# 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. 270.18 shall not apply.

Wis. J. I.—Criminal, Part I, 520, 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.

Instruction No. 1220 as to the element of intent approved State v. Zdiarstek, 53 W (2d) 776, 193 NW (2d) 833.

**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. 270, unless the defendant waives a jury in writing or by statement in open court, 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.

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.

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.

**972.04 Exercise of challenges.** (1) The number of jurors called shall total 12 plus the number of peremptory challenges available to all the parties, and that number, exclusive of those challenged for cause, shall be maintained in the jury box 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, such 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.

**972.05 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.

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

**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.

**972.08 Incriminating testimony compelled; immunity.** (1) 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 may tend to incriminate him or subject him to a forfeiture or penalty, he may nevertheless be compelled to testify or produce such 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 such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, but no person shall be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

**(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.

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.

**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.

**972.10 Order of trial.** (1) After the selection of a jury, the court may instruct it as to its duties. Such general instructions shall be furnished 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, such instructions shall be reduced to writing, signed by the party or his attorney and filed with the clerk, unless the court otherwise directs. Counsel for the parties, or the defendant if he 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 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 must specify with particularity wherein the instruction is insufficient, or does not state the law, or to what particular language there is an objection. All objections must be on the record.

**(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.

**972.11 Evidence and practice; civil rules applicable.** 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. Title XLIII, except ss. 887.05 to 887.12, 887.23 to 887.29, 889.22, 895.29 and 895.30, shall apply in all criminal proceedings.

**History:** Sup. Ct. order, 59 W (2d) R7.

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.

Impropriety in employment of photographs by police for identification purposes does not arise ipso facto because a single photograph is used, but only where under the "totality of the circumstances" the photographic identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Clarke, 49 W (2d) 161, 181 NW (2d) 355.

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.

**972.12 Conduct of jury after commencement of trial.** (1) The jurors sworn may, at any time before the submission of the case, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer, except in trials for crimes punishable by life imprisonment, where the jurors shall be kept together as provided in sub. (2) after they have been sworn.

**(2)** When the jury retires to consider its verdict, an officer of the court shall be appointed to keep them together and to prevent communication between the jurors and others.

**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 either impose or withhold sentence and, if the defendant is not fined or imprisoned, he shall be placed on probation as provided in s. 973.09. 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, and the adjudication and sentence. 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 his 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 he 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 ordered to pay a fine of $..... (and the costs of this action).

*The ..... at ..... is designated as the Reception Center to which the said 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 ..... his 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 this title.

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.

**972.14 Statements before sentencing.** Before pronouncing sentence, the court shall inquire of the defendant why sentence should not be pronounced upon him and accord the district attorney, defense counsel and defendant an opportunity to make a statement with respect to any matter relevant to sentence.

**972.15 Presentence investigation.** (1) After conviction the court may order a presentence investigation.

**(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.

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

**(4)** After sentencing, unless otherwise 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.

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.