CHAPTER 972

CRIMINAL TRIALS

972.01 Jury; civil rules applicable. The summoning of jurors, the impaneling and qualifications of the jury, the challenge of jurors for cause and 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 in civil actions, except that s. 805.08 (3) shall not apply.

History: Sup. Ct. Order, 67 W (2d) 784.

Wis. J.I.—Criminal, 520, the Allen charge, as to the duty of a jury to try to reach agreement, is proper. Kelley v. State, 51 W (2d) 641, 187 NW (2d) 810.

972.02 Jury trial; waiver. (1) Except as otherwise provided in this chapter, criminal cases shall be tried by a jury of 12, drawn as prescribed in ch. 805, unless the defendant waives a jury in writing or by statement in open court or under s. 967.08 (2) (b), on the record, with the approval of the court and the consent of the state.

(2) At any time before verdict the parties may stipulate in writing or by statement in open court, on the record, 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.

(4) No member of the grand jury which found the indictment shall be a juror for the trial of the indictment.

History: Sup. Ct. Order, 67 W (2d) 784; Sup. Ct. Order, 141 W (2d) xxxii.

Judicial Council Note, 1988: Sub. (1) is amended to reflect that waiver of trial by jury may be made by telephone upon the defendant's request, unless good cause to the contrary is shown. [Re Order effective Jan. 1, 1988]

A defendant cannot claim that his waiver of a jury, where the record is silent as to acceptance by the court and prosecution, made his subsequent jury trial invalid. Spiller v. State, 49 W (2d) 372, 182 NW (2d) 242.

A defendant can waive a jury after the state has completed its case. Warrix v. State, 50 W (2d) 368, 184 NW (2d) 189.

Where defendant demanded a jury trial he cannot be held to have waived it by participating in a trial to the court. He can raise this question for the first time on appeal. State v. Cleveland, 50 W (2d) 666, 184 NW (2d) 899.

A record demonstrating defendant's willingness and intent to waive jury must be established before accepting waiver. Krueger v. State, 84 W (2d) 272, 267 NW (2d) 602 (1978).

Defense's participation in misdemeanor court trial without objection did not constitute waiver of jury trial. State v. Moore, 97 W (2d) 669, 294 NW (2d) 551 (Ct. App. 1980).

Under facts of case, court abused discretion in discharging juror during deliberations. State v. Lehman, 108 W (2d) 291, 321 NW (2d) 212 (1982).

Trial court may not deny accused's motion to withdraw jury waiver without showing that granting withdrawal would substantially delay or impede cause of justice. State v. Cloud, 133 W (2d) 58, 393 NW (2d) 129 (Ct. App. 1986).

Waiver of jury trial must be made by affirmative action of defendant; neither counsel nor court may waive it on defendant's behalf. If defendant has not personally waived right, proper remedy is new trial rather than postconviction hearing. State v. Livingston, 159 W (2d) 561, 464 NW (2d) 839 (1991).

Waiver of jury in Wisconsin. 1971 WLR 626.

972.03 Peremptory challenges. Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section. When the crime charged is punishable by life imprisonment the state is entitled to 6 peremptory challenges and the defendant is entitled to 6 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 12 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. Each side shall be allowed one additional peremptory challenge if additional jurors are to be impaneled under s. 972.04 (1).

History: 1983 a. 226.

Judicial Council Note, 1983: This section is amended by allowing one additional peremptory challenge when additional jurors are to be impaneled. This approximates the right of each side under prior s. 972.05 to one additional peremptory challenge for each alternate juror. Since abolition of the concept of "alternate" jurors permits the additional peremptory challenge to be made to any member of the panel, only one additional challenge is permitted. [Bill 320-S]

Defendant has heavy burden to show unlawful discrimination in prosecutor's peremptory challenges. State v. Grady, 93 W (2d) 1, 286 NW (2d) 607 (Ct. App. 1979).

972.04 Exercise of challenges. (1) The number of jurors impaneled shall be 12 unless a lesser number has been stipulated and approved under s. 972.02 (2) or the court orders that additional jurors be impaneled. That number, plus the number of peremptory challenges available to all the parties, shall be called initially and maintained in the jury box by calling others to replace jurors excused for cause until all jurors have been examined. The parties shall thereupon exercise in their order, the state beginning, the peremptory challenges available to them, and if any party declines to challenge, the challenge shall be made by the clerk by lot.

(2) A party may waive in advance any or all of its peremptory challenges and the number of jurors called pursuant to sub. (1) shall be reduced by this number.

History: 1983 a. 226.

Judicial Council Note, 1983: Sub. (1) is amended by allowing the court to order that additional jurors be impaneled. The size of the panel is then reduced to the appropriate number by lot immediately before final submission if that has not already occurred through death or discharge of a juror. See s. 972.10 (7), stats. Abolition of the concept of "alternate" jurors is intended to promote an attentive attitude and a collegial relationship among all jurors. [Bill 320-S]

See note to 805.08, citing Press-Enterprise Co. v. Superior Court of Cal. 464 US 501 (1984).

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

See note to 805.08, citing American Family Mut. Ins. Co. v. Shannon, 120 W (2d) 560, 356 NW (2d) 175 (1984).

972.07 Jeopardy. Jeopardy attaches:

(1) In a trial to the court without a jury when a witness is sworn;

(2) In a jury trial when the selection of the jury has been completed and the jury sworn.

Federal rule that jeopardy attaches when jury is sworn is integral part of guarantee against double jeopardy. Crist v. Bretz, 437 US 28 (1978).

972.08 Incriminating testimony compelled; immunity. (1) (a) Whenever any person refuses to testify or to produce books, papers or documents when required to do so before

any grand jury, in a proceeding under s. 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

(b) The immunity provided under par. (a) is subject to the restrictions under s. 972.085.

(2) Whenever a witness attending in any court trial or appearing before any grand jury or John Doe investigation fails or refuses without just cause to comply with an order of the court under this section to give testimony in response to a question or with respect to any matter, the court, upon such failure or refusal, or when such failure or refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or until such trial, grand jury term or John Doe investigation is concluded but in no case exceeding one year. No person confined under this section shall be admitted to bail pending the determination of an appeal taken by him from the order of his confinement.

(3) Any witness appearing before a grand jury may be ordered confined under sub. (2) for not more than one separate failure or refusal before that grand jury.

History: 1979 c. 291; 1989 a. 122.

See note to Art. I, sec. 8, citing State v. Blake, 46 W (2d) 386, 175 NW (2d) 210.

The district attorney is required to move that witnesses be granted immunity before the court can act. The trial court has no discretion to act without a motion and a defendant cannot invoke the statute. Elam v. State, 50 W (2d) 383, 184 NW (2d) 176.

See note to Art. I, sec. 8, citing Hebel v. State, 60 W (2d) 325, 210 NW (2d) 695.

An order by a judge to compel a witness in a John Doe proceeding to testify after refusal on the ground of self-incrimination must be done in open court. State ex rel. Newspapers, Inc. v. Circuit Court, 65 W (2d) 66, 221 NW (2d) 894.

In considering whether to move for immunity for a witness a district attorney should bear in mind that his duty is not merely to convict but to seek impartial justice, and he should not hesitate to move for immunity solely on the ground that the testimony thus elicited might exonerate the defendant. Peters v. State, 70 W (2d) 22, 233 NW (2d) 420.

See note to 48.34, citing State v. J.H.S. 90 W (2d) 613, 280 NW (2d) 356 (Ct. App. 1979).

See note to Art. I, sec. 8, citing United States v. Wilson, 421 US 309.

Defendant seeking review of prosecutor's immunization decision must make substantial evidentiary showing that government intended to distort judicial fact-finding process. Stuart v. Gagnon, 614 F. Supp. 247 (1985).

972.085 Immunity; use standard. Immunity from criminal or forfeiture prosecution under ss. 13.35, 17.16 (7), 77.61 (12), 93.17, 111.07 (2) (b), 128.16, 133.15, 139.20, 139.39 (5), 195.048, 196.48, 551.56 (3), 553.55 (3), 601.62 (5), 767.47 (4), 767.65 (21), 776.23, 885.15, 885.24, 885.25 (2), 891.39 (2), 968.26, 972.08 (1) and 979.07 (1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

History: 1989 a. 122.

972.09 Hostile witness in criminal cases. Where testimony of a witness at any preliminary examination, hearing or trial in a criminal action is inconsistent with a statement previously made by him, he may be regarded as a hostile witness and examined as an adverse witness, and the party producing him may impeach him by evidence of such prior contradictory statement. When called by the defendant, a law enforcement officer who was involved in the seizure of evidence shall be regarded as a hostile witness and may be examined as an adverse witness at any hearing in which the legality of such seizure may properly be raised.

History: Sup. Ct. Order, 59 W (2d) R6.

Defendant was not prejudiced by receipt in evidence of the hostile state witness' entire statement rather than only those portions she acknowledged at trial, for while prior inconsistent statements may not be introduced until they have been read to the witness in order that the witness may explain the contradiction, it appeared herein that the unread portion of the statement was not inconsistent with the witness' testimony at trial, but would have been objectionable as hearsay if such objection had been made. Where the question is raised as to the propriety of use of a prior inconsistent statement of a witness, and request is made for hearing outside the presence of the jury, the more appropriate procedure is to excuse the jury; however, such request is addressed to the discretion of the trial court and will not constitute grounds for reversal unless there is a showing of prejudicial effect on the jury or denial of defendant to his right to a fair trial. Bullock v. State, 53 W (2d) 809, 193 NW (2d) 889.

This section does not forbid the use of prior inconsistent statements of a witness as substantive evidence when no objection is made by counsel. There is no duty on the trial court to sua sponte reject the evidence or to instruct the jury that the evidence is limited to impeachment. Irby v. State, 60 W (2d) 311, 210 NW (2d) 755.

See note to art. I, sec. 11, citing United States v. Havens, 446 US 620 (1980).

972.10 Order of trial. (1) (a) After the selection of a jury, the court shall determine if the jurors may take notes of the proceedings:

1. If the court authorizes note-taking, the court shall instruct the jurors that they may make written notes of the proceedings, except the opening statements and closing arguments, if they so desire and that the court will provide materials for that purpose if they so request. The court shall stress the confidentiality of the notes to the jurors. The jurors may refer to their notes during the proceedings and deliberation. The notes may not be the basis for or the object of any motion by any party. After the jury has rendered its verdict, the court shall ensure that the notes are promptly collected and destroyed.

2. If the court does not authorize note-taking, the court shall state the reasons for the determination on the record.

(b) The court may give additional preliminary instructions to assist the jury in understanding its duty and the evidence it will hear. The preliminary instructions may include, without limitation, the elements of any offense charged, what constitutes evidence and what does not, guidance regarding the burden of proof and the credibility of witnesses, and directions not to discuss the case until deliberations begin. The additional instructions shall be disclosed to the parties before they are given and either party may object to any specific instruction or propose instructions of its own to be given prior to trial.

(2) In a trial where the issue is mental responsibility of a defendant, the defendant may make an opening statement on such issue prior to his offer of evidence. The state may make its opening statement on such issue prior to the defendant's offer of evidence or reserve the right to make such statement until after the defendant has rested.

(3) The state first offers evidence in support of the prosecution. The defendant may offer evidence after the state has rested. If the state and defendant have offered evidence upon the original case, the parties may then respectively offer rebuttal testimony only, unless the court in its discretion permits them to offer evidence upon their original case.

(4) At the close of the state's case and at the conclusion of the entire case, the defendant may move on the record for a dismissal.

(5) When the evidence is concluded and the testimony closed, if either party desires special instructions to be given to the jury, the instructions shall be reduced to writing, signed by the party or his or her attorney and filed with the clerk, unless the court otherwise directs. Counsel for the parties, or the defendant if he or she is without counsel, shall be allowed reasonable opportunity to examine the instructions requested and to present and argue to the court objections to the

adoption or rejection of any instructions requested by counsel. The court shall advise the parties of the instructions to be given. Counsel, or the defendant if he or she is not represented by counsel, shall specify and state the particular ground on which the instruction is objected to, and it shall not be sufficient to object generally that the instruction does not state the law, or is against the law, but the objection shall specify with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection. All objections shall be on the record. The court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.

(6) In closing argument, the state on the issue of guilt and the defendant on the issue of mental responsibility shall commence and may conclude the argument.

(7) If additional jurors have been impaneled under s. 972.04 (1) and the number remains more than required at final submission of the cause, the court shall determine by lot which jurors shall not participate in deliberations and discharge them.

History: 1979 c. 128; 1981 c. 358; 1983 a. 226; Sup. Ct. Order, 130 W (2d) xv.

Judicial Council Note, 1983: Sub. (7) requires the court to reduce the size of the jury panel to the proper number immediately prior to final submission of the cause. Unneeded jurors must be determined by lot and these may not participate in deliberations. State v. Lehman, 108 Wis. 2d 291 (1982). [Bill 320-S]

Judicial Council Note, 1986: Sub. (1) (b) is amended to provide that preliminary instructions may include the elements of any offense charged, what constitutes evidence and what does not, guidance regarding the burden of proof and the credibility of witnesses, and directions not to discuss the case until deliberations begin.

Sub. (5) is amended to require that the court provide the jury one written copy of its instructions regarding the burden of proof. [Re Order eff. 7-1-86]

No potential coercion was exerted by the trial court in its further supplemental statement made to the jury requesting it to continue its deliberations for the next half hour or hour, and if not then agreed, overnight hotel arrangements would be made. Ziegler v. State, 65 W (2d) 703, 223 NW (2d) 442.

Objection to jury instructions will not be waived when instruction misstates law. Randolph v. State, 83 W (2d) 630, 266 NW (2d) 334 (1978).

If defendant moves for dismissal at close of state's case and then presents evidence, appellate court will consider all evidence of guilt in ruling on motion. State v. Gebarski, 90 W (2d) 754, 280 NW (2d) 672 (1979).

Refusal to give jury special instructions on identification was not abuse of discretion. Hampton v. State, 92 W (2d) 450, 285 NW (2d) 868 (1979).

Control of content and duration of closing argument is within discretion of trial court. State v. Stawicki, 93 W (2d) 63, 286 NW (2d) 612 (Ct. App. 1979).

Special instruction need not be given because witness has been granted immunity. Linse v. State, 93 W (2d) 163, 286 NW (2d) 554 (1980).

See note to 939.23, citing State v. Bougneit, 97 W (2d) 687, 294 NW (2d) 675 (Ct. App. 1980).

Defendant who chose to be represented by counsel had no right to address jury personally in closing argument. Robinson v. State, 100 W (2d) 152, 301 NW (2d) 429 (1981).

Court refuses to extend "theory of defense instruction" to include legal basis for motivation of witness who is not a defendant. State v. Dean, 105 W (2d) 390, 314 NW (2d) 151 (Ct. App. 1981).

Unless defendant consents, it is reversible error for court to substitute alternate juror for regular juror after jury deliberations have begun. State v. Lehman, 108 W (2d) 291, 321 NW (2d) 212 (1982).

See note to 805.13, citing In Matter of E. B. 111 W (2d) 175, 330 NW (2d) 584 (1983).

Entrapment instructions upheld. State v. Saternus, 127 W (2d) 460, 381 NW (2d) 290 (1986).

Court must inform counsel of changes it makes to jury instructions following instructions conference. State v. Kuntz, 160 W (2d) 722, 467 NW (2d) 531 (1991).

See note to Art. I, sec. 7, citing State v. Kuntz, 160 W (2d) 722, 467 NW (2d) 531 (1991).

See note to Art. I, sec. 7, citing Herring v. New York, 422 US 853.

See note to Art. I, sec. 3, citing Richmond Newspapers, Inc. v. Virginia, 448 US 555 (1980).

972.11 Evidence and practice; civil rules applicable. (1) Except as provided in subs. (2) to (4), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Chapters 885 to 895, except ss. 804.02 to 804.07 and 887.23 to 887.26, shall apply in all criminal proceedings.

(2) (a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

(b) If the defendant is accused of a crime under s. 940.225, 948.02, 948.05 or 948.06, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):

1. Evidence of the complaining witness's past conduct with the defendant.

2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.

3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

(c) Notwithstanding s. 901.06, the limitation on the admission of evidence of or reference to the prior sexual conduct of the complaining witness in par. (b) applies regardless of the purpose of the admission or reference unless the admission is expressly permitted under par. (b) 1, 2 or 3.

(3) (a) In a prosecution under s. 940.22 involving a therapist and a patient or client, evidence of the patient's or client's personal or medical history is not admissible except if:

1. The defendant requests a hearing prior to trial and makes an offer of proof of the relevancy of the evidence; and

2. The court finds that the evidence is relevant and that its probative value outweighs its prejudicial nature.

(b) The court shall limit the evidence admitted under par. (a) to relevant evidence which pertains to specific information or examples of conduct. The court's order shall specify the information or conduct that is admissible and no other evidence of the patient's or client's personal or medical history may be introduced.

(c) Violation of the terms of the order is grounds for a mistrial but does not prevent the retrial of the defendant.

(4) Upon the motion of any party or its own motion, a court may order that any exhibit or evidence be delivered to the party or the owner prior to the final determination of the action or proceeding if all of the following requirements are met:

(a) There is a written stipulation by all the parties agreeing to the order.

(b) No party will be prejudiced by the order.

(c) A complete photographic or other record is made of any exhibits or evidence so released.

History: Sup. Ct. Order, 59 W (2d) R7; Sup. Ct. Order, 67 W (2d) 784; 1975 c. 184, 422; 1979 c. 89; 1981 c. 147 ss. 1, 2; 1983 a. 165, 449; 1985 a. 275; 1987 a. 332 s. 64.

Testimony of an officer that a piece of cloth found at the burglary scene where forcible entry was effected was similar to a coat worn by one of the defendants at the time of his apprehension was admissible and not objectionable because the coat and piece of material were not produced. York v. State, 45 W (2d) 550, 173 NW (2d) 693.

Contradictory testimony of different witnesses for the state does not necessarily cancel the testimony and render it unfit as a basis for conviction, for determination of credibility and the weight to be accorded conflicting testimony is properly a function of the jury in the exercise of which the jury may accept or reject the inconsistent testimony even under the beyond-a-reasonable-doubt burden of proof. Embry v. State, 46 W (2d) 151, 174 NW (2d) 521.

An offer of proof must be made as a necessary condition precedent to review by the supreme court of any alleged error in the exclusion of evidence (because without such an offer there is no way to determine whether the exclusion was prejudicial). State v. Moffett, 46 W (2d) 164, 174 NW (2d) 263.

Defendant's conviction could not be impugned because the trial court permitted the state in rebuttal to adduce testimony of witnesses as to prior threats of the defendant to shoot the victims, injuries inflicted upon the daughter as disclosed in medical records, and the number of shots fired; such testimony

clearly rebutting defendant's disclaimer of intent and version of the incident, i.e., the accidental discharge of the weapon. State v. Watson, 46 W (2d) 492, 175 NW (2d) 244.

A question is not leading if it merely suggests a subject rather than a specific answer which may not be a true one. Evidence is relevant if it tends to prove a material fact by connection with other facts. Hicks v. State, 47 W (2d) 38, 176 NW (2d) 386.

Challenge to the admissibility of items taken from defendant's motel room, on the ground that the chain of custody was not properly established because a police department laboratory chemist who examined the same was not present to testify, could not be sustained under uncontroverted proof that the condition of the exhibits had not been altered by the chemist's examination, there was no unexplained or missing link as to who had had custody, and they were in substantially the same condition at the time of the chemist's examination as when taken from defendant's room. State v. McCarty, 47 W (2d) 781, 177 NW (2d) 819.

In a criminal trial it is not error to admit into evidence 2 guns carried by one coconspirator even though that man was convicted of an offense not involving the guns and defendant was not connected with the guns. State v. Hancock, 48 W (2d) 687, 180 NW (2d) 517.

In a prosecution of codefendants for armed robbery of a narcotic addict, where the victim admitted injecting heroin into his arm about 72 hours before he testified, the trial court properly denied defendants' request that the witness display his arm in the presence of the jury in an attempt to prove that the injection was more recent, and correctly ruled that the jury was unqualified to so determine but that the discovery sought might be required outside the presence of the jury before an expert competent to pass judgment upon the freshness of the needle marks made by the injection. Edwards v. State, 49 W (2d) 105, 181 NW (2d) 383.

A detective's opinion of a drug addict's reputation for truth and veracity did not qualify to prove such reputation in the community because it was based on 12 varying opinions of persons who knew the addict, from which a community reputation could not be ascertained. Edwards v. State, 49 W (2d) 105, 181 NW (2d) 383.

While witnesses may be questioned regarding their mental or physical condition where such matters have bearing on their credibility, evidence that a witness was subject to epilepsy does not warrant disregarding his testimony in the absence of showing what effect the epilepsy had on his memory. Sturdevant v. State, 49 W (2d) 142, 181 NW (2d) 523.

Evidence of defendant's expenditure of money shortly after a burglary is properly admitted. State v. Heidelbach, 49 W (2d) 350, 182 NW (2d) 497.

It is not error to give an instruction as to prior convictions as affecting credibility where the prior case was a misdemeanor. McKissick v. State, 49 W (2d) 537, 182 NW (2d) 282.

An exception to the res gestae rule will admit statements by a child victim of a sexual assault to a parent 2 days later. Bertrang v. State, 50 W (2d) 702, 184 NW (2d) 867.

Challenge to the admissibility of boots on the ground that the victim did not properly identify the same was devoid of merit, where it was stipulated that the child said they "could be" the ones she saw, for her lack of certitude did not preclude admissibility, but went to the weight the jury should give to her testimony. Howland v. State, 51 W (2d) 162, 186 NW (2d) 319.

The state need not introduce evidence of a confession until after defendant testifies and gives contradictory testimony. Ameen v. State, 51 W (2d) 175, 186 NW (2d) 206.

Testimony of an accomplice who waived her privilege is admissible even though she had not been tried or granted immunity. State v. Wells, 51 W (2d) 477, 187 NW (2d) 328.

Where counsel fails to state the purpose of a question to which objection is sustained on grounds of immateriality, the court may exclude the evidence. State v. Becker, 51 W (2d) 659, 188 NW (2d) 449.

Where the evidence was in conflict as to whether a substance found in defendant's possession was heroin, the judge cannot take judicial notice of other sources without proper notice to the parties. State v. Barnes, 52 W (2d) 82, 187 NW (2d) 845.

The rule that the asking of an improper question which is not answered is not ground for reversal is especially true when the trial court instructs the jury to disregard such questions and to draw no inferences from them, for an instruction is presumed to efface any possible prejudice which may have resulted from the asking of the question. Taylor v. State, 52 W (2d) 453, 190 NW (2d) 208.

A witness for the defense could be impeached by prior inconsistent statements to the district attorney even though made in the course of plea bargaining as to a related offense. Taylor v. State, 52 W (2d) 453, 190 NW (2d) 208.

The trial court did not err in failing to declare a mistrial because of a statement made by the prosecutor in closing argument, challenged as improper allegedly because he expressed his opinion as to defendant's guilt, where it neither could be said that the statement was based on sources of information outside the record, nor expressed the prosecutor's conviction as to what the evidence established. State v. McGee, 52 W (2d) 736, 190 NW (2d) 893.

It is error for a trial court to restrict cross-examination of an accomplice who was granted immunity, but the conviction will not be reversed if the error was harmless. State v. Schenk, 53 W (2d) 327, 193 NW (2d) 26.

Generally, a witness may not be impeached on collateral matters, and what constitutes a collateral matter depends on the issues of the particular case and the substance, rather than the form, of the questions asked on direct examination. Miller v. State, 53 W (2d) 358, 192 NW (2d) 921.

A defendant who testifies in his own behalf may be recalled for the purpose of laying a foundation for impeachment. Evidence that on a prior occasion defendant did not wear glasses and that he had a gun similar to that described by the complainant was admissible where it contradicted testimony of the defendant. Parham v. State, 53 W (2d) 458, 192 NW (2d) 838.

Where the prosecutor stated in his opening remarks that defendant refused to be fingerprinted but forgot to introduce testimony to this effect, the error is cured by proper instructions. State v. Tew, 54 W (2d) 361, 195 NW (2d) 615.

A deliberate failure to object to prejudicial evidence at trial constitutes a binding waiver. Murray v. State, 83 W (2d) 621, 266 NW (2d) 288 (1978).

Guidelines set for admission of testimony of hypnotized witness. State v. Armstrong, 110 W (2d) 555, 329 NW (2d) 386 (1983).

Act of writing about sexual desires or activities was not itself prior "sexual conduct". Victim's notes expressing sexual desires and fantasies were, therefore, admissible. State v. Vonesh, 135 W (2d) 477, 401 NW (2d) 170 (Ct. App. 1986).

Erroneously admitted and false testimony of victim that she was virgin at time of disputed assault so pervasively affected trial that issue of consent wasn't fully tried. State v. Penigar, 139 W (2d) 569, 408 NW (2d) 28 (1987).

Sub. (2) (b) (rape shield law) bars, with 2 narrow exceptions, evidence of all sexual activity by complainant not incident to alleged rape. State v. Gulrud, 140 W (2d) 721, 412 NW (2d) 139 (Ct. App. 1987).

This section doesn't violate separation of powers doctrine. State v. Mitchell, 144 W (2d) 596, 424 NW (2d) 698 (1988).

This section does not on its face violate constitutional right to present evidence, but may, in particular circumstances violate right; to establish constitutional right to present otherwise excluded evidence, defendant must make offer of proof establishing 5 factors and court must perform balancing test. State v. Pulizzano, 155 W (2d) 633, 456 NW (2d) 325 (1990).

To admit evidence of prior untruthful allegations of sexual assault under (2) (b) 3 court must be able to conclude from offer of proof that reasonable person could infer that complainant made prior untruthful allegation; "allegation" is not restricted to allegations reported to police. State v. DeSantis, 155 W (2d) 774, 456 NW (2d) 600 (1990).

972.12 Sequestration of jurors. The court may direct that the jurors sworn be kept together or be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others.

History: 1987 a. 73; 1991 a. 39.

Allowing jury to separate during its deliberations created rebuttable presumption of prejudice. State v. Halmo, 125 W (2d) 369, 371 NW (2d) 424 (Ct. App. 1985).

972.13 Judgment. (1) A judgment of conviction shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest.

(2) Except in cases where ch. 975 is applicable, upon a judgment of conviction the court shall proceed under ch. 973. The court may adjourn the case from time to time for the purpose of pronouncing sentence.

(3) A judgment of conviction shall set forth the plea, the verdict or finding, the adjudication and sentence, and a finding as to the specific number of days for which sentence credit is to be granted under s. 973.155. If the defendant is acquitted, judgment shall be entered accordingly.

(4) Judgments shall be in writing and signed by the judge or clerk.

(5) A copy of the judgment shall constitute authority for the sheriff to execute the sentence.

(6) The following forms may be used for judgments:

STATE OF WISCONSIN

..... County

In ..... Court

The State of Wisconsin

vs.

.....(Name of defendant)

UPON ALL THE FILES, RECORDS AND PROCEEDINGS,

IT IS ADJUDGED That the defendant has been convicted upon the defendant's plea of guilty (not guilty and a verdict of guilty) (not guilty and a finding of guilty) (no contest) on the..... day of....., 19.., of the crime of..... in violation of s.....; and the court having asked the defendant whether the defendant has anything to state why sentence should not be pronounced, and no sufficient grounds to the contrary being shown or appearing to the court.

*IT IS ADJUDGED That the defendant is guilty as convicted.

*IT IS ADJUDGED That the defendant is hereby committed to the Wisconsin state prisons (county jail of..... county) for an indeterminate term of not more than.....

*IT IS ADJUDGED That the defendant is placed in the intensive sanctions program subject to the limitations of section 973.032 (3) of the Wisconsin Statutes and the following conditions:....

*IT IS ADJUDGED That the defendant is hereby committed to detention in (the defendant's place of residence or place designated by judge) for a term of not more than....

*IT IS ADJUDGED That the defendant is ordered to pay a fine of $.... (and the costs of this action).

*IT IS ADJUDGED That the defendant pay restitution to....

*IT IS ADJUDGED That the defendant is restricted in his or her use of computers as follows:....

*The.... at.... is designated as the Reception Center to which the defendant shall be delivered by the sheriff.

*IT IS ORDERED That the clerk deliver a duplicate original of this judgment to the sheriff who shall forthwith execute the same and deliver it to the warden.

Dated this.... day of...., 19....

BY THE COURT....

Date of Offense....,

District Attorney....,

Defense Attorney....

*Strike inapplicable paragraphs.

STATE OF WISCONSIN

..... County

In.... Court

The State of Wisconsin

vs.

.....(Name of defendant)

On the.... day of...., 19..., the district attorney appeared for the state and the defendant appeared in person and by.... the defendant's attorney.

UPON ALL THE FILES, RECORDS AND PROCEEDINGS

IT IS ADJUDGED That the defendant has been found not guilty by the verdict of the jury (by the court) and is therefore ordered discharged forthwith.

Dated this.... day of...., 19....

BY THE COURT....

(7) The department shall prescribe and furnish forms to the clerk of each county for use as judgments in cases where a defendant is placed on probation or committed to the custody of the department pursuant to chs. 967 to 979.

History: 1975 c. 39, 199; 1977 c. 353, 418; 1979 c. 89; 1983 a. 261, 438, 538; 1987 a. 27; 1989 a. 31; 1991 a. 39.

The trial court can on motion or on its own motion modify a criminal sentence if the motion is made within 90 days after sentencing. Prior cases overruled. The first judgment should not be vacated; it should be amended. Hayes v. State, 46 W (2d) 93, 175 NW (2d) 625.

A trial court must inform the defendant of his right to appeal. If it does not, the defendant may pursue a late appeal. Peterson v. State, 54 W (2d) 370, 195 NW (2d) 837.

The court did not abuse its discretion in revoking probation, reinstating the prior sentences and sentencing on 5 subsequent offenses for a total cumulative sentence of 16 years, where the defendant had a long record and interposed a frivolous defense in the later trials. Lange v. State, 54 W (2d) 569, 196 NW (2d) 680.

Hayes v. State was not intended to impose a jurisdictional limit on the power of a court to review a sentence. State ex rel. Warren v. County Court, 54 W (2d) 613, 197 NW (2d) 1.

The requirement that a court inform the defendant of his right to appeal applies only to convictions after April 1, 1972. In re Applications of Maroney and Kunz, 54 W (2d) 638, 196 NW (2d) 712.

Following sentencing the trial court must not only advise defendant of his right to appeal but also advise defendant and his attorney of the obligation of trial counsel to continue representation pending a decision as to appeal and until other counsel is appointed. Whitmore v. State, 56 W (2d) 706, 203 NW (2d) 56.

Factors relevant to the appropriateness of the sentence discussed. Tucker v. State, 56 W (2d) 728, 202 NW (2d) 897.

A trial judge has no power to validly sentence with a mental reservation that he might modify the sentence within 90 days if defendant has profited from imprisonment, and he cannot change an imposed sentence unless new factors are present. State v. Foellmi, 57 W (2d) 572, 205 NW (2d) 144.

Claim the trial court lacked jurisdiction to impose sentence because it failed to enter judgment of conviction on the jury's verdict is not reviewable because it involves no jurisdictional question, and the construction of the statute was not raised by defendant in his motion for postconviction relief nor did defendant go back to the trial court for relief as a basis for an appeal. Sass v. State, 63 W (2d) 92, 216 NW (2d) 22.

Where Whitmore (56 W (2d) 706) instructions are given, defendant must show that failure to move for new trial constituted an unintentional waiver of rights. Thiesen v. State, 86 W (2d) 562, 273 NW (2d) 314 (1979).

See note to 971.31, citing State v. Smith, 113 W (2d) 497, 335 NW (2d) 376 (1983).

Judgment entered by state court during pendency of removal proceedings in federal court was void. State v. Cegielski, 124 W (2d) 13, 368 NW (2d) 628 (1985).

Court's refusal to poll jurors individually was reversible error. State v. Wojtalewicz, 127 W (2d) 344, 379 NW (2d) 338 (Ct. App. 1985).

Written judgment of conviction is not prerequisite to sentencing. State v. Pham, 137 W (2d) 31, 403 NW (2d) 35 (1987).

Where judge allowed voir dire after polling jury on guilty verdict and where one juror's responses seriously undermined previous vote of guilty, jury's verdict was no longer unanimous, requiring new trial. State v. Cartagena, 140 W (2d) 59, 409 NW (2d) 386 (Ct. App. 1987).

As to traffic cases, see note to 345.34, citing 63 Atty. Gen. 328.

972.14 Statements before sentencing. (1) In this section:

(a) "Family member" has the meaning specified in s. 950.02 (3).

(b) "Victim" has the meaning specified in s. 950.02 (4).

(2) Before pronouncing sentence, the court shall ask the defendant why sentence should not be pronounced upon him or her and allow the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to the sentence. In addition, if the defendant is under 21 years of age and if the court has not ordered a presentence investigation under s. 972.15, the court shall ask the defendant if he or she has been adjudged delinquent under ch. 48 or has had a similar adjudication in any other state in the 3 years immediately preceding the date the criminal complaint relating to the present offense was issued.

(3) (a) Before pronouncing sentence in a felony case, the court shall also allow a victim or family member of a homicide victim to make a statement or submit a written statement to be read in court. The court may allow any other person to make or submit a statement under this paragraph. Any statement under this paragraph must be relevant to the sentence.

(b) After a conviction in a felony case, if the district attorney knows of a victim or family member of a homicide or felony murder victim, the district attorney shall attempt to contact that person to inform him or her of the right to make or provide a statement under par. (a). The district attorney may mail a letter or form to comply with this paragraph. Any failure to comply with this paragraph is not a ground for an appeal of a judgment of conviction or for any court to reverse or modify a judgment of conviction.

History: 1987 a. 27; 1989 a. 31.

Court's presentencing preparation and formulation of tentative sentence does not deny defendant's right to allocution at sentencing. State v. Varnell, 153 W (2d) 334, 450 NW (2d) 524 (Ct. App. 1989).

972.15 Presentence investigation. (1) After a conviction the court may order a presentence investigation, except that the court may order an employe of the department of corrections to conduct a presentence investigation only after a conviction for a felony.

(2) When a presentence investigation report has been received the judge shall disclose the contents of the report to the defendant's attorney and to the district attorney prior to sentencing. When the defendant is not represented by an attorney, the contents shall be disclosed to the defendant.

(2m) The person preparing the presentence investigation report shall attempt to contact the victim to determine the economic, physical and psychological effect of the crime on the victim. The person preparing the report may ask any appropriate person for information. This subsection does not preclude the person who prepares the report from including

any information for the court concerning the impact of a crime on the victim.

(2s) If the defendant is under 21 years of age, the person preparing the presentence investigation report shall attempt to determine whether the defendant has been adjudged delinquent under ch. 48 or has had a similar adjudication in any other state in the 3 years immediately preceding the date the criminal complaint relating to the present offense was issued and, if so, shall include that information in the report.

(3) The judge may conceal the identity of any person who provided information in the presentence investigation report.

(4) After sentencing, unless otherwise authorized under sub. (5) or ordered by the court, the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court.

(5) The department may use the presentence investigation report for correctional programming, parole consideration or care and treatment of any person sentenced to imprisonment or the intensive sanctions program, placed on probation, released on parole or committed to the department under ch. 51 or 971 or any other person in the custody of the department or for research purposes. The department may make the report available to other agencies or persons to use for purposes related to correctional programming, parole consideration, care and treatment, or research. Any use of the report under this subsection is subject to the following conditions:

(a) If a report is used or made available to use for research purposes and the research involves personal contact with subjects, the department, agency or person conducting the research may use a subject only with the written consent of the subject or the subject's authorized representative.

(b) The department or the agency or person to whom the report is made available shall not disclose the name or any other identifying characteristics of the subject, except for disclosure to appropriate staff members or employes of the department, agency or person as necessary for purposes related to correctional programming, parole consideration, care and treatment, or research.

History: 1983 a. 102; 1987 a. 27, 227; 1991 a. 39.

Defendant was not denied due process because the trial judge refused to order a psychiatric examination and have a psychiatric evaluation included in the presentence report. Hanson v. State, 48 W (2d) 203, 179 NW (2d) 909.

It is not error for the court to fail to order a presentence investigation, especially where the record contains much information as to the defendant's background and criminal record. State v. Schilz, 50 W (2d) 395, 184 NW (2d) 134.

48.78 does not prevent a judge from examining records of the department. Restrictive rules of evidence do not apply to sentencing procedures. Hammill v. State, 52 W (2d) 118, 187 NW (2d) 792.

Refusal to accept a recommendation of probation does not amount to an abuse of discretion where the evidence justified a severe sentence. State v. Burgher, 53 W (2d) 452, 192 NW (2d) 869.

If a presentence report is used by the trial court it must be part of the record; its absence is not error where defendant and counsel saw it and had a chance to correct it and where counsel approved the record without moving for its inclusion. Chambers v. State, 54 W (2d) 460, 195 NW (2d) 477.

Failure to order and consider a presentence report is not an abuse of discretion. Byas v. State, 55 W (2d) 125, 197 NW (2d) 757.

It is error for the sentencing court to consider pre-Gault juvenile adjudications where juveniles were denied counsel, even to the extent of showing a pattern of conduct. Stockwell v. State, 59 W (2d) 21, 207 NW (2d) 883.

The presentence report, consisting of information concerning defendant's personality, social circumstances and general pattern of behavior—and a section entitled "Agent's Impressions"—contained neither biased nor incompetent material where such reports are not limited to evidence which is admissible in court, and defendant's report, although recommending imposition of a maximum term, contained material both favorable and unfavorable as to defendant's general pattern of behavior. State v. Jackson, 69 W (2d) 266, 230 NW (2d) 832.

Consideration by the trial court of a presentence report prior to defendant's plea of guilty and hence in violation of (1), constituted at most harmless error, since the evil the statute is designed to prevent—receipt by the judge of prejudicial information while he is still considering the defendant's guilt or innocence or presiding over a jury trial—cannot arise in the context of a guilty plea, especially where, as here, the trial court had already assured itself of the voluntariness of the plea and the factual basis for the crime. Rosado v. State, 70 W (2d) 280, 234 NW (2d) 69.

Sentencing judge does not deny due process by considering pending criminal charges in determining sentence. Scope of judicial inquiry prior to sentencing discussed. Handel v. State, 74 W (2d) 699, 247 NW (2d) 711.

Information gathered in course of presentence investigation may not be revealed at trial following withdrawal of guilty plea. State v. Crowell, 149 W (2d) 859, 440 NW (2d) 348 (1989).

Defendants appearing with or without counsel have due process right to read presentence investigation report prior to sentencing. State v. Skaff, 152 W (2d) 48, 447 NW (2d) 84 (Ct. App. 1989).

See note to 974.06, citing State v. Flores, 158 W (2d) 636, 462 NW (2d) 899 (Ct. App. 1990).

Insuring the accuracy of the presentence investigation report in the Wisconsin correctional system. 1986 WLR 613.