in which event the objection to the sufficiency must be raised before trial or it will be deemed to have been waived. The entering of a plea of guilty is not a trial but the waiver thereof, and in such a case 955.09 (3) does not apply because the requirement of that section has not happened in that there has yet been no trial. (Language in Spoo v. State, 219 Wis. 285 to the contrary, overruled.) State v. Lampe, 26 W (2d) 646, 133 NW (2d) 349.

955.09 (6), Stats. 1963, which authorizes a trial court to proscribe a specified period of time during which a defendant may be held in custody or have his bail continued pending issuance of a new warrant where a complaint has been dismissed because of defect in prior proceedings, does not purport to be a statute of limitations barring institution of a new action if the action is not commenced within the time specified, for the only consequence to the state flowing from such failure is that the prisoner must be released, and if a new prosecution is thereafter commenced the defendant must be located. Blackwell v. State, 42 W (2d) 615, 167 NW (2d) 587.

Defendant's claim that the complaint was vitiated by the arresting officer's statement at the preliminary hearing was devoid of merit where, the contention was made for the first time after the state had put in its case, and hence any error was waived. Williams v. State, 45 W (2d) 44, 172 NW (2d) 31.

971.32 History: 1969 c. 255; Stats. 1969 s. 971.32.

Comment of Judicial Council, 1969: Present s. 955.39. [Bill 603-A]

971.33 History: 1969 c. 255; Stats. 1969 s. 971.33.

Comment of Judicial Council, 1969: Present s. 955.395. [Bill 603-A]

An indictment for arson alleging that accused set fire to a store building occupied by him and owned by M was not bad for variance, because the proof was that the building was owned by M and the lower part occupied by accused and the upper part by another. State v. Kroscher, 24 W 64.

An information charging burglary with intent to steal goods of B was sustained by proof that goods were in his actual possession, though they were in fact the property of C. Neubrandt v. State, 53 W 89, 9 NW 824.

It is sufficient to prove that when the offense of larceny of timber was committed, either actual or constructive possession or general or special property in the whole or any part of the land was in the person or company alleged in the information to be the owner. Golonbieski v. State, 101 W 333, 77 NW 189.

971.34 History: 1969 c. 255; Stats. 1969 s. 971.34.

Comment of Judicial Council, 1969: Present s. 955.40. [Bill 603-A]

971.35 History: 1969 c. 255; Stats. 1969 s. 971.35.

Comment of Judicial Council, 1969: Present s. 955.24. [Bill 603-A]

See note to sec. 7, art. I, on nature of accusation, citing Rowan v. State, 30 W 129, and other cases.

An information which alleges "that J. B., with a club," etc., "inflicted a mortal wound upon the body," etc., "of one H. S. with a premeditated design to effect the death of said H. S., from which mortal wound he did die," and "that J. B., from premeditated design to effect the death of H. S., did the said H. S. feloniously slay, kill and murder," charges the crime of murder in the first degree. Bernhardt v. State, 82 W 23, 51 NW 1009.

The word "wilful" in an information does not supply the necessary element of premeditation required to charge murder in the first degree, the words "malice aforethought" being required by the statute as well as by the common law. In re Carlson, 176 W 538, 186 NW 722.

An indictment or information for manslaughter need not state the offense in the language of sec. 4660, Stats. 1917, "did feloniously kill and slay the deceased," but may be good if it alleges that the accused aided another in wilfully and feloniously murdering the deceased, which includes every element of a charge of first-degree manslaughter. In re Carlson, 176 W 538, 186 NW 722.

An information for murder in the exact language of 355.24, Stats. 1925, is sufficient. Deerkop v. State, 196 W 571, 219 NW 278.

971.36 History: 1969 c. 255; Stats. 1969 s. 971.36.

Comment of Judicial Council, 1969: Present s. 955.31. [Bill 603-A]

An information cannot be sustained by evidence of acts committed before the time stated. State v. Cornhauser, 74 W 42, 41 NW 959.

Embezzlement may be proved by showing a general shortage in defendant's accounts without proving the conversion of a specific item. Secor v. State, 118 W 621, 95 NW 942.

See note to sec. 8, art. I, on double jeopardy, citing Anderson v. State, 221 W 78, 265 NW 210.

955.31 (4) does not apply to preliminary hearings. State v. Fish, 20 W (2d) 431, 122 NW (2d) 381.

CHAPTER 972.

Criminal Trials.

972.01 History: 1969 c. 255; Stats. 1969 s. 972.01.

Comment of Judicial Council, 1969: Substantially present s. 957.14. [Bill 603-A]

Editor's Note: The rules governing the selection of the jury and the charge to the jury in a civil action are set out in various sections of chapters 255 and 270 and in relevant decisions of the supreme court. The notes of decisions set out in three groups below are taken from reports of decisions in criminal actions decided prior to 1970 and are generally consistent with the law applicable to civil actions.

1. Scope of section.
2. Selection of jury.
3. Charge to jury.

1. Scope of Section.

All statutory rules of civil trials are not made applicable to criminal trials by 357.14, Stats. 1953, but only those covering the subjects expressly enumerated therein. The right of a trial court to make a finding of fact after return of the verdict is not embraced within any of the categories enumerated in said section. Heyroth v. State, 275 W 104, 81 NW (2d) 56.

Only those rules of criminal procedure expressly enumerated in 957.14, Stats. 1963, are applicable in a criminal trial, and the provisions of 270.205 which prescribe that on the trial not more than one attorney on each side shall examine or cross-examine a witness unless the judge otherwise has ordered, are not included therein. Dascenzo v. State, 26 W (2d) 225, 132 NW (2d) 231.

2. Selection of Jury.

Section 4701, R. S. 1878, is confined to challenges for cause. Rounds v. State, 57 W 45, 14 NW 865.

The presumption is that jurors were regularly drawn. Osgood v. State, 64 W 472, 25 NW 529.

The order of challenging jurors is in the discretion of the trial court. Santry v. State, 67 W 65, 30 NW 226.

Where impressions are formed on rumor or newspaper statements which the juror feels confident he can dismiss, or has no fixed belief or prejudice and can say he can fairly try the prisoner on the evidence freed from the influence of the impressions, he is competent. Baker v. State, 88 W 140, 59 NW 570.

In a prosecution for murder, the announcement of counsel for the defendant that "we accept the jury", constitutes a waiver of any irregularity in the selection of the jurors. Flynn v. State, 97 W 44, 72 NW 373.

Silence when objection ought to be made works a waiver as much as express assent. Emery v. State, 101 W 627, 78 NW 145.

An unconditional acceptance of the jury, after it is complete, by counsel for defendant in a criminal case, is a waiver of all objections to the manner of its selection or to the qualifications of the jurors. Cornell v. State, 104 W 527, 80 NW 745.

Where each commissioner makes a partial list and the aggregate of such lists equals the number of names to be furnished and the 3 lists are delivered to the clerk and treated as one the irregularity is immaterial. Ullman v. State, 124 W 602, 103 NW 6.

The right to make an objection to the entire panel exists by well established practice. It is immaterial how the question of validity of a panel is raised so long as the grounds thereof are brought definitely to the attention of the court. It is good practice to make the challenge to the array in writing. The grounds of a challenge to the array should be specifically stated. The right of challenge should be exercised before commencing to empanel the jury, otherwise it is deemed waived. It is proper to treat the grounds assigned by the challenge, which are not admitted by the adverse party, as of issue and to summarily try such issue. Ullman v. State, 124 W 602, 103 NW 6.

Examination of a juror as to his belief in the guilt of defendant indicted by a grand jury is not within the proper scope of such examination. Niezorawski v. State, 131 W 166, 111 NW 250.

Objection to a juror because of his inability to understand English must be made by challenge to the juror or it is waived. Okershauser v. State, 136 W 111, 116 NW 769.

A juror who says he will give the defendant the benefit of the presumption of innocence, disregard any opinion he may have formed or expressed as to defendants' guilt or innocence, and try the defendant impartially on the evidence given in court and on that alone, is competent. Mainville v. State, 173 W 12, 179 NW 764.

When selecting names of electors to serve as jurors it is improper for the commissioners to consider sex but if the commissioners do give that factor consideration it is not an irregularity of which a litigant can complain. Petition of Salen, 231 W 489, 286 NW 5.

The fact that the jury was selected from a panel consisting of only 33 jurors, instead of the 36 required by statute, was not prejudicial error, it being within the discretion of the trial judge to determine the necessity of drawing additional names. State v. Zuehlke, 239 W 111, 300 NW 746.

The failure of the commissioners to follow the statute must be shown by affirmative proof. The mere absence of a jointly certified list is not enough. State v. Nutley, 24 W (2d) 527, 129 NW (2d) 155.

Literal adherence to ch. 255, Stats. 1965, and particularly 255.04, is not demanded, substantial compliance being all that is required. State v. Bond, 41 W (2d) 219, 163 NW (2d) 601.

A defendant challenging the validity of a jury array has the burden of establishing a clear showing or prima facie case of discrimination which, once presented, shifts the burden to the prosecution. To succeed on a challenge to the jury array the defendant must show a systematic exclusion of some representative unit of citizens. A systematic exclusion can be shown by the direct testimony of the jury commissioners or by proving a disproportionate representation of a cohesive unit of citizens on the jury array over a period of time. There should be no systematic exclusion of any economic, social, religious, racial, political, or geographical groups of the community. State v. Holstrom, 43 W (2d) 465, 168 NW (2d) 574.

Application of psychological techniques to the problem of jury bias. Boehm, 1968 WLR 734.

3. Charge to Jury.

Where the judge read to the jury from his written charge 3 forms of verdict, and afterwards wrote out the same forms separately and passed them to the jury before they retired, defendant's counsel expressly consenting thereto, there was no error, nor was such consent necessary. State v. Glass, 50 W 218, 6 NW 500.

A failure to charge the jury cannot be assigned as error where counsel, although informed before the argument that no charge would be given, did not request the giving of

any instruction. Hepler v. State, 58 W 46, 16 NW 42.

It is not error to neglect to charge as to the definition of "nighttime" contained in ch. 85, Laws 1895, where no request was made for such charge. Shaffel v. State, 97 W 377, 72 NW 888.

A requested instruction should be so drawn that it can be given without change. In prosecutions for serious crimes a requested instruction should not be refused on account of a mere verbal inaccuracy, but the trial court should correct the inaccuracy and give the instruction. Montgomery v. State, 128 W 183, 107 NW 14.

It is not error to refuse requested instructions which are adequately and fairly covered in the general charge or which relate to mere evidentiary matters. Vogel v. State, 138 W 315, 119 NW 190.

Refusals to instruct on the subject of reasonable doubt, whether or not of an explanatory nature, do not constitute error if the subject is covered by a proper statement of the rule in the general charge. Miller v. State, 139 W 57, 119 NW 850.

Where a charge was so inadeqate that it seems probable that the jury did not understand it and so gave it no effect, it did not constitute reversible error. Miller v. State, 139 W 57, 119 NW 850.

Combined instructions which may have led the jury to believe that the court viewed testimony relating to an alibi with grave suspicion invaded the province of the jury and were erroneous. Roen v. State, 182 W 515, 196 NW 825.

Notwithstanding the testimony as to the character of the accused was not very satisfactory, it was testimony which the jury had the right to consider without disparagement by the court; and an instruction which tended to lead the jury to believe that the court considered the testimony of little or no value was erroneous. Roen v. State, 182 W 515, 196 NW 825.

In view of the provision in 270.21, Stats. 1941, that each instruction asked by counsel to be given the jury shall be given without change or refused in full, if an instruction cannot be given as requested it is not error to refuse it entirely. State v. Legg, 243 W 449, 10 NW (2d) 187.

Under 270.21, Stats. 1955, a trial court may properly refuse to give an instruction where a portion of it is improper; and where the last sentence of a requested instruction was not applicable and the substance of the first portion thereof was adequately covered in different language in the instructions given, the refusal to give the requested instruction was not error. Zenou v. State, 4 W (2d) 655, 91 NW (2d) 208.

An erroneous (and prejudicial) instruction on a given subject in a criminal case is not cured by the fact that the law is correctly stated elsewhere, since it cannot be known whether the jury was guided by the correct rule or by the erroneous one. Kwosek v. State, 8 W (2d) 640, 100 NW (2d) 339, 101 NW (2d) 103.

An instruction in a criminal case to the effect that should the jury make a certain finding "you would disregard the undisputed facts and the law applicable to this case" is improper. State v. Weinman, 20 W (2d) 106, 121 NW (2d) 295.

A court in reinstructing a jury fulfills its duty when it satisfies the jury it has complied with the request. State v. Morrissy, 25 W (2d) 638, 131 NW (2d) 366.

See note to 274.37, on criminal actions, citing Neuenfeldt v. State, 29 W (2d) 20, 138 NW (2d) 252.

A contention that sua sponte cautionary instructions should have been given because an alleged coconspirator witness invoked his privilege had no merit, for whether or not such instructions should be asked for in a case is a matter of trial strategy and the trial court at the risk of error is not required to give such instruction sua sponte. State v. Yancey, 32 W (2d) 104, 145 NW (2d) 145.

Where defendant requested a criminal case instruction by number and after the jury had been instructed objected to part of it, his objection was timely but was deficient because his objection was not specific and did not include his suggested language. State v. Halverson, 32 W (2d) 503, 145 NW (2d) 739.

A trial court is not required to give a requested instruction unless the evidence reasonably requires it, even though the requested instruction asserts a correct rule of law. Belohlavek v. State, 34 W (2d) 176, 148 NW (2d) 665.

Error cannot be predicated upon failure of a trial court to instruct the jury to disregard certain testimony which had been objected to in the absence of a request for such instruction. Whitty v. State, 34 W (2d) 278, 149 NW (2d) 557.

Where in a criminal case as a matter of trial strategy counsel has elected to waive a request for possible instructions, defendant is bound thereby. Green v. State, 38 W (2d) 361, 156 NW (2d) 477.

In determining whether there has been any error in giving instructions to the jury, they must be considered as a whole. State v. Davidson, 44 W (2d) 177, 170 NW (2d) 755.

972.02 History: 1969 c. 255; Stats. 1969 s. 972.02.

Comment of Judicial Council, 1969: This section combines the present ss. 957.01 and 957.02. It should be noted that this bill does not contain any provision for a 6-man jury. Sub. (2) permits the parties, with the approval of the court, to stipulate for a jury of less than 12, however. [Bill 603-A]

On rights of accused (trial by jury) see notes to sec. 1, art. I.

Where grand jurors' names do not appear in an indictment the fact that one of them, without knowledge of defendant or of his counsel, was on a jury which rendered a verdict of guilty is ground for a new trial. Bennet v. State, 24 W 57.

A defendant in a criminal case is not required to submit his case to a jury, but when he does so he takes his chances upon the suitability of its members for jury service. Newbern v. State, 222 W 291, 260 NW 236, 268 NW 871.

Defendant need not himself waive a jury where his counsel does so in open court in his presence and he does not object. State ex rel.

Derber v. Skaff, 22 W (2d) 269, 125 NW (2d) 561; Dascenzo v. State, 26 W (2d) 225, 132 NW (2d) 231.

A 6-man jury trial may not be granted unless the state consents. State ex rel. Sauk County D. A. v. Gollmar, 32 W (2d) 406, 145 NW (2d) 670.

A district attorney may not refuse as a matter of practice to consent to a trial to the court or with a jury of 6 in all misdemeanor cases in county court in order to force the trial to be held in circuit court. State ex rel. Murphy v. Voss, 34 W (2d) 501, 149 NW (2d) 595.

Waiver of trial by jury in a criminal action. 8 WLR 265.

972.03 History: 1969 c. 255; Stats. 1969 s. 972.03.

Comment of Judicial Council, 1969: This is the present s. 957.03 except that the number of peremptory challenges in first degree murder cases is reduced to 6. Experience has indicated that in most first degree murder cases the existing provisions for 12 are unneeded and merely increase time and expense. [Bill 603-A]

No rule of practice can be adopted which abridges or destroys the defendant's right of challenge. Schumaker v. State, 5 W 324.

The right of challenge should be exercised before commencing to impanel the jury, otherwise it should be deemed waived. It is proper practice to treat the grounds assigned as the challenge, which are not admitted by the adverse party, as of issue and to summarily try such issue. Exceptions should be taken and the matter embodied in a bill of exceptions in order to have the matter reviewed. Ullman v. State, 124 W 602, 103 NW 6.

The denial of defendants' request for additional peremptory challenges was not error, in the absence of anything in the record indicating that the jury as chosen was not fair and impartial. Pollack v. State, 215 W 200, 253 NW 560, 254 NW 471.

972.04 History: 1969 c. 255; Stats. 1969 s. 972.04.

Comment of Judicial Council, 1969: This section retains the present system of exercising challenges found in s. 957.04. The section has been completely redrafted, however, to make the procedure more clear. [Bill 603-A]

Where the panel is complete and the jury is accepted, though not sworn, it is too late for the accused to challenge though his peremptory challenges are not exhausted. State v. Cameron, 2 Pin. 490.

The right to peremptory challenges is purely a creature of the statute, and it cannot be extended. Schoeffler v. State, 3 W 823, 839.

It is error to require defendant to exercise 4 peremptory challenges at one time or waive 4. Schumaker v. State, 5 W 324.

The statutory method of striking names of jurors is mandatory. Gallagher v. State, 26 W 423.

972.05 History: 1969 c. 255; Stats. 1969 s. 972.05.

Comment of Judicial Council, 1969: Present s. 957.05. [Bill 603-A]

972.06 History: 1969 c. 255; Stats. 1969 s. 972.06.

Comment of Judicial Council, 1969: Present s. 957.08. [Bill 603-A]

If counsel accompany the jury upon a view of the place where a crime is alleged to have been committed they should not be allowed while there to discuss localities or call the attention of the jury to the facts. The object of a view is merely to assist the jurors in weighing and applying the evidence. The knowledge derived from the view itself is no part of the evidence. Sasse v. State, 68 W 530, 32 NW 849.

See note to 274.37, relating to criminal actions, citing Parb v. State, 143 W 561, 128 NW 65.

In an action for unlawful possession of intoxicating liquor, the fact that the jury viewed the premises at defendant's request was no ground for complaint; and the fact that the sheriff and the prohibition officer accompanied the jury to the premises was no ground for complaint, where the court directed them to do so in defendant's presence and he made no objection. The act of the jury in opening a door to a room other than the one in which the liquor was found, which was contrary to directions given by the court, was not reversible error, no intentional disobedience appearing on the part of the jury. Nelson v. State, 186 W 648, 203 NW 343.

972.07 History: 1969 c. 255; Stats. 1969 s. 972.07.

Comment of Judicial Council, 1969: New. Based on the majority view as found in the case law of this and other states. [Bill 603-A]

On prosecutions (double jeopardy) see notes to sec. 8, art. I.

972.08 History: 1969 c. 255; 1969 c. 392 ss. 82, 84; Stats. 1969 s. 972.08.

Comment of Judicial Council, 1969: This is present s. 885.34 with language changes to conform to the terminology of this bill. It should be further noted that the cumbersome procedure for granting immunity at John Doe proceedings or preliminary examinations mandated by State ex rel. Jackson v. Coffey, 18 Wis. 2d 529, will no longer be necessary since these proceedings now will be conducted by judges who will have authority to grant immunity in those proceedings. The convening of a separate proceeding for such purpose will no longer be necessary. [Bill 603-A]

On prosecutions (self-incrimination) see notes to sec. 8, art. I.

An attendant in a physician's office may be called as a witness upon the trial of the physician on a charge of performing an abortion, although she could not thereafter be prosecuted on account of anything concerning which she testified. Werner v. State, 189 W 26, 206 NW 898.

In a prosecution for assault with intent to produce abortion, a medical witness' testimony respecting pregnancy of the victim is not privileged. Bonich v. State, 202 W 523, 232 NW 873.

Although the attorney general has no common law powers, he can prosecute a John Doe proceeding when requested by the governor, and in such case can move for an order compelling self-incriminating testimony. The witness can be compelled to testify even though

his evidence might incriminate him under federal law. State ex rel. Jackson v. Coffey, 18 W (2d) 529, 118 NW (2d) 939.

Where defendant answered some questions under compulsion, he is not immune to prosecution based on answers to other questions before a grand jury. The burden is on him to show that his compelled answers were used as a link in the evidence supporting prosecution. State ex rel. Rizzo v. County Court, 32 W (2d) 642, 146 NW (2d) 499, 148 NW (2d) 86.

972.09 History: 1969 c. 255; Stats. 1969 s. 972.09.

Comment of Judicial Council, 1969: This is present s. 885.35 broadened to cover preliminary examinations or other criminal hearings. This is especially important in view of the decision in Gelhaar v. State, 41 Wis. 2d 230, which adopts Professor McCormick's view that a statement made on a former occasion by declarant may be received as evidence for such facts if the witness is present and subject to cross-examination. The previous rule in Wisconsin found in State v. Major, 274 Wis. 110, 79 NW 2d 75, has thus been overruled and the broadening of this statute should be of assistance to prosecutors at the preliminary examination who are faced with recalcitrant witnesses. [Bill 603-A]

Editor's Note: In Gelhaar v. State, 41 W (2d) 230, 163 NW (2d) 609, the supreme court adopted (subject to certain limitations) the rule of the A.L.I. Model Code of Evidence (Rule 503) which permits a jury to consider as substantive evidence prior inconsistent statements of a witness who testifies to material facts at a trial, and it expressly overruled previous cases holding to the contrary. In announcing the new rule, the supreme court imposed the following limitation: A statement made on a former occasion, by a declarant having an opportunity to observe the facts stated, will be received as evidence of such facts notwithstanding the rule against hearsay if (1) the statement is proved to have been written or signed by the declarant, or to have been given by him as testimony in a judicial or official hearing, or the making of the statement is acknowledged by the declarant in his testimony in the present proceeding, (2) the party against whom the statement is offered is afforded an opportunity to cross-examine the declarant, and (3) the witness has testified to the same events in a contrary manner in the present proceedings.

972.10 History: 1969 c. 255; Stats. 1969 s. 972.10.

Comment of Judicial Council, 1969: New. Subs. (2) and (6) are required because the defendant will have the burden of proof on issues of mental responsibility. (See s. 971.15 (3).) Other provisions of this section reflect the current practice in this state and should be codified. [Bill 603-A]

972.11 History: 1969 c. 255; Stats. 1969 s. 972.11.

Comment of Judicial Council, 1969: New. Heyroth v. State, 275 Wis. 104, 81 NW 2d 56, holds that only those rules of civil procedure expressly enumerated in s. 957.14 (s. 972.01 in this bill) are applicable in criminal trials. Those provisions are far too limiting and in practice it has been found that there is a great deal of utilization of civil rules in many courts of the state. Uniformity in this regard should be achieved and the Judicial Council feels that this section is desirable and will achieve such uniformity as well as improve the conduct of criminal trials. [Bill 603-A]

Editor's Note: Practice regulations in civil actions are contained in ch. 269 and in some few sections of ch. 270. Numerous rules on the subject of evidence are set out in chapters 885, 887, 889 and 891. The notes of decisions set out in four groups below are taken from reports of decisions in criminal actions decided prior to 1970 and are generally consistent with the statute law and case law applicable to civil actions.

1. Rules of evidence.
2. Arguments to the jury.
3. Other conduct during trial.
4. Verdicts in criminal actions.

1. Rules of Evidence.

On rights of accused (meet the witnesses) see notes to sec. 7, art. I; and on prosecutions (self-incrimination) see notes to sec. 8, art. I.

Evidence relevant and necessary to prove the offense charged should not be excluded although it also tends to show that the accused committed other offenses. Halleck v. State, 65 W 147, 26 NW 572.

The admission, on the trial of the issue of insanity, of testimony prima facie connecting the accused with the offense charged was not error, where such testimony was relevant and admissible to show conduct bearing on his mental condition. Cornell v. State, 104 W 527, 80 NW 745.

A hypothetical question to an expert witness need not embrace all the material facts in evidence bearing upon the subject of inquiry. Schissler v. State, 122 W 365, 99 NW 593.

Statements made by the prosecutrix, a short time after the commission of the offense, to those who had rescued her from defendants and were taking her to a neighboring house, in reply to their questions as to what defendants had done to her and why she did not yell, were admissible as part of the *res gestae*. Vogel v. State, 138 W 315, 119 NW 190.

If a witness testifies wilfully and falsely as to any material matter in the trial of a case, the jury may, if it sees fit, but is not bound to, reject all of such witness's evidence not corroborated by some other credible evidence. Miller v. State, 139 W 57, 119 NW 850.

The allowance of leading questions is a matter largely in the discretion of the trial court. Loescher v. State, 142 W 260, 125 NW (2d) 459.

See note to 274.37, citing Runge v. State, 160 W 8, 150 NW 977.

Defendant having claimed that deceased took several steps after being shot and before he fell, 2 surgeons of several years experience who were familiar with the anatomy of the body and the result of cutting or severing the arteries and nerves, could testify that the wounds they found on deceased would cause instant death, though neither had had any experience with that kind of gunshot wound or

the result of such wound. Manna v. State, 179 W 384, 192 NW 160.

In a prosecution for murder, evidence given by defendant at the coroner's inquest was admissible. Shiefel v. State, 180 W 186, 192 NW 386.

Statements of a witness who fled from the scene of a homicide shortly before the encounter between the defendant and deceased, and which were made at a place a quarter of a mile from the scene of the killing and after the witness had had time for reflection, were not a part of the *res gestae*. Shiefel v. State, 180 W 186, 192 NW 386.

Inculpatory statements made in the presence and hearing of one accused of crime, which he has an opportunity to deny and does not, and the truth or falsity of which is within his personal knowledge, are admissions of the accused by acquiescence, and as such are admissible in evidence. McCormick v. State, 181 W 261, 194 NW 347.

When one party gives in evidence a portion of a conversation material to the controversy, the other may give the whole thereof or at least so much as has any relation to the portion already offered. Wilson v. State, 184 W 636, 200 NW 369.

Though the statements of the victim of homicide cannot be received as dying declarations unless made in belief of impending death, such belief may be inferred not only from the statements but also from the nature of the wound and the fact that death shortly followed. Oehler v. State, 202 W 530, 232 NW 866.

It is not error to refuse to admit testimony by a witness of a result of a test, made outside of court, upon defendant with a "lie detector", an instrument claimed to show the guilt or innocence of the person being tested by recording, through his blood pressure, his emotional disturbances while being questioned as to the crime with which he is charged, as the instrument has not progressed from the experimental to the demonstrative stage. State v. Bohner, 210 W 651, 246 NW 314. See also Le Ferre v. State, 242 W 416, 8 NW (2d) 288.

In a prosecution for illegal sale of intoxicating liquor, admission of testimony of sales previous to the one charged, if received to prove defendant's guilt of the specific charge, would be prejudicial error. State v. Jackson, 219 W 13, 261 NW 732.

The fact that the trial is had to the court alone does not justify reception of wholly incompetent evidence, but all trials should be conducted fairly and the trial court must scrupulously attempt to observe all well established rules of evidence. Birmingham v. State, 228 W 448, 279 NW 15.

See note to 274.37, citing State v. Jaskie, 245 W 398, 14 NW (2d) 148.

The defendant's testimony that he was under the influence of liquor to a certain extent, but was not drunk, given in answer to questions asked by his own counsel, was, although doubtless prejudicial, an admission entitled to be weighed by the jury with the other evidence as to whether the defendant was guilty of causing the death of a bicyclist by operation of an automobile while under the influence of alcoholic beverages, and such admission did not warrant the ordering of a new trial on the ground that it was an inept or inadvertent statement which inordinately influenced the jury. State v. Hanks, 252 W 414, 31 NW (2d) 596.

Photographs of portion of a building showing the damage done by a fire, including several of the second-floor apartment where the body of an occupant burned to death had been found, were material evidence, and the trial court did not abuse its discretion in receiving them, over objection, although the existence of the fire, its concentration at the rear of the building, and the fact that it caused the death, were sufficiently established by testimony without pictures. State v. Carlson, 5 W (2d) 595, 93 NW (2d) 354.

See note to 274.37, citing State v. Schweider, 5 W (2d) 627, 94 NW (2d) 154.

In a prosecution for murder, wherein the defendant pleaded not guilty by reason of insanity, the refusal of the trial court to permit the defendant to cross-examine the psychiatrist employed by the state, as to his having been retained by the state before seeing or examining the defendant, was not error, the mere time of employment being immaterial, and the defendant's offer of proof relating only thereto. Kwosek v. State, 8 W (2d) 640, 100 NW (2d) 339, 101 NW (2d) 103.

It is largely a matter of discretion for the trial court to determine how many witnesses may testify to the same event, even though the event involves unpleasant details. When the evidence becomes merely cumulative, the trial court may refuse to hear additional witnesses on the same subject. Kwosek v. State, 8 W (2d) 640, 100 NW (2d) 339, 101 NW (2d) 103.

In a prosecution for murder, the trial court did not err to the prejudice of the defendant in permitting the state to put in evidence a written confession and also a substantially identical oral confession of later date. Kwosek v. State, 8 W (2d) 640, 100 NW (2d) 339, 101 NW (2d) 103.

Even if error within 325.21, Stats. 1957, prohibiting with certain exceptions the testimony of a physician disclosing information acquired in attending a patient in a professional character, the action of the trial court, in the instant murder case, in permitting a physician, over objection, to testify as to his observations of the defendant while examining and treating the defendant at the request of the sheriff, was not prejudicial to the defendant on the issue of the defendant's insanity, the convulsive shaking which the physician had observed appearing to favor the defense of insanity, and his testimony as to such observation not being contrary to that of lay witnesses who had observed the same thing. Kwosek v. State, 8 W (2d) 640, 100 NW (2d) 339, 101 NW (2d) 703.

The facts that are assumed and that form the premises constitute the key point in a hypothetical question and if these facts fail in any important particular then necessarily the answer or conclusion that assumes the facts must fail. State v. Cohen, 31 W (2d) 97, 142 NW (2d) 161.

It is within the province of the trier of facts to determine what effect the display of a defendant's photograph to witnesses prior to their identification of him has on the weight and credibility of their subsequent identifica-

tion. Guilbeau v. State, 31 W (2d) 338, 142 NW (2d) 834.

It is an elementary rule of evidence that an objection must be made as soon as the opponent might reasonably be aware of the objectionable nature of the testimony or of the incapacity of the witness to testify. Collier v. State, 30 W (2d) 101, 140 NW (2d) 252; Bosket v. State, 31 W (2d) 586, 143 NW (2d) 553.

The degree and manner of cross-examination in criminal cases are matters lying largely in the discretion of the trial court. O'Connor v. State, 31 W (2d) 684, 143 NW (2d) 489.

All the facts in evidence in a case need not be stated in a hypothetical question, but only those needed to allow the expert witness to provide a correct answer on the theory advocated by the questioner's side of the case. Simpson v. State, 32 W (2d) 195, 145 NW (2d) 206.

What issues are covered in direct examination and therefore within its scope for purposes of cross-examination are governed by and dependent upon the quantitative and not the semantic precision of questions and answers on direct examination. Tobar v. State, 32 W (2d) 398, 145 NW (2d) 782.

Any fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable; and relevancy is not determined by resemblance to, but by the connection with other facts. Oseman v. State, 32 W (2d) 523, 145 NW (2d) 766.

Evidence of prior crimes is admissible when such evidence is particularly probative in showing elements of the specific crime charged, intent, identity, system of criminal activity, to impeach credibility, and to show character in cases where character is put in issue by the defendant, and the admission of evidence of prior crimes for such purposes is not forbidden because such evidence would not be admissible under the general character rule. Whitty v. State, 34 W (2d) 278, 149 NW (2d) 557. See also: State v. Watkins, 39 W (2d) 718, 159 NW (2d) 675; State v. Midell, 39 W (2d) 733, 159 NW (2d) 614; State v. Hutnik, 39 W (2d) 754, 159 NW (2d) 733; and Cheney v. State, 44 W (2d) 454, 171 NW (2d) 339, 174 NW (2d) 1.

While, generally, a person charged with a particular offense has a right to have the evidence in support of the charge confined to the particular offense, the state may be permitted to offer proof of other offenses so intimately connected with the one for which the defendant is on trial as to be evidentiary of intent, design or motive. Nelson v. State, 35 W (2d) 797, 151 NW (2d) 694.

Though otherwise admissible, it is within the discretion of the trial court to exclude utterances as part of the *res gestae* if the circumstances surrounding the utterances are indicative of factors that may result in lack of trustworthiness or if the hearsay statement otherwise admissible is of such low probative value that it would not aid a judge or jury in the quest for the truth. State v. Smith, 36 W (2d) 584, 153 NW (2d) 538.

In a prosecution for burglary of a service station, testimony of the apprehending police officer in response to the state's interrogation, detailing what he did after securing a description from the eyewitness, was not objectionable, as it merely asked the officer to relate physical actions and hence could not be challenged as hearsay. Jones v. State, 37 W (2d) 56, 154 NW (2d) 278, 155 NW (2d) 571.

Evidence of criminal acts or occurrences of the accused, constituting admissions by conduct, intended to obstruct justice or avoid punishment for the crime charged, are admissible in evidence, for they are in the classification of events that have probative value that is relevant to the crime under inquiry. Price v. State, 37 W (2d) 117, 154 NW (2d) 222.

In a prosecution for unlawful possession and use of narcotics, where defendant contested venue relating to the charge of use, a statement made by his accomplice while being interrogated in the presence of defendant that both had used heroin at defendant's home in the county of venue, to which defendant made no comment but merely snickered, was properly received as admissible evidence. State v. Rice, 37 W (2d) 392, 155 NW (2d) 116.

Hypothetical questions put to an expert witness on cross-examination may go outside the record for the purpose of testing the skill of the witness, but need not be limited in purpose to testing his skill. State v. Rice, 38 W (2d) 344, 156 NW (2d) 409.

There is no rule requiring that all material facts be included in a hypothetical question; the safeguards are that the adversary may on cross-examination supply omitted facts and ask the expert if his opinion would be modified by them, and further that the trial judge if he deems the original question unfair may in his discretion require that the hypothesis be reframed to supply an adequate basis for a helpful answer. State v. Rice, 38 W (2d) 344, 156 NW (2d) 409.

In a prosecution for theft by fraud, where the proof disclosed that the defendant, posing as a livestock dealer and by other false representations obtained cattle without intent to pay therefor, it was not error for the trial court to admit proof that defendant was neither licensed nor registered as a livestock dealer, his status as such being material to the representations made and reliance placed thereon by the owners so defrauded. Lehmann v. State, 39 W (2d) 619, 159 NW (2d) 607.

The admissibility of prior crime evidence under the multiple-admissibility rule does not depend upon admission or conviction for prior criminal conduct but upon its probative value, which depends in part upon its nearness in time, place, and circumstances to the alleged crime or element sought to be proved. Timeliness and similarity of situation are the important factors in finding evidence of prior occurrences to be relevant and thus admissible on the question of intent, and by being dissimilar in character and circumstances they fall outside the test of relevancy as not tending in a reasonable degree to establish probability or improbability of a fact in issue. State v. Watkins, 39 W (2d) 718, 159 NW (2d) 675.

Prior crime evidence received under the multiple-admissibility rule is not admitted for purposes of proving general character,

criminal propensity, or general disposition on the issue of guilt or innocence, because such evidence, while having probative value, is not legally or logically relevant to the crime charged; but such evidence is admitted when it is particularly probative in showing elements of the specific crime charged, intent, identity, system of criminal activity, to impeach credibility, and to show character in cases where character is put in issue by the defendant. State v. Midell, 39 W (2d) 733, 159 NW (2d) 614.

The rule that evidence of the commission of other offenses is admissible where the evidence tends to establish some ingredient of the offense charged such as knowledge, intent, system or design, and also to show that the crime charged is a part of a scheme or plan which includes numerous offenses, applies to all such offenses whether committed before or after the date of the offense charged in the information so long as such offenses are connected and similar in character. State v. Hutnik, 39 W (2d) 754, 159 NW (2d) 733.

Evidence of guilt at the scene of the crime (burglary) need not be held in the hand of the criminal suspect, for "possession" may be constructive, meaning that the item is immediately available and under the control of the person charged with the crime. Curl v. State, 40 W (2d) 474, 162 NW (2d) 77.

It is universally recognized that when a witness gives inconsistent statements his credibility is, as a consequence, impaired, and it is apparent that one of the statements must have been false. In view of the patent inconsistency between defendant's first and second statements, it was proper for the trial court to give the *falsus in uno* instruction, which permits the jury to disbelieve any of the testimony of a witness who has testified falsely about any material fact. State v. Harrell, 40 W (2d) 536, 162 NW (2d) 590.

In a prosecution of defendant for murder of her husband by stabbing him in the chest with a knife, pretrial statements of their children, relating the conversation overheard between their parents from which it could be concluded that the assault was unprovoked and the stab inflicted with intent to kill, were admissible as substantive evidence where both children gave contrary testimony for the defense at trial. (State v. Major, 274 W 110, overruled.) Gelhaar v. State, 41 W (2d) 230, 163 NW (2d) 609.

While the proper time to lay a foundation for impeachment of an opposing party's witness is on cross-examination, failure to then do so does not preclude his recall to continue cross-examination for that purpose. Although permission to recall a witness to lay impeachment foundation is within the trial court's discretion, it should be exercised in favor of the impeacher where there has been nothing distinctly culpable on his part. Sipero v. State, 41 W (2d) 390, 164 NW (2d) 230.

Relevancy is not determined by resemblance to, but by the connection with, other facts; thus any fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable. Berg v. State, 41 W (2d) 729, 165 NW (2d) 189.

The doctrine of *res gestae* is an exception to the hearsay rule, which permits the admission of a statement into evidence when the declarant is not available for cross-examination, but is not applicable to the admission of real evidence. Real evidence corroborative of oral testimony or which throws light on the problem before a jury is admissible, not as part of the *res gestae*, but based on a principle which permits the introduction of evidence closely connected in point of time with the facts or conduct at issue. Berg v. State, 41 W (2d) 729, 165 NW (2d) 189. Compare Ferguson v. State, 41 W (2d) 588, 104 NW (2d) 492.

In a prosecution for selling narcotic drugs (heroin), permitting the arresting officer to testify as to his conversation with defendant who, immediately prior to his arrest, offered to sell additional drugs, was not error (as defendant contended) but highly probative and relevant to refuting his claim of mistaken identity and establishing his identity as the person who sold heroin to the officer a few hours before. Blackwell v. State, 42 W (2d) 615, 167 NW (2d) 587.

A defense which admits the presence of the accused at the scene of the crime but disputes his guilt is not alibi; hence, testimony not of an alibi nature but corroborative of defendant's version of what he claims occurred should not be excluded. Logan v. State, 43 W (2d) 128, 168 NW (2d) 171.

Defendant having attempted to establish he was not in possession, occupancy, or control of the apartment searched (although certain "evidentiary" items seized therein connected him to the premises), it was not error for the trial court to receive evidence of his pretrial admission that he was addicted to heroin, for such admission fell within the exception to the multiple-admissibility rule, and the relevancy outweighed any possible resulting prejudice to him. Morales v. State, 44 W (2d) 96, 170 NW (2d) 684.

The corpus delicti in an arson prosecution may be proved, with other elements of the offense, by circumstantial evidence; hence the facts which are presented to show the responsibility of the defendant may aid in establishing the corpus delicti. State v. Kitowski, 44 W (2d) 259, 170 NW (2d) 703.

The purpose of the best-evidence rule is to prevent fraud upon the trier of facts, and is aimed only at excluding evidence which concerns the contents of a writing, having no application to a case where a party seeks to prove a fact which has existence independently of a writing. Goetsch v. State, 45 W (2d) 285, 172 NW (2d) 688.

Learned treatises as evidence in Wisconsin. Holz, 51 MLR 271.

The psychologist's role in determining accountability for crimes. Pouros, 52 MLR 380.

Gelhaar v. State—prior inconsistent statements. 52 MLR 580.

Evidence—use of a hypothetical question. 52 MLR 590.

Expert and opinion evidence in criminal cases in Wisconsin. Croak, 36 WBB, No. 4.

The use of scientific evidence and its legal limitations. Gordon, 37 WBB, No. 5.

Use of medical and scientific treatises as evidence in Wisconsin. Holz, 41 WBB, No. 1.

2. *Arguments to the Jury.*

The prosecuting attorney having asked the accused a certain question, and the judge in excluding it having said that it was "entirely improper" and that the attorney "ought to understand it", it was not improper for such attorney on the argument to state that he asked such question because he was advised by eminent counsel that it was proper. Williams v. State, 61 W 281, 21 NW 56.

A remark by the prosecuting attorney to the jury, that "a man that will poison a dog will burn a barn or buildings", was not objectionable. Halleck v. State, 65 W 147, 26 NW 572.

On the trial for an offense charged under ch. 63, Laws 1893, the district attorney, in his argument to the jury, said, in effect, that defendant and 2 men arrested with him were thieves, and afterwards repeated the statement, and the court ruled that the remarks were warranted by the evidence. There being no evidence that defendant had ever been convicted or been guilty of larceny, such ruling was error. Scott v. State, 91 W 552, 65 NW 61.

See note to 974.02, citing Schissler v. State, 122 W 365, 99 NW 593.

Considerable latitude must be allowed counsel in arguing cases, and a judgment should not be reversed because of improper remarks unless the court is satisfied that the jury was not sufficiently instructed to disregard them or they appear to be so flagrant that they must have been prejudicial notwithstanding any admonition that may have been given by the trial court. Vogel v. State, 138 W 315, 119 NW 190.

See note to 274.37, on criminal actions, citing Alsheimer v. State, 165 W 646, 163 NW 255.

The statement of the district attorney of his knowledge of a fact, a matter not in evidence, is not permissible in argument, and on objection the jury should be cautioned not to consider it. Flamme v. State, 171 W 501, 177 NW 596.

See note to 274.37, on criminal actions, citing Esterra v. State, 196 W 104, 219 NW 349.

See note to 274.37, on criminal actions, citing Ford v. State, 206 W 138, 238 NW 865.

A remark of the district attorney in argument to the jury that the defendant had not taken the stand was improper; and the trial court should have promptly condemned it, specifically instructed the jury as to the rights of the defendant to take the stand or not as he saw fit, and admonished the jury to ignore the remark; and simply sustaining an objection to such unfair comment was not sufficient to counteract its prejudicial effect. State v. Jackson, 219 W 13, 261 NW 232.

In a prosecution of defendants for robbery, argument of the district attorney, referring to the defendants as "gangsters", "gunmen", "hoodlums", "mobsters", "ruffians", "conspirators", and "racketeers", and erroneously stating that all defendants admitted that they had been convicted of a previous crime, was improper, but it was not prejudicial where the evidence as to robbery was almost uncontradicted and so overwhelming as to require a conviction unless the jury failed to do its duty. State v. Clementi, 224 W 145, 272 NW 29.

In a prosecution for statutory rape, the district attorney's statement, in argument to the jury, that on conviction the defendant could be fined one dollar and costs, was misleading; and, under the circumstances, the court should have characterized the district attorney's statement as highly improper and should have reprimanded him for making it, and should have informed the jury of the maximum sentence and that the extent of the punishment, solely a matter for the court, was entirely immaterial in determining the question of the defendant's guilt. The court's statement, in its charge to the jury, that the offense was a serious one, did not repel the district attorney's imputation that from the standpoint of punishment it was a trivial one. State v. Garnett, 243 W 615, 11 NW (2d) 166.

There is no requirement that the trial court instruct with respect to a defendant's lack of insight into his conduct in connection with his capacity to understand the nature and quality of his act, but where expert testimony as to lack of insight is adduced in connection with the issue, counsel may advert thereto in his argument to the jury. State v. Shoffer, 31 W (2d) 412, 143 NW (2d) 458.

The state of mind of the attorney is not evidence, nor is it proper for an attorney to indicate his belief or knowledge as to the guilt of an accused, but an exception is made when the argument states the belief of the prosecutor is founded only upon the evidence which was heard by the jury or the idea conveyed was that the evidence convinced the speaker, or when the statements indicating the prosecutor's belief in the guilt of the accused are invited or provoked by counsel for the defense. State v. Yancey, 32 W (2d) 104, 145 NW (2d) 145.

Failure to move for a mistrial before the jury returns its verdict constitutes waiver of complaints of impropriety with respect to closing argument by the adverse party's counsel. State v. Christopherson, 36 W (2d) 574, 153 NW (2d) 631.

Defendant was precluded from claiming prejudice warranting a new trial because of asserted improprieties in the argument of the prosecution, where no objection was made thereto at trial and no motion for a mistrial was made at any time prior to the verdict. Aside from waiver, the prosecution's argument could not be deemed prejudicial, where but one sentence was singled out of context, which at most reflected on defense witnesses' unconventional appearance and unorthodox dress. State v. Ruud, 41 W (2d) 720, 165 NW (2d) 153.

See note to 256.55, citing Jandri v. State, 43 W (2d) 497, 168 NW (2d) 602.

The ruling on a motion for mistrial because of claimed prejudicial argument to the jury by counsel rests in the sound discretion of the trial judge, subject only to review for abuse of that discretion. State v. Richardson, 44 (2d) 75, 170 NW (2d) 775.

A remark by the prosecutor in closing argument that he received the bullet removed from the victim from the ballistics expert and that the defendant produced the gun (similarly rifled), while improper, was harmless, in view of the compelling circumstantial evidence of guilt, aliunde, and the corrective instructions given by the trial court which ob-

viated the possibility of prejudice. State v. Dombrowski, 44 W (2d) 486, 171 NW (2d) 349.

The prosecutor's closing argument reference to petitioner as a "big ape" and a "gorilla" was error but did not affect the overall fairness of the trial and did not attain constitutional proportions. Downie v. Burke, 408 F (2d) 343.

3. Other Conduct During Trial.

There ought not be be anything in the conduct of the court toward the jury, or any member therof, calculated to press them, or him, to a verdict, against rational doubts conscientiously entertained, from the evidence in the case. State v. Austin, 6 W 205. See also: Douglass v. State, 4 W 387.

The manner or emphasis or form of expression of a judge which cannot reasonably be interpreted to express a wrong opinion as to the law or facts, or to express an opinion of a fact which should be left wholly to the jury, cannot be assigned as error. Briffitt v. State, 58 W 39, 16 NW 39.

Under the facts (stated in the opinion) an officer's warning to the jury that they would be locked up for the night unless they agreed very soon was both threatening and coercive and had a natural tendency to induce the jurymen to surrender their opinion. Brown v. State, 127 W 193, 106 NW 536.

In a criminal case the trial judge should refrain from expressing in the presence of the jury his view as to the probative force of the evidence upon any phase of the alleged guilt of the defendant, and should rule upon objections or requests made without comment upon what the evidence shows. Drinkwater v. State, 168 W 176, 169 NW 285.

Permitting the jury to take to the jury room exhibits consisting of transcripts of shorthand notes of statements of the defendant made out of court to police officers and to the district attorney, though error because such statements were constantly before the jury while they were obligated to rely upon their memories with reference to the defendant's testimony given upon the trial, was harmless, in view of the weaknesses in the evidence of the defense of justification and of the fact that the verdict was as favorable to the defendant as it well could be. Payne v. State, 199 W 615, 227 NW 258.

See note to 274.37, on criminal actions, citing Hackbarth v. State, 201 W 3, 229 NW 83.

A statement by the trial judge to the defendant in the course of the trial, on sustaining an objection to his attempted testimony, with reference to an apology through his attorney, that he had had plenty of time to apologize since, was not prejudicial error. Branigan v. State, 209 W 249, 244 NW 767.

No error was committed by the special prosecutor in stating in the presence of the petit jury that the defendant had been indicted by the grand jury. State v. Krause, 260 W 313, 50 NW (2d) 439.

Permitting a deputy sheriff, who had been one of the arresting officers and one of the officers who had obtained an alleged confession and who was also a witness for the state at the trial, to act as bailiff in charge of the jury during its deliberations, constituted reversible error, requiring a new trial, although no objection was made until after the jury had returned their verdict of guilty, and although no showing was made that the defendants were actually prejudiced thereby. (La Valley v. State, 188 W 68, followed.) Surma v. State, 260 W 510, 51 NW (2d) 47.

Where a sheriff, appointed to act as bailiff in charge of the jury during its deliberations, had taken part in the investigation of the case, and was a rebuttal witness for the state at the trial, and stated to the jury, after they had retired to the juryroom, that they would not hurt his feelings if they hurried, a verdict of guilty should have been set aside and a new trial granted, even though no prejudice to the defendant was shown and the instructions given to the jury to disregard the sheriff's statement would tend to eliminate prejudice. State v. Cotter, 262 W 168, 54 NW (2d) 43.

See note to 274.37, on criminal actions, citing State v. Sawyer, 263 W 218, 56 NW (2d) 811.

A trial judge has the right, in the exercise of a sound discretion, to examine or cross-examine a witness in a criminal case; but the right should be most carefully exercised, and the questions should not betray bias or prejudice nor carry to the jury the impression that the judge has made up his mind as to the facts, but should be framed to make clear that which is not clear. State v. Driscoll, 263 W 230, 56 NW (2d) 788.

The jury has a right to have the testimony read to it by the court reporter, but the extent thereof is within the discretion of the trial court, and the right to have the testimony read to the jury may be waived. State v. Cooper, 4 W (2d) 251, 89 NW (2d) 816.

While it was error for the trial court to permit a prosecution witness' wife to serve as a jury matron, such error was not prejudicial where as here there was no showing that any actual impropriety with the jurors took place; the record failed to reflect that there was an awareness by the jury of her identity; the testimony of her husband was not crucial to the conviction, and the period of the jury matron's contact with the jury was inappreciable. Cullen v. State, 26 W (2d) 652, 133 NW (2d) 284.

Conduct of the district attorney in displaying money allegedly removed from the cash register of the tavern burglarized (without proof of chain of custody), while improper, was not prejudicial, where eyewitness testimony established that defendant was caught with his hands in the till, and he thereafter in effect admitted his guilt. Commodore v. State, 33 W (2d) 373, 147 NW (2d) 283.

While, at an optimum, a trial judge should abstain from all comments or questions that would give the appearance of a prejudgment of guilt or hostility toward the defendant or his counsel, he is in no wise precluded from questioning a witness called by the parties in order to clarify received testimony. Flowers v. State, 43 W (2d) 352, 168 NW (2d) 843.

It is within the discretion of the trial court to order the defendant restrained during the trial. A trial judge should not order a defendant restrained unless he has in fact exercised his discretion and set forth his reasons in the record. Flowers v. State, 43 W (2d) 352, 168 NW (2d) 843.

Impropriety of the district attorney's adverting to defendant's silence at the time of

his arrest, not objected to by defendant's counsel, who correctly and effectively answered the comment in closing argument, could not be deemed prejudicial to defendant's case, the trial being to the court, and there being no indication that the trial court believed the prosecutor (who was clearly wrong) or disbelieved the defense attorney (who was clearly right). Deja v. State, 43 W (2d) 488, 168 NW (2d) 856.

Claim of denial of a fair trial because the trial judge without any indication of partisanship questioned a defense witness, eliciting facts pertinent to the issues, was devoid of merit, for such questioning was well within the recognized power of a trial court to question witnesses in order to ascertain and elicit the truth. Lemerond v. State, 44 W (2d) 158, 170 NW (2d) 700.

4. Verdicts in Criminal Actions.

The members of the jury were bound to decide for themselves upon the weight of the evidence, and to respond by their verdict according to the convictions of their own judgments. Douglass v. State, 4 W 387.

Any juror may dissent from a verdict to which he has previously agreed, at any time before it has been received and recorded. State v. Austin, 6 W 205.

No entry or record of the verdict in a criminal action need be made before the discharge of the jury, except that in the minute book. Smith v. State, 51 W 615, 8 NW 410.

The verdict in a criminal action should not be set aside on the ground of the prejudice of a juror unless the fact is satisfactorily established; and the decision of the trial court on that question should not be disturbed unless against the clear weight of the evidence. Upon a motion to set aside the verdict for prejudice of a juror, the juror's affidavit in denial of his prejudice may be received and considered. Schissler v. State, 122 W 365, 99 NW 593.

Where in a criminal case the jury has separated after agreeing upon and sealing up a verdict, such verdict cannot, when opened in court, be orally altered or amended in matter of substance. Koch v. State, 126 W 470, 106 NW 531.

A verdict cannot stand where the jury has been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to any agreement at all, unless it be clearly shown that no influence was thereby exerted. Brown v. State, 127 W 193, 106 NW 536.

In a criminal prosecution on an information charging the defendant, and others, with separate offenses in several counts the submission of a verdict in a form prescribed by the court (which is set out in the report of the case) was not error, in view of the careful explanation by the court in the instructions to the jury. Siegel v. State, 201 W 12, 229 NW 44.

Failure of the jury to render a verdict on 3 of the 4 counts in the information submitted to them charging the same act as that charged in the count on which they found defendant guilty did not effect an acquittal, as the jury manifestly did not intend to find the defendant both guilty and not guilty of the same act or offense. Branigan v. State, 209 W 249, 244 NW 767.

An affidavit of a juror relative to occurrences in the jury room when deliberating upon the case may not be considered to impeach the verdict, and likewise an affidavit of a husband of a juror containing statements made to him by such juror relative to occurrences in the jury room when deliberating upon the case may not be considered to impeach the verdict. Newbern v. State, 222 W 291, 260 NW 236, 268 NW 871.

Where a verdict of guilty was complete, agreed to by all members of the jury, and signed by the foreman, the jury's gratuitous recommendation of leniency penciled on a separate sheet of paper, and not signed by the members of the jury or by the foreman, did not vitiate the verdict. Kushman v. State ex rel. Panzer, 240 W 134, 2 NW (2d) 862.

The general rule that juries will not be permitted to impeach a verdict by affidavit, but that evidence showing what the jury actually did agree on is to be considered if a mistake has been made so that the verdict is not correctly reported, applies to criminal actions as well as to civil actions. In a prosecution against 4 defendants for converting to their own use forest products on certain land in the value of $1,385.20, the jury's verdicts that each defendant was guilty of cutting forest products as charged in the information, and that the value thereof was $133.85, could not be impeached, so as to warrant the granting of a new trial, by affidavits of jurors which stated that they did not understand that this was a criminal case or that a guilty verdict provided for punishment, but which did not show that there had been any mistake in recording their verdicts but only a mistake of the jurors as to the legal effect of their verdicts. State v. Biller, 262 W 472, 55 NW (2d) 414.

972.12 History: 1969 c. 255; Stats. 1969 s. 972.12.

Comment of Judicial Council, 1969: This section codifies existing practice. [Bill 603-A]

Except in the case of a conflict with a statutory provision, and except in cases where the penalty may be life imprisonment, it is the general practice to permit the jury to separate until the cause is submitted to it for its final deliberations. This rests within the discretion of the trial court. The defendant waived his alleged right not to have the jury separated during the trial by failing to request that the jury be confined or placed in custody of an officer. State v. Cooper, 4 W (2d) 251, 89 NW (2d) 816.

972.13 History: 1969 c. 255; Stats. 1969 s. 972.13.

Comment of Judicial Council, 1969: Subs. (1) and (2) combine the present ss. 959.01 and 959.02. Currently in criminal actions in Wisconsin no written judgments are entered. Sub. (4) corrects this deficiency. The present commitment form which is utilized when a defendant is taken to a penal institution is eliminated and in its place a copy of the judgment is substituted. Commitment forms under existing law ended up in the prisoner's

file at the institution but the case file usually had no formal documents indicating the final disposition of the case or the defendant. [Bill 603-A]

After verdict the court cannot order a plea of not guilty to be entered without defendant's consent and then render judgment upon the verdict. Davis v. State, 38 W 487.

A court is not confined to the imposition of a small fine in sentencing one who is permitted to enter a plea of nolo contendere; the plea is an implied confession, and judgment of conviction follows as a matter of course. Brozosky v. State, 197 W 446, 222 NW 311.

Judicial confessions without corroboration are sufficient to sustain a conviction. Mularkey v. State, 199 W 269, 225 NW 933.

See note to 274.37, on criminal actions, citing Hobbins v. State, 214 W 496, 253 NW 570.

Nolo contendere admits matters alleged in the information when the plea is entered, is a waiver of proof, and places the defendant in the same position as though he had pleaded or had been found guilty by the verdict of a jury. Ellsworth v. State, 258 W 636, 46 NW (2d) 746.

Wisconsin adheres to the common-law principle that a trial court has no power to revise its judgment and sentence in a criminal case after the expiration of the term or after the execution of the sentence has commenced. State ex rel. Reynolds v. County Court, 11 W (2d) 512, 105 NW (2d) 812.

Until execution (providing the term of court has not expired), there is no prohibition under 959.01 or 959.07, Stats. 1963, which precludes a trial court from deferring execution or even imposing a sentence in order to consolidate other matters before the court affecting the same defendant. Weston v. State, 28 W (2d) 136, 135 NW (2d) 820.

972.14 History: 1969 c. 255; Stats. 1969 s. 972.14.

Comment of Judicial Council, 1969: This is a codification of the common-law right of allocution. Its omission is probably not prejudicial error, (see Boehm v. State, 190 Wis. 609), but fairness and good practice dictate its retention. [Bill 603-A]

The right of the accused to be heard as to whether he has anything to say why sentence should not be pronounced against him is not a mere formality. In re Carlson, 176 W 538, 186 NW 722.

972.15 History: 1969 c. 255; Stats. 1969 s. 972.15.

Comment of Judicial Council, 1969: Most judges and attorneys will be surprised to learn that, outside of a provision for Milwaukee county (s. 57.02 (6)), there is presently no statutory authority for presentence investigations. Wisconsin has been a pioneer in this field and obviously the presentence investigation is an integral part of the sentencing practice in this state.

Sub. (2) provides for a disclosure of the contents of the presentence report to the district attorney and the defense. This provision is subject to a great deal of debate nationally. After weighing all factors, the Council believes that the Model Penal Code, s. 7.07 (5) provisions are appropriate whereby the contents are disclosed. The judge may, however, conceal the identity of persons who provided information for the report. This concept is found in subs. (2) and (3) and is consistent with the recommendations of the President's Crime Commission report, The Challenge of Crime in a Free Society, 145, and the American Bar Association's Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedure Standards, s. 4.4. The Division of Corrections was consulted by the Council prior to the adoption of subs. (3) and (4) and indicated that they would not object to these provisions.

Sub. (4) is consistent with ABA Sentencing Alternatives and Procedure Standards, s. 4.3, that presentence reports should not be public records. The information in such reports is often unverified and would in many cases, even if true, cause irreparable harm to informants or the defendant. The information may, of course, upon specific authorization of the court, be made available to any agencies, courts or individuals which have a legitimate need for it. [Bill 603-A]

In determining an appropriate sentence (notwithstanding the absence of express statutory authority) courts may and in fact do widely use the data in presentence investigation reports which contain, typically, pertinent information relating to the defendant's personality, social circumstances, and his prior criminal record (if any). Waddell v. State, 24 W (2d) 364, 129 NW (2d) 201.

CHAPTER 973.

Sentencing.

973.01 History: 1969 c. 255; Stats. 1969 s. 973.01.

Comment of Judicial Council, 1969: Present s. 959.05. [Bill 603-A]

Imposing a determinate, instead of an indeterminate, sentence in the state prison in this case, although error, did not constitute ground for reversal, in view of the provision in 359.05, Stats. 1947, that if a person is sentenced for a definite period for any offense for which he may be sentenced under such section the sentence shall not be void but the person shall be deemed to be sentenced nevertheless as defined and required by such section. Johnson v. State, 254 W 320, 36 NW (2d) 86.

It is a matter of proper legislative consideration to adopt or not a rule giving credit for time spent in jail prior to sentencing. Cheney v. State, 44 W (2d) 454, 171 NW (2d) 339, 174 NW (2d) 1.

A definite sentence to the state prison, except for certain specified crimes, must be construed as an indeterminate sentence, the minimum imprisonment provided by the statute being the minimum sentence and definite sentence being the maximum. The court has no power to add to maximum of an indeterminate sentence imprisonment in the state prison for failure to pay fine and costs. 14 Atty. Gen. 384.

Conviction for the offense of assault with intent to murder or rob as defined in 340.40,