sup> To illustrate this point, one need only look at the Wyoming Criminal Pattern Jury Instructions.<sup>41</sup> It becomes evident that almost none of the pattern instructions require proof of a voluntary act.<sup>42</sup> No requirement exists for trial courts to use the Wyoming Criminal Pattern Jury Instructions.<sup>43</sup> However, the pattern instructions and court precedent "advise" the courts and practitioners in how to carefully draft jury instructions, and thereby correctly instruct the jury.<sup>44</sup>

The pattern instructions show existing practice in Wyoming.<sup>45</sup> For instance, the Wyoming Supreme Court established aggravated homicide by vehicle as a general intent crime.<sup>46</sup> In reviewing the Wyoming Criminal Pattern Jury Instruction on aggravated homicide by vehicle, the pattern instructions make no mention of a voluntary act.<sup>47</sup> Similarly, the court recognized aggravated assault and battery with a deadly weapon as a general intent crime.<sup>48</sup> The pattern instructions do not mention voluntary act as an essential element.<sup>49</sup> In other words, for most general intent crimes, such as escape, the jury instructions do not mention voluntary act as an essential element on which the trial judge must instruct.<sup>50</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Farahany & Coleman, *supra* note 32, at 143 (citing *United States v. Moore*, 486 F.2d 1139, 1179 (D.C. Cir. 1973)).

<sup>40</sup> WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) (2004).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Reilly v. State*, 55 P.3d 1259, 1267 n.7 (Wyo. 2002).

<sup>44</sup> *Tanner v. State*, 57 P.3d 1242, 1248 (Wyo. 2002).

<sup>45</sup> *See infra* note 46–50 and accompanying text.

<sup>46</sup> *Fleske v. State*, 706 P.2d 257, 260 (Wyo. 1985).

<sup>47</sup> WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 21.06B3 (2004).

<sup>48</sup> *Streitmatter v. State*, 981 P.2d 921, 924 (Wyo. 1999).

<sup>49</sup> WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 25.02B (2004).

<sup>50</sup> WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 52.06A (2004); *see also supra* notes 41–49.

*Why Courts Do Not Instruct on Voluntariness*

Generally, courts do not instruct on voluntariness, *sua sponte*, because the issue is simply not disputed.<sup>51</sup> In essence, the issue of voluntariness is not litigated unless the defendant “injects” it into the case.<sup>52</sup> The Wyoming Supreme Court recognized this concept in *Brooks v. State*, in which the court acknowledged insanity as an affirmative defense requiring the defendant to inject the issue of voluntariness into the case.<sup>53</sup> The best explanation for why courts generally do not instruct, *sua sponte*, on a voluntary act is the existence of a *presumption of voluntariness*.<sup>54</sup> This presumption rests on the proposition that human beings have a certain level of “control over their behavior” and causing an action arises from exercising this control.<sup>55</sup> As the Wyoming Supreme Court acknowledged in *Polston v. State*, every man is presumed normal and in possession of “ordinary faculties” unless the defendant proves otherwise.<sup>56</sup> Therefore, on the basis of the prosecution’s proof of the prohibited act, the jury presumes the defendant decided to engage in this act because of the defendant’s inherent ability to control his behavior and act voluntarily.<sup>57</sup>

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<sup>51</sup> *Mooney*, 105 P.3d at 155. *Sua sponte* means “[w]ithout prompting or suggestion; on its own motion.” BLACK’S LAW DICTIONARY 1192 (8th ed. 2005). Thus, in this context, the judge does not automatically instruct the jury on a voluntary act without any prompting or suggestion from either of the parties. *Mooney*, 105 P.3d at 155.

<sup>52</sup> *Baird v. State*, 604 N.E.2d 1170, 1176 (Ind. 1992) (reasoning “[i]n most cases there is no issue of voluntariness and the State’s burden is carried by proof of commission of the act itself”); see also HAW. REV. STAT. ANN. § 702-200 cmt. (West 2008) (stating that “[generally,] the issue of whether the defendant’s conduct includes a voluntary act or a voluntary omission will not be separately litigated. . . . [I]nvoluntariness [is] a defense, [and] puts the ultimate burden on the defendant to inject that issue into the case”).

<sup>53</sup> 706 P.2d 664, 667 (Wyo. 1985) (stating “[m]ental illness or deficiency is an affirmative defense which relieves an accused of responsibility for the crime he committed”).

<sup>54</sup> See, e.g., *Walker v. State*, 652 P.2d 88, 91 (Alaska 1982) (articulating “[t]he law assumes that every person intends the natural consequences of his voluntary acts”); see also *infra* notes 55–75 and accompanying text.

<sup>55</sup> *Farahany & Coleman, supra* note 32, at 139 n.174. Stating

[c]riminal law provides that a criminal act may be attributed to the accused (and therefore “voluntary”) by making two presuppositions: first, individuals have control over their behavior (legal free will), and second, a human agent causes the actions he performs by the exercise of his capacities and control. Thus, one can infer a defendant chose to act from proof that he engaged in the prohibited act. Because criminal law allows this inference, the question whether the defendant engaged voluntarily in an act does not usually arise.

*Id.*

<sup>56</sup> 685 P.2d 1, 6 (Wyo. 1984).

<sup>57</sup> *Id.*

For example, Illinois defines armed robbery as a general intent crime and this crime is proven if the evidence establishes an inference that “the prohibited result” came about because of the defendant’s voluntary act.<sup>58</sup> But, the state does not have to independently prove voluntariness.<sup>59</sup> The state simply presents evidence that the defendant engaged in the prohibited act, by taking the victim’s belongings, along with other facts sufficient for the court to conclude that an armed robbery took place.<sup>60</sup> Unless there is any evidence to the contrary, the fact finder may then infer that the defendant committed a voluntary act.<sup>61</sup> Similarly, Alaska defines rape as a general intent crime, which requires proof of a voluntary act.<sup>62</sup> Here, the state meets its burden if it proves the prohibited act—forced intercourse against the victim’s will—and the state need not independently prove voluntariness.<sup>63</sup> Except where the evidence raises any issue to the contrary, the jury may infer the defendant intended all the consequences resulting from his voluntary act.<sup>64</sup> Therefore, unless the defendant raises the issue of voluntariness and introduces some relevant evidence to rebut the presumption, the defendant does not get an instruction, *sua sponte*, on voluntariness.<sup>65</sup>

Difficulties arise when courts try to distinguish between essential elements and presumed facts; yet, not all fundamental conditions to criminal liability are essential elements.<sup>66</sup> For example, in *Clark v. Arizona* the United States Supreme Court held that sanity, a fundamental condition to criminal liability, is presumed and does not constitute an essential element.<sup>67</sup> *Clark* established both a presumption of sanity and allowed the presumption of a fundamental condition to criminal liability.<sup>68</sup> The Wyoming Supreme Court likewise allows for the presumption of sanity and expressly rejects mental responsibility as an essential

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<sup>58</sup> *People v. Jamison*, 756 N.E.2d 788, 801 (Ill. 2001).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Walker*, 652 P.2d at 91.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Mooney*, 105 P.3d at 154–55 (holding the defendant did not raise the issue of voluntariness and nothing in the record entitled the defendant to an automatic instruction on voluntariness); *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (holding the jury shall be charged on the issue of voluntariness only when admitted evidence raises the issue of voluntariness and the defendant requests the charge); *State v. Lara*, 902 P.2d 1337, 1338 (Ariz. 1995) (holding the defendant not entitled to a jury instruction on voluntary act because nothing in the evidence indicated any involuntary bodily movements).

<sup>66</sup> See *infra* notes 67–75 and accompanying text.

<sup>67</sup> *Clark v. Arizona*, 548 U.S. 735, 766 (2006) (stating “[t]he presumption of sanity is equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the mens rea necessary for a verdict of guilt and the consequent criminal responsibility”).

<sup>68</sup> *Id.*

element.<sup>69</sup> Thus, while sanity, and the actor's capability to act voluntarily, remains a fundamental condition to the imposition of liability, the Wyoming Supreme Court held sanity is not an essential element, but a presumption.<sup>70</sup>

To further stress this point, several jurisdictions, including Wyoming, allow a defendant to raise the affirmative defense of "unconsciousness" or "automatism."<sup>71</sup> Here, the court presumes consciousness when the accused commits the criminal act, and, if the accused wants the jury to know otherwise, he must raise the affirmative defense of unconsciousness.<sup>72</sup> As the Wyoming Supreme Court stated in *Fulcher v. State*, the defense of unconsciousness or automatism exists because a defendant, who performs actions unconsciously, performs these actions involuntarily.<sup>73</sup> But, unless the defendant invokes the unconsciousness defense, a presumption of consciousness and voluntariness remains.<sup>74</sup> In effect, courts have repeatedly rejected consciousness as an essential element, but clearly view consciousness and voluntariness as fundamental conditions to criminal liability.<sup>75</sup>

#### *Defendant Must Raise Voluntariness as a Defensive Issue*

A presumption, such as the voluntary act presumption, shifts the burden of proof to the defendant.<sup>76</sup> Under the burden of proof, the defendant carries the burden of production, which means he must produce enough evidence on

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<sup>69</sup> *Brooks*, 706 P.2d at 667. Stating:

Mental responsibility is not an element of the offense charged. [Mental responsibility] is an issue separate and apart from the essential element of the criminal intent. Mental illness or deficiency is an affirmative defense which relieves an accused of responsibility for the crime he committed. Requiring the accused to prove the affirmative defense of mental illness or deficiency does not constitute a shifting of the burden of proof to the accused to disprove an essential element of the crime charged.

*Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., *People v. Nihell*, 77 P. 916 (Cal. 1904) (recognizing the unconsciousness defense); *Polston v. State*, 685 P.2d 1 (Wyo. 1984) (recognizing the unconsciousness defense); *State v. Caddell*, 215 S.E.2d 348 (N.C. 1975) (recognizing the unconsciousness defense).

<sup>72</sup> *Nihell*, 77 P. at 917 (stating "[m]en are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem they must impart that knowledge by affirmative proof"); see also *Polston*, 685 P.2d at 6 (holding a person who raises this defense "is presumed to be a person with a healthy mind [and] the burden is on the defendant who raises the defense of automatism to prove the elements necessary to establish the defense"); *Caddell*, 215 S.E.2d 348, 363 (holding the presumption that the defendant committed the act voluntarily applies to the consciousness defense and "the burden rests upon the defendant to establish this defense").

<sup>73</sup> 633 P.2d 142, 145 (Wyo. 1981).

<sup>74</sup> See, e.g., *Polston*, 685 P.2d at 6; *Nihell*, 77 P. at 917; *Caddell*, 215 S.E.2d at 363.

<sup>75</sup> See *supra* notes 71–74 and accompanying text.

<sup>76</sup> JOHN W. STRONG ET. AL., MCCORMICK ON EVIDENCE § 343, at 520 (5th ed. 1999).

the disputed issue to satisfy the judge, or the defendant carries the burden of persuasion and must persuade the judge or jury regarding the correctness of a disputed fact.<sup>77</sup> A presumption may assign both burdens.<sup>78</sup> After the defendant meets his burden of proof the burden shifts to the opposing party to prove the nonexistence of the particular fact.<sup>79</sup>

According to required procedure for an affirmative defense in Wyoming, a defendant must introduce some evidence before he receives a jury instruction on the defensive issue.<sup>80</sup> Also, the defendant must request an instruction from the court.<sup>81</sup> Since courts do not ordinarily instruct the jury on the requirement of a voluntary act, but instead presume the defendant's actions are voluntary, one may infer the defendant bears the burden of proof with respect to this issue.<sup>82</sup> Thus, at a minimum, the defendant must raise the issue of voluntariness and must introduce some evidence, to the satisfaction of the judge, disputing the voluntariness of his act; otherwise, the defendant does not get an automatic jury instruction on voluntariness.<sup>83</sup>

### *The Constitutionally Permissible Allocation of Proof*

Requiring the defendant to raise the issue of voluntariness as an affirmative defense is constitutionally permissible.<sup>84</sup> Certainly, the prosecution must prove all facts that constitute the crime, but the prosecution need not prove every fact that might affect "culpability or severity of punishment."<sup>85</sup> Accordingly, the burden of proof regarding a particular issue may shift from the state to the defendant.<sup>86</sup>

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<sup>77</sup> *Id.* § 336, at 508.

<sup>78</sup> *Id.* § 343, at 520.

<sup>79</sup> *Id.* § 342, at 518.

<sup>80</sup> *Ortega v. State*, 966 P.2d 961, 964 (Wyo. 1998). If a defendant wants a jury instruction on a defensive issue, he must timely submit a jury instruction that "correctly states the law and is supported by the evidence." *Id.* Furthermore, statutes or case law must recognize the defense in the jurisdiction. *Bouwkamp v. State*, 833 P.2d 486, 490 (Wyo. 1992).

<sup>81</sup> *Ortega*, 966 P.2d at 964.

<sup>82</sup> See *supra* notes 51–81 and accompanying text.

<sup>83</sup> See, e.g., *Brooks*, 706 P.2d at 667; *Polston*, 685 P.2d at 6; see also *Angelo v. State*, 977 S.W.2d 169, 178 (Tex. App. 1998) (reasoning that "when the accused voluntarily engages in conduct that includes a bodily movement sufficient for the gun to discharge a bullet, 'without more—such as a precipitation by another individual,' a jury need not be charged on the voluntariness of the accused's conduct") (quoting *George v. State*, 681 S.W.2d 43, 47 (Tex. Crim. App. 1884)); *State v. Sparks*, 68 S.W.3d 6, 12 (Tex. App. 2001) (stating a defendant is entitled to an instruction on voluntariness when "warranted by the evidence").

<sup>84</sup> *Patterson v. New York*, 432 U.S. 197, 205–06 (1977) (holding that shifting the burden of proof of an affirmative defense to the defendant is consistent with due process so long as the State has the burden of proving "beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant was] charged.'").

<sup>85</sup> *Id.* at 204, 207.

<sup>86</sup> *Id.* at 203 n.9 (citing WIGMORE, EVIDENCE, Vol. 5, §§ 2486, 2512).

While the prosecution bears the burden of proof regarding every essential element of the crime charged, the defendant carries the burden of proving an affirmative defense.<sup>87</sup> However, a presumption cannot shift the burden of proof to the extent that it places upon the defendant the burden of proving, or disproving, an essential element of the crime as defined by the legislature.<sup>88</sup> Rather, the affirmative defense must be a “separate issue” where the accused carries the burden of proof.<sup>89</sup>

To illustrate, the North Carolina Court of Appeals, in *State v. Jones*, upheld the constitutionality of forcing the defendant to raise voluntariness as a defensive issue.<sup>90</sup> In that case, Jones challenged the jury instructions arguing they required him to disprove the voluntariness of his acts, thereby relieving the state of its burden to prove an essential element of the crime.<sup>91</sup> Specifically, Jones argued the trial court erred when it instructed the jury that the defendant had the burden of establishing the unconsciousness defense.<sup>92</sup> In support of his argument, Jones argued the court should apply the holding of *Mullaney v. Wilbur*, in which the United States Supreme Court held it unconstitutional to place the burden on the defendant to disprove an essential element.<sup>93</sup>

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<sup>87</sup> *Proof Issues*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 652, 657 (2008).

<sup>88</sup> *Patterson*, 432 U.S. at 208. In this case, the state charged Patterson under a New York statute which did not have malice aforethought as “an element of the crime,” but permitted “a person accused of murder to raise an affirmative defense that he ‘acted under the influence of extreme emotional disturbance.’” *Id.* at 198. The New York Court of Appeals upheld the constitutionality of the New York statute because it did not require the defendant to disprove an essential element; rather, it simply allowed the defendant to raise an affirmative defense. *Id.* at 201. The United States Supreme Court affirmed the holding because once the state proves all essential elements “beyond a reasonable doubt” the defendant may then raise an affirmative defense as long as the defense “does not serve to negate any facts of the crime which the State is to prove in order to convict of murder.” *Id.* at 201, 206–07. Consequently, *Patterson* stands for the proposition that “essential elements” just means those identified by the legislature as elements of the offense and something is not an element of the offense unless the legislature makes it one. *Id.*

<sup>89</sup> *Id.* at 207. Yet, no violation of due process exists simply because evidence used to prove an affirmative defense also shows the existence or nonexistence of an essential element as long as the state still has the ultimate burden of proof regarding that element. *Proof Issues*, *supra* note 87, at 657 (citing *Martin v. Ohio*, 480 U.S. 228, 234 (1987)).

<sup>90</sup> 527 S.E.2d 700 (N.C. Ct. App. 2000).

<sup>91</sup> *Id.* at 706.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)). In *Mullaney*, the state charged the defendant under a statute which required the defendant to prove that “he acted in the heat of passion on sudden provocation in order to reduce the murder [charge] to manslaughter.” *Mullaney*, 421 U.S. at 688–91. The Court reasoned that since malice aforethought was “a critical fact in dispute” it would be unconstitutional to place the burden on the defendant to disprove malice by showing that he acted in the heat of passion upon sudden provocation. *Id.* at 701, 703. On the contrary, due process “requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation” and the Court ultimately held that “it was unconstitutional for a state to require a defendant to negate a required element of an offense.” *Id.* at 704, 707.

The North Carolina Court of Appeals disagreed and distinguished the issue in Jones' case from *Mullaney* because the prosecution still had the burden of proving all essential elements of the crime charged.<sup>94</sup> Therefore, the jury instructions did not require Jones disprove an essential element; rather, they merely required that he raise an affirmative defense to overcome the presumption of the voluntariness of his acts.<sup>95</sup> Since a voluntary act is not an essential element, it is constitutionally permissible to place the burden on the defendant to prove the involuntariness of his actions and the trial court can instruct the jury to that effect.<sup>96</sup>

#### PRINCIPAL CASE

On June 2, 2004, Brian Seymore did not return to the Frontier Corrections System as required and such a violation constituted escape.<sup>97</sup> Seymore recognized his violation and tried to turn himself in; however, the jail declined to take him without an arrest warrant.<sup>98</sup> Eventually, authorities arrested and charged Seymore with escape and a jury subsequently convicted Seymore.<sup>99</sup>

#### *Majority Opinion (Chief Justice Voigt, joined by Justices Kite and Burke)*

The issue on appeal for the Wyoming Supreme Court turned on whether the trial judge "misinformed" the jury regarding the intent element of escape.<sup>100</sup> Seymore alleged error occurred because the trial judge did not instruct the jury as to the essential element of *mens rea*.<sup>101</sup> Specifically, Seymore argued the trial court erred when it failed to instruct the jury on the specific intent necessary for the crime of escape.<sup>102</sup> The court held the trial judge incorrectly informed the jury regarding the *mens rea* element of escape and subsequently reversed and remanded for new trial.<sup>103</sup>

First, the court reviewed this case under the plain error standard because Seymore did not object to the jury instructions at trial.<sup>104</sup> Second, the court addressed Seymore's argument that escape was a specific intent crime and rejected

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<sup>94</sup> *Jones*, 527 S.E.2d at 707.

<sup>95</sup> *Id.* at 706–07.

<sup>96</sup> *See supra* notes 84–95 and accompanying text.

<sup>97</sup> *Seymore v. State*, 152 P.3d 401, 403 (Wyo. 2007).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 405.

<sup>102</sup> *Seymore*, 152 P.3d at 405.

<sup>103</sup> *Id.* at 411.

<sup>104</sup> *Id.* at 404; *see also* note 10 and accompanying text (explaining the plain error standard).

the argument because previous cases established escape as a general intent crime.<sup>105</sup> As a result, the court found the non-instruction on the specific intent element correct.<sup>106</sup> Nevertheless, the court held the jury instructions insufficient because, even for a general intent crime, the state must prove the voluntariness of the actor's criminal conduct.<sup>107</sup>

In its reasoning, the court recognized *mens rea* as an essential element to almost every crime charged, and since the court equated voluntariness with *mens rea*, an actor is not criminally responsible for his actions unless the state proves he acted voluntarily.<sup>108</sup> Therefore, the *Seymore* court found instructing a jury on the voluntary act requirement as paramount; otherwise, the trial court commits reversible error.<sup>109</sup> Read broadly, this holding implies that a trial judge must now instruct on a voluntary act in each and every case, and if it does not, the case is subject to reversal.<sup>110</sup>

Although the holding on the first issue required reversal, the Wyoming Supreme Court also addressed a second issue which turned on whether the prosecutor committed prosecutorial misconduct.<sup>111</sup> *Seymore* alleged nine such instances and the court found the "cumulative effect" of these instances also required reversal.<sup>112</sup>

### *Dissenting Opinion (Justice Hill)*

Justice Hill's analysis began by recognizing no argument of voluntariness appeared in *Seymore*'s brief; consequently, the court raised the issue for *Seymore* and framed his argument on appeal.<sup>113</sup> The dissent noted that, as a general rule, the court should not define the scope of the appellant's argument nor raise an issue for him; on the contrary, the defendant himself must meet this obligation.<sup>114</sup> As Justice Hill argued, *Seymore* neglected to establish and argue the issue of

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<sup>105</sup> *Seymore*, 152 P.3d at 406 (citing *Slaughter v. State*, 629 P.2d 481, 483 (Wyo. 1981)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (quoting *Rowe v. State*, 974 P.2d 937, 939 (Wyo. 1999)).

<sup>108</sup> *Id.* at 405–06.

<sup>109</sup> *Id.* at 407. A fundamental error, which requires reversal, occurs when the trial judge does not instruct the jury as to all the essential elements of the crime charge. *Id.* *But see supra* note 18 and accompanying text (discussing that the defendant must now also show prejudice before a reversal is warranted).

<sup>110</sup> *Seymore*, 152 P.3d at 407.

<sup>111</sup> *Id.* at 403, 407.

<sup>112</sup> *Id.* at 407–11. The discussion of prosecutorial misconduct is not part of this case note and will not be addressed.

<sup>113</sup> *Id.* at 411 (Hill, J., dissenting).

<sup>114</sup> *Id.* (Hill, J., dissenting) (citing *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring)).

voluntariness on appeal, which forfeits “any claim of error.”<sup>115</sup> Therefore, the court overstepped its boundaries when it framed the issue for Seymore on appeal.<sup>116</sup>

*Dissenting Opinion (Justice Golden)*

In a second dissenting opinion, Justice Golden disagreed with the majority and argued the statute defines a strict liability crime and not a general intent crime.<sup>117</sup> Justice Golden argued the legislature purposely created the escape statute without including a *mens rea* element.<sup>118</sup> To support this argument, Justice Golden referred to a different statute which requires a showing of intentional conduct in its definition of “escape from a work release program.”<sup>119</sup> Therefore, according to Justice Golden, the statute applicable to Seymore’s case defines a strict liability crime; otherwise, the legislature would have included an intentional act as it did with the other escape statute.<sup>120</sup> Justice Golden concluded that the trial judge correctly barred a jury instruction on *mens rea* as an essential element of the crime of escape.<sup>121</sup>

ANALYSIS

The Wyoming Supreme Court erroneously held that trial judges must automatically instruct juries on a voluntary act.<sup>122</sup> This section will discuss several arguments in support of the proposition that the court erred in its holding and will articulate why trial judges usually do not instruct a jury, *sua sponte*, on a voluntary act.<sup>123</sup> First, a presumption of voluntariness exists and the court disregarded its own precedent establishing this presumption.<sup>124</sup> Second, a presumption of voluntariness shifts the burden of proof to the defendant; however, nothing in the record indicates Seymore introduced any evidence alleging his actions were involuntary.<sup>125</sup> Lastly, it makes sense not to instruct jurors, *sua sponte*, on a voluntary act because such an instruction causes great jury confusion.<sup>126</sup>

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<sup>115</sup> *Seymore*, 152 P.3d at 411 (Hill, J., dissenting).

<sup>116</sup> *Id.* (Hill, J., dissenting).

<sup>117</sup> *Id.* (Golden, J., dissenting).

<sup>118</sup> *Id.* (Golden, J., dissenting).

<sup>119</sup> *Id.* (Golden, J. dissenting) (arguing Wyoming Statute § 7-16-309 “defines an escape from a work release program to require an ‘intentional act’”).

<sup>120</sup> *Seymore*, 152 P.3d at 411 (Golden, J. dissenting).

<sup>121</sup> *Id.* (Golden, J., dissenting).

<sup>122</sup> See *infra* notes 127–68 and accompanying text.

<sup>123</sup> *Id.*

<sup>124</sup> See *infra* notes 127–40 and accompanying text.

<sup>125</sup> See *infra* notes 141–51 and accompanying text.

<sup>126</sup> See *infra* notes 152–68 and accompanying text.

*Presumption of Voluntariness Exists*

Defendants continuously try to argue the burden is on the state to prove they acted voluntarily.<sup>127</sup> Nevertheless, several jurisdictions recognize that even though a voluntary act is a minimum requirement for the imposition of criminal liability, a jury may infer the voluntariness of the defendant's actions.<sup>128</sup> Unless there is evidence to the contrary, the defendant does not receive an instruction on voluntariness.<sup>129</sup> Yet, the *Seymore* court found instructing a jury on the voluntary act requirement essential to withstand a conviction because the court equated voluntariness with an essential element.<sup>130</sup> This is clearly erroneous considering the vast amount of authority rejecting voluntariness as an essential element.<sup>131</sup> Indeed, the court even ignores its own precedent which allows for the presumption of voluntariness.<sup>132</sup>

For example, *Brooks v. State* allows for a presumption of sanity and places upon the defendant the burden to prove his actions were involuntary.<sup>133</sup> *Polston v. State* specifically states every man is presumed "normal" and in possession of ordinary sense and a defendant who raises an involuntariness defense must prove otherwise.<sup>134</sup> Furthermore, *Fulcher v. State* allows the presumption of voluntariness and places the burden on the defendant to prove he acted involuntarily by asserting the defense of unconsciousness.<sup>135</sup> In short, Wyoming precedent allows for the presumption of voluntariness and requires the defendant raise the involuntariness defense.<sup>136</sup> No doubt, *Seymore* contradicts the proposition that previous cases allow

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<sup>127</sup> *State v. Lara*, 902 P.2d 1337, 1338–39 (Ariz. 1995); *State v. Baird*, 604 N.E.2d 1170, 1176 (Ind. 1992); *Mooney v. State*, 105 P.3d 149, 154–55 (Alaska Ct. App. 2005).

<sup>128</sup> *Walker v. State*, 652 P.2d 88, 91 (Alaska 1982); *People v. Jamison*, 756 N.E.2d 788, 801 (Ill. 2001); *Baird*, 604 N.E.2d at 1176.

<sup>129</sup> *Polston v. State*, 685 P.2d 1, 6 (Wyo. 1984); *Fulcher v. State*, 633 P.2d 142, 147 (Wyo. 1981); *Brooks v. State*, 706 P.2d 664, 667 (Wyo. 1985) (recognizing the insanity defense); *Lara*, 902 P.2d at 1338; *Baird*, 604 N.E.2d at 1176; *Mooney*, 105 P.3d at 154–55; *Walker*, 652 P.2d at 91.

<sup>130</sup> *Seymore v. State*, 152 P.3d 401, 407 (Wyo. 2007).

<sup>131</sup> See, e.g., Farahany & Coleman, *supra* note 32, at 139 n.174 (articulating the criminal law allows the inference that individuals can control their behavior and causes their actions "by the exercise of [their] capacities and control. Thus, one can infer a defendant chose to act from proof that he engaged in the prohibited act. Because criminal law allows this inference, the question whether the defendant engaged voluntarily in an act does not usually arise"); *Clark v. Arizona*, 548 U.S. 735, 766 (2006) (allowing for the presumption of sanity); *Mooney*, 105 P.3d at 154–55 (holding a voluntary act fundamental to criminal liability, but the defendant must raise the issue; otherwise, no jury instruction is given).

<sup>132</sup> See *infra* notes 133–36 and accompanying text.

<sup>133</sup> 706 P.2d at 667.

<sup>134</sup> 685 P.2d at 6.

<sup>135</sup> 633 P.2d at 145, 147.

<sup>136</sup> Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 13–20 (2007) (articulating a presumption of voluntariness and stating

for the presumption of voluntariness; yet, the *Seymore* court, without discussing or explicitly overruling these cases, implicitly held a voluntary act as an essential element to every crime charged.<sup>137</sup>

When the Wyoming Supreme Court reviews jury instructions on appeal, with no objection given at trial, the court will uphold the jury instructions as long as the trial court correctly presented the law to the jurors and included in the instructions all relevant issues introduced at trial.<sup>138</sup> According to previous discussion, established law in Wyoming prior to *Seymore* required the defendant to raise the issue of voluntariness and the defendant did not automatically get a jury instruction on voluntariness.<sup>139</sup> In this regard, the trial judge in *Seymore* did not commit plain error and the trial judge gave the jury adequate instructions because no requirement existed, *sua sponte*, to instruct the jurors on a voluntary act.<sup>140</sup>

### *Presumption of Voluntariness Shifts the Burden of Proof*

Another argument supporting the proposition that the Wyoming Supreme Court incorrectly decided *Seymore* arises from the fact that a presumption shifts the burden of proof.<sup>141</sup> This means the defendant must raise an affirmative defense and, at the very least, produce some evidence.<sup>142</sup> In *Seymore*, the statute relevant to the crime charged does not mention a voluntary act; subsequently, voluntariness is neither statutorily defined as an essential element, nor as a statutory defense.<sup>143</sup> Accordingly, one must assume the legislature intended to retain the common law defense of involuntariness.<sup>144</sup> In these cases, a presumption of voluntariness exists and the Wyoming Supreme Court has allocated at least the burden of production,

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“the Wyoming courts impose on the defendant the burden of raising the ‘defense’ of involuntariness and the burden of proving by a preponderance of the evidence that his acts were performed involuntarily”).

<sup>137</sup> *Seymore*, 152 P.3d at 406–07; see also *supra* notes 12–17, 108–10 and accompanying text (articulating the Wyoming Supreme Court recognizes *mens rea* as an essential element to almost every crime charged, and since the court equates voluntariness with *mens rea*, an actor is not criminally liable for his actions unless the state proves he acted voluntarily). Therefore, *Seymore* implicitly stands for the proposition that trial courts must now instruct on a voluntary act in each and every case because, according to the court, voluntariness is an essential element. *Seymore*, 153 P.3d at 406–07.

<sup>138</sup> *Seymore*, 152 P.3d at 404.

<sup>139</sup> See *supra* notes 133–36 and accompanying text.

<sup>140</sup> *Id.* As already articulated, cases such as *Brooks*, 706 P.2d at 667, *Polston*, 685 P.2d at 6, and *Fulcher*, 633 P.2d at 145, 147, allow for the presumption of voluntariness and place the burden on the defendant to raise the issue of voluntariness in order to receive a jury instruction. *Id.*

<sup>141</sup> STRONG ET. AL., *supra* note 76, § 343, at 520.

<sup>142</sup> *Id.* § 336, at 508.

<sup>143</sup> See *supra* note 7 and accompanying text.

<sup>144</sup> WYO. STAT. ANN. § 6-1-102(b) (West 2008) (stating “[c]ommon law defenses are retained unless otherwise provided by this act”).

and sometimes the burden of persuasion, in regard to the voluntariness defense.<sup>145</sup> Thus, according to Wyoming, and other jurisdictions, the defendant bears at least the burden of production on the issue of voluntariness before he receives a jury instruction.<sup>146</sup> However, no indication appeared from the record that Seymore argued the involuntariness of his bodily movements nor did he introduce any evidence at trial on the matter.<sup>147</sup>

Additionally, nothing in the record indicated Seymore failed to return to FCS involuntarily.<sup>148</sup> No evidence emerged that Seymore failed to return to FCS due to a car accident, disabling injuries, or a natural misfortune such as being tied down or drugged.<sup>149</sup> Nonetheless, the court injected the issue of voluntariness, contrary to precedent, and thereby framed the issue for Seymore.<sup>150</sup> This is certainly inconsistent with prior decisions and creates unpredictability for future litigation as to who injects the issue of voluntariness: the defendant, the state, or the court?<sup>151</sup>

#### *Automatic Jury Instruction on Voluntariness May Cause Confusion*

A final argument supporting the position that the Wyoming Supreme Court erred in its holding arises from the notion that an automatic instruction on a voluntary act causes jury confusion.<sup>152</sup> For example, in *People v. Bui*, the Appellate Court of Illinois held the lower court properly denied a jury instruction requiring an instruction on a voluntary act, because little evidence indicated the defendant acted involuntarily.<sup>153</sup> Furthermore, the disputed issue at trial did not center on voluntariness, so the proposed jury instructions would have only contributed to jury confusion because of the uncertain significance of including voluntariness in the instructions.<sup>154</sup> In other words, if the defendant does not raise the issue of

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<sup>145</sup> *Id.*; see e.g., *Polston*, 685 P.2d at 6 (placing the burden on the defendant to prove the defense); *Brooks*, 706 P.2d at 667 (“requiring the accused to prove the affirmative defense of mental illness or deficiency”); *Fulcher*, 633 P.2d at 147 (holding “the burden rests upon the defendant to establish this defense”).

<sup>146</sup> See, e.g., *Brooks*, 706 P.2d at 667; *Fulcher*, 633 P.2d at 147; *Mooney*, 105 P.3d at 155; *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997); *State v. Jones*, 527 S.E.2d 700 (N.C. Ct. App. 2000).

<sup>147</sup> *Seymore*, 152 P.3d at 411 (Hill, J., dissenting).

<sup>148</sup> *Id.* at 403–05.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 411 (Hill, J., dissenting) (arguing there was no indication from the record that Seymore raised the issue of voluntariness).

<sup>151</sup> See *supra* notes 141–50 and accompanying text.

<sup>152</sup> See *infra* notes 153–68 and accompanying text.

<sup>153</sup> 885 N.E.2d 506, 531 (Ill. App. Ct. 2008).

<sup>154</sup> *Id.*

voluntariness himself, the jurors likely become confused as to why they have to consider the issue at all.<sup>155</sup>

The Alaska Court of Appeals came to a similar conclusion in *Nelson v. State*.<sup>156</sup> In that case, the jury instruction given at trial turned on whether the defendant recklessly caused the result of an assault.<sup>157</sup> On appeal, Nelson objected to this instruction because the trial judge did not require a finding that Nelson engaged in the conduct “knowingly.”<sup>158</sup> Thus, according to Nelson, not only should the state have proved her recklessness in causing the result, but the state also should have proved she acted knowingly or voluntarily.<sup>159</sup>

In its brief, the prosecution agreed that the assault statutes, which charged Nelson for her criminal conduct, contained the implied “requirement” that the conduct be undertaken knowingly or voluntarily.<sup>160</sup> However, the state argued a separate instruction on voluntariness was unnecessary, because by determining recklessness the jury also determines a sequence of acts including the defendant’s awareness and voluntariness of these acts.<sup>161</sup> Any further instruction on recklessness would have only served to confuse the jurors because they understood the “everyday use” and ordinary meaning of the word reckless.<sup>162</sup> The Alaska Court of Appeals agreed and upheld the instructions given at trial.<sup>163</sup> The court reasoned that since the issue turned on whether Nelson recklessly caused the result, jurors “will approach their task correctly if they are told the statutory meaning of . . . recklessly.”<sup>164</sup>

The concept of voluntariness appears difficult even for judges, practitioners, and commentators to understand; therefore, it is unfair to expect jurors to understand voluntariness. Furthermore, without some conduct to attach

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<sup>155</sup> *Id.*

<sup>156</sup> 927 P.2d 331 (Alaska Ct. App. 1996). In that case, Nelson went to a Sears store to satisfy her “compulsive urge to shoplift.” *Id.* at 331. A security guard (Davis) followed Nelson and her companion (Matthews) into the parking lot where he confronted Nelson. *Id.* at 332. A scuffle arose and another security guard (Jasso) arrived at the scene to help out Davis. *Id.* Nelson decided to get in her truck; she put her truck in drive and after three attempts of driving towards the men, she finally succeeded in running over Jasso, causing bodily injury, and, at the same time, causing Davis to fear for his life. *Id.*

<sup>157</sup> *Id.* at 333.

<sup>158</sup> Brief for Appellee at 11, *Nelson v. Alaska*, 927 P.2d 331 (Alaska Ct. App. 1996) (No. A-5688).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 12.

<sup>162</sup> *Id.* at 13–14.

<sup>163</sup> *Nelson*, 927 P.2d at 334.

<sup>164</sup> *Id.* at 333–34, 334 n.4.

voluntariness to, the jury will likely be confused as to what conduct it has to find voluntary or involuntary.<sup>165</sup> Additionally, how does that conduct interact with the requisite mental state such as recklessness?<sup>166</sup> As becomes evident from the state's brief in *Nelson*, the jury already considers a sequence of acts and uses common sense to determine the voluntariness of these acts.<sup>167</sup> Therefore, a separate jury instruction on voluntariness is unnecessary.<sup>168</sup>

#### CONCLUSION

The Wyoming Supreme Court erred in holding that juries must automatically be instructed on a voluntary act.<sup>169</sup> In deciding *Seymore*, the Wyoming Supreme Court passed down a landmark decision because it dramatically changes existing practice of not instructing jurors on a voluntary act in the State of Wyoming.<sup>170</sup> Furthermore, *Seymore* will undoubtedly cause great impairment because of its likelihood to confuse judges, practitioners and jurors alike.<sup>171</sup> Unfortunately, this fundamental change in Wyoming's criminal law was based on a hasty decision by the Wyoming Supreme Court and the court misspoke when it said a voluntary act is an essential element which requires an automatic jury instruction.<sup>172</sup>

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<sup>165</sup> *Bui*, 885 N.E.2d at 531; *Nelson*, 927 P.2d at 333–34, 334 n.4; Brief for Appellee, *supra* note 158, at 11–14.

<sup>166</sup> *See supra* note 165 and accompanying text.

<sup>167</sup> *See supra* notes 160–62 and accompanying text.

<sup>168</sup> *See supra* notes 152–67 and accompanying text.

<sup>169</sup> *See supra* notes 24–168 and accompanying text.

<sup>170</sup> *See supra* notes 127–51 and accompanying text.

<sup>171</sup> *See supra* notes 152–68 and accompanying text.

<sup>172</sup> *See supra* notes 127–51 and accompanying text.