CHAPTER 957.

CRIMINAL TRIALS.

957.01 Jury trail; waiver. (1) Except as otherwise provided in this chapter, criminal cases in courts of record shall be tried by a jury of 12, drawn as prescribed in ch. 270, unless the defendant waives a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court and the consent of the state. A defendant charged with a misdemeanor in county court waives trial by a jury of 12 if he elects to be tried by a jury of 6.

(2) At any time before verdict the parties may stipulate in writing or by statement in open court, entered in the minutes, with the approval of the court, that the jury shall consist of any number less than 12.

(3) In a case tried without a jury the court shall make a general finding and may in addition find the facts specially.

History: 1961 c. 561.

957.02 Grand juror not to serve on trial jury. No member of the grand jury which found the indictment shall be a juror for the trial of the indictment if challenged for that cause.

957.03 Peremptory challenges. Each side is entitled to only 4 peremptory challenges except as provided otherwise in this section. When the crime charged is punishable by life imprisonment, each side is entitled to 12 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment the total peremptory challenges allowed the defense shall not exceed 16 if there are only 2 defendants and 18 if there are more than 2 defendants; in other cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2.

957.04 Exercise of challenges. The parties shall exercise or waive their peremptory challenges alternately as nearly as practicable, the state beginning. Twenty jurors shall be called, and that number (exclusive of those challenged peremptorily and those excused for cause) shall be maintained in the jury box until all peremptory challenges in excess of 8 have been exercised or waived. From the 20 remaining the parties shall exercise in their order the remaining 8 challenges; and if any party declines to challenge in turn such challenge shall be made by the clerk by lot.

957.05 Alternate jurors. If the court is of the opinion that the trial of the action is likely to be protracted, it may, immediately after the jury is impaneled and sworn, call one or 2 alternate jurors. They shall be drawn in the same manner and have the same qualifications as regular jurors and shall be subject to like examination and challenge. Each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the oath or affirmation and shall be seated next to the regular jurors and shall attend the trial at all times. If the regular jurors are kept in custody, the alternates shall also be so kept. If before the final submission of the cause a regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box. If there are 2 alternate jurors, the court shall select one by lot. Upon entering the jury box, the alternate juror becomes a regular juror.

957.052 Jurors. The method of selecting jurors for the county court shall be the same as the method used for circuit court and shall be governed by ss. 255.04 to 255.095,

except that the jurors on jury lists shall serve as provided by rule of court under s. 255.04 (6).

History: 1961 c. 561, 614.

957.053 12-man jury trial. The procedure used for a 12-man jury trial in county court shall be the same as that used in circuit court and shall be governed by this chapter.

History: 1961 c. 561.

957.054 Selecting a 6-man jury. (1) If a 6-man jury is demanded by the defendant before the trial begins, the judge shall direct the clerk of the court to select by lot from the current jury panel the names of 18 residents of the county qualified to serve as jurors in courts of record, from which lists the defendant and the state may each strike 5 names. If either party neglects to strike out names, the clerk shall strike out names for him. Except in counties having a population of 500,000 or more, no voir dire examination or challenge for cause shall be permitted. The clerk shall issue a venire to the sheriff or constable to summon any 6 persons whose names are not struck out, to appear at the time and place named in the venire.

(2) Jurors may all be residents of a municipality in which the court is held unless the defendant demands a county-wide jury. For this purpose a municipal jury list may be established, known as the "..... (name of municipality) jury list", which shall be constituted as follows: The jury commissioners appointed by the circuit court of the county in which the municipality is located shall, from time to time as required by the county court, provide and furnish a list containing the names of 200 jurors selected by them from citizens residing within the municipality involved. The judge or judges of county court may by court order direct the jury commissioners to furnish a list of less than 200 jurors, but in no event shall such list contain less than 50 names. Except as herein provided, the provisions of s. 255.04, relating to the preparation of jury lists for the circuit court, so far as applicable, shall apply to and govern the preparation of such list, but the slips containing the names of jurors so selected shall be deposited in a box designated the "..... (name of municipality) jury list."

(3) Subsection (2) and s. 957.053 shall not apply in counties having a population of 500,000 or more. In such counties all county court juries shall be supplied from the circuit court jury venire.

History: 1961 c. 561, 643; 1963 c. 407.

957.055 Service of venire. The officer shall summon the jurors personally and shall make a list of the persons summoned, which he shall certify and annex to the venire and return to the clerk within the time therein specified.

History: 1961 c. 561.

957.056 Second jury. If the officer fails to return the venire as required, or if the jury fails to agree and is discharged, a new jury shall be selected and summoned in the same manner as the preceding one, and the same proceedings shall thereupon be had as that prescribed with respect to the first jury, unless jury trial is waived as in s. 957.01, in which case the court shall proceed as if no jury had been demanded.

History: 1961 c. 561.

957.07 Defendant to be present. A defendant accused of a felony shall be personally present during the trial. A defendant accused of a misdemeanor may at his written request and by leave of court be tried in his absence if represented by his attorney duly authorized for that purpose.

957.08 View. The court may order a view by the jury.

957.09 Conviction of included crime. When a defendant is tried for a crime and is acquitted of part of the crime charged and is convicted of the residue thereof, the verdict may be received and thereupon he shall be adjudged guilty of the crime which appears to the court to be substantially charged by such residue of the indictment or information and shall be sentenced accordingly.

957.11 Plea of insanity as defense. (1) No plea that the defendant indicted or informed against was insane or feeble-minded at the time of the commission of the alleged crime shall be received unless it is interposed at the time of arraignment and entry of a plea of not guilty unless the court for cause shown otherwise orders. When such plea is interposed the special issue thereby made shall be tried with the plea of not guilty; and if the jury finds that the defendant was insane or feeble-minded or that there is reasonable doubt of his sanity or mental responsibility at the time of the commission of the alleged crime, they shall find the defendant not guilty because insane or feeble-minded.

(2) The presumption of the defendant's sanity and mental normality at the time he committed the alleged crime shall prevail on the trial of the special issue unless the evidence creates in the minds of the jury reasonable doubt of his sanity or mental responsibility at said time.

(3) If found not guilty because insane or not guilty because feeble-minded, the defendant shall be committed to the central state hospital or to an institution designated by the state department of public welfare, there to be detained until discharged in accordance with law.

(4) A reexamination of his mental condition may be had as provided in s. 51.11, except that his application for rehearing shall be to the committing court. If upon such reexamination the court finds he is insane or feeble-minded, another reexamination shall not be had unless the court is satisfied there is reasonable cause to believe that his mental condition is improved, in which case the court may order another examination. No person so committed shall be discharged unless the court, in addition to finding him sane and mentally responsible, also finds that he is not likely to have a recurrence of insanity or mental irresponsibility as will result in acts which but for insanity or mental irresponsibility would be crimes.

The burden of proof on the special issue of insanity in criminal cases is imposed on the state if there is evidence which raises a reasonable doubt of the defendant's sanity. The jury need not be satisfied that the elements required by the definition of the defense of insanity in a criminal case are present in fact, and a defendant succeeds if he is able to raise a reasonable doubt that they may be present. State v. Esser, 16 W (2d) 567, 115 NW (2d) 505.

The supreme court declines to declare that psychopaths fall without the pale of such "abnormal conditions of the mind" as to bring them within the definition of insanity set forth in State v. Esser, 16 W (2d) 567. Brook v. State, 21 W (2d) 32, 123 NW (2d) 535.

Insanity as a defense. 45 MLR 477.

957.13 Insane at time of trial. (1) If the court is reliably advised before or at his trial or after conviction and before commitment that the defendant is probably insane or feeble-minded, the court shall in a summary manner make inquiry thereof.

(2) If the court finds that the defendant is insane or feeble-minded, his trial or sentence or commitment shall be postponed indefinitely and the court shall thereupon order him confined in the central state hospital or an institution designated by the department of public welfare.

(3) Upon the defendant's recovery the hospital superintendent shall notify the committing court thereof. The court shall thereupon issue an order remanding the defendant to the custody of the sheriff pending further proceedings in the cause.

(4) A person committed under this section shall be entitled to a rehearing as to his sanity, as provided by s. 51.11, except that his application for rehearing shall be to the court which committed him. If he is found insane or feeble-minded, another rehearing shall not be had unless the court is satisfied there is reasonable cause to believe that there is improvement in his mental condition, in which case the court may order another rehearing. If it is determined upon reexamination that the insanity or feeble-mindedness of the defendant is chronic, he shall be recommitted to such institution and shall not be discharged except upon the order of the court which committed him.

957.14 Rules of civil trials. The summoning of jurors; the impaneling and qualifications of the jury; the challenge of jurors for cause; the duty of the court in charging the jury and giving instructions and discharging the jury when unable to agree shall be the same in criminal as it is in civil actions, except that s. 270.18 shall not apply to criminal actions. Section 327.25 applies to criminal proceedings.

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.

957.16 Variances disregarded; amendment. (1) The trial court may allow amendments in case of variance between the complaint or indictment or information and the proofs in all cases where the variance is not material to the merits of the action. After verdict the pleading shall be deemed amended to conform to the proof if no objection based on such variance was timely raised upon the trial.

(2) Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

957.25 Plea of guilty or nolo contendere. Upon the request of a defendant stating that he desires to plead guilty or nolo contendere the trial court may at any time at a regular or special term require the district attorney to file an information against him and may receive his plea and enter judgment thereon. If the defendant is arraigned on

a charge of misdemeanor, the plea may be to the complaint. The court may in its discretion refuse to accept a plea of nolo contendere.

History: 1961 c. 561.

957.255 New trial; service of affidavits; appeal. (1) Within one year after judgment has been rendered and on motion in writing of the defendant the court may grant a new trial for any cause for which a new trial may be granted in the circuit court or when it appears to the court that justice has not been done, and on such terms and conditions as the court directs. The motion shall be signed by the defendant or his attorney and shall set forth the grounds upon which the defendant relies for a new trial. The motion together with any affidavits intended to be used in connection therewith shall be served on the district attorney and filed with the clerk of the court at least 20 days before the argument on said motion, but the court may, by order, fix a shorter time. If the trial judge is disabled or no longer in office, his successor or another judge may hear and determine the motion.

(2) If a new trial is denied an appeal may be taken therefrom to the circuit court within 15 days of the date of such denial, and said circuit court may review the order refusing a new trial and if reversed and the crime involved is a felony then the circuit court may order a new trial to be had in said circuit court, and if the crime involved is a misdemeanor then the case shall be remanded to the county court for trial, or said circuit court may render such other order or judgment as it deems proper.

(3) A new trial shall proceed in all respects as if there had been no former trial. On the new trial the defendant may be convicted of any crime charged in the complaint or other pleading irrespective of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to on the new trial.

History: 1961 c. 561.

957.26 Counsel for indigent defendants charged with felony; advice by court. (1) Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order, pursuant to s. 256.49, as compensation and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warrant to the county treasurer to make such payment.

(2) Upon arraignment and before plea, the court shall advise any person charged with a felony of his right to counsel and that if he is indigent the court will appoint counsel at his request. A record of such advice and of the defendant's reply, if any, shall be made in the docket or in a transcript of the proceedings.

(3) If appointment of counsel has not been so made as to include services upon appeal or writ of error, or if no counsel was appointed in the trial court, the supreme court or the chief justice, upon timely notice to the district attorney and upon being satisfied that review is sought in good faith and upon reasonable grounds (or if the appeal or writ of error is prosecuted by the state) may appoint counsel to prosecute or defend such appeal or writ of error. If no counsel was appointed in the trial court, the defendant shall be required to show his inability to employ counsel. Upon the certificate of the clerk of the supreme court the county treasurer shall pay the attorney such sum for compensation and expenses as the supreme court allows.

(4) Under like circumstances counsel may be appointed and compensated for representing prisoners upon writs of habeas corpus.

History: 1961 c. 500.

Cross Reference: See 270.125 (4) as to district attorney's duty to inform prisoner of his right to counsel and to compulsory process to procure attendance of witnesses.

Trial court authorized to order payment of compensation to court appointed attorney under 957.26 (1), as amended, and the amount is to be determined pursuant to 256.49. 50 Atty Gen. 176.

Counsel for indigent defendants. 47 MLR 111.

957.27 Expert witnesses. (1) EXPERTS TO BE APPOINTED BY JUDGE. Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. Before entering upon such investigation such expert shall take and subscribe the following oath, before the judge making the appointment or some officer designated by him: "I do solemnly swear that I will make a faithful and impartial examination of the matters to be investigated by me and that I will make a true report thereon according to the best of my knowledge, belief and understanding. So help me God." The compensation of such expert witnesses shall be fixed by the court and paid by the county upon the order of the court as a part of

the costs of the action. The receipt by any expert witness summoned under this section of any other compensation than so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation shall be unlawful and punishable as contempt of court. The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross-examination by both parties, who may also summon other expert witnesses at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject.

(2) EXPERTS TO EXAMINE THE ACCUSED. No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been seasonably demanded.

(3) ACCUSED MAY BE COMMITTED TO HOSPITAL. Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under s. 957.13. In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of the said chief physician who may be cross-examined regarding the report by counsel for both parties. It shall be the duty of the sheriff to convey the accused to and from the place of commitment, and if the sheriff fails to call for the accused upon expiration of the time fixed by the court the accused shall be retained in custody in the hospital or asylum and if the accused is not removed upon the expiration of the time fixed by the court the superintendent shall give notice thereof by registered mail to the judge and the sheriff; and the county shall pay to the hospital or asylum for the keep and maintenance of the accused the sum of $10 per day after the expiration of the time fixed by the court until the accused is removed.

(4) EXPERTS, WRITTEN REPORTS OF. Each expert witness appointed by the court may be required by the court to prepare a written brief report under oath upon the mental condition of the person in question and such report shall be filed with the clerk at such time as may be fixed by the court. Such report may with the permission of the court be read by the witness at the trial.