CHAPTER 906

EVIDENCE — WITNESSES

NOTE: Extensive comments by the Judicial Council Committee and the Federal Advisory Committee are printed with chs. 901 to 911 in 59 Wis. 2d. The court did not adopt the comments but ordered them printed with the rules for information purposes.

906.01 General rule of competency. Every person is competent to be a witness except as otherwise provided in these rules.

History: Sup. Ct. Order, 59 Wis. 2d R1, R157 (1973); Sup. Ct. Order No. 16–01, 2017 WI 13, 373 Wis. 2d xiii.

The "best evidence rule" requires production of a writing to prove its contents. There is no comparable "better evidence rule" that requires the production of an item rather than testimony about the item. York v. State, 45 Wis. 2d 550, 173 N.W.2d 693 (1970).

The trial court may not declare a witness incompetent to testify, except as provided in this section. A witness's credibility is determined by the fact finder. State v. Hanson, 149 Wis. 2d 474, 439 N.W.2d 133 (Ct. App. 1989).

906.02 Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

History: Sup. Ct. Order, 59 Wis. 2d R1, R160 (1973); 1991 a. 32.

The chain of custody to items taken from the defendant's motel room was properly established although a police department laboratory chemist who examined the same was not present to testify when uncontroverted proof showed 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 the items 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 Wis. 2d 781, 177 N.W.2d 819 (1970).

A challenge to the admissibility of boots on the ground that the victim did not properly identify them was devoid of merit, as it was stipulated that the child said they "could be" the ones the child saw. The child's lack of certitude did not preclude admissibility, but went to the weight the jury should give to the testimony. Howland v. State, 51 Wis. 2d 162, 186 N.W.2d 319 (1971).

906.03 Oath or affirmation. (1) Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so.

(2) The oath may be administered substantially in the following form: Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God.

(3) Every person who shall declare that the person has conscientious scruples against taking the oath, or swearing in the usual form, shall make a solemn declaration or affirmation, which may be in the following form: Do you solemnly, sincerely and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury.

(4) The assent to the oath or affirmation by the person making it may be manifested by the uplifted hand.

History: Sup. Ct. Order, 59 Wis. 2d R1, R161 (1973); 1991 a. 32.

A witness who is a young child need not be formally sworn to meet the oath or affirmation requirement. State v. Hanson, 149 Wis. 2d 474, 439 N.W.2d 133 (1989).

906.04 Interpreters. An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

History: Sup. Ct. Order, 59 Wis. 2d R1, R162 (1973); 1981 c. 390; 1991 a. 32.

906.05 Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

History: Sup. Ct. Order, 59 Wis. 2d R1, R163 (1973).

A judge who carefully considered the transcribed record and the judge's recollection of a previous proceeding involving the defendant did not impermissibly testify. State v. Meeks, 2002 WI App 65, 251 Wis. 2d 361, 643 N.W.2d 526, 01–0263. Reversed on other grounds. 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859, 01–0263.

906.06 Competency of juror as witness. (1) AT THE TRIAL. A member of the jury may not testify as a witness before that jury in the trial of the case in which the member is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

History: Sup. Ct. Order, 59 Wis. 2d R1, R165 (1973); 1991 a. 32.

Verdict impeachment requires evidence that is: 1) competent; 2) shows substantive grounds sufficient to overturn the verdict; and 3) shows resulting prejudice. Discussing impeachment of a verdict through juror affidavits or testimony. After Hour Welding, Inc. v. Laneil Management Co., 108 Wis. 2d 734, 324 N.W.2d 686 (1982).

There was probable prejudice when the question of a depraved mind was central and a juror went to the jury room with a dictionary definition of "depraved" written on a card. State v. Ott, 111 Wis. 2d 691, 331 N.W.2d 629 (Ct. App. 1983).

A conviction was reversed when extraneous information improperly brought to the jury's attention raised a reasonable possibility that the information had a prejudicial effect on the hypothetical average jury. State v. Poh, 116 Wis. 2d 510, 343 N.W.2d 108 (1984).

Evidence of a juror's racially–prejudiced remark during jury deliberations was not competent under sub. (2). State v. Shillcutt, 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

In any jury trial, material prejudice on the part of any juror impairs the right to a jury trial. That prejudicial material was brought to only one juror's attention and was not communicated to any other jurors is irrelevant to determining whether that information was "improperly brought to the jury's attention" under sub. (2). Castenada v. Pederson, 185 Wis. 2d 200, 518 N.W.2d 246 (1994), State v. Messelt, 185 Wis. 2d 255, 518 N.W.2d 232 (1994).

Extraneous information is information, other than the general wisdom that a juror is expected to possess, that a juror obtains from a non–evidentiary source. A juror who consciously brings non–evidentiary objects to show the other jurors improperly brings extraneous information before the jury. State v. Eison, 188 Wis. 2d 298, 525 N.W.2d 91 (Ct. App. 1994).

Sub. (2) does not limit the testimony of a juror regarding clerical errors in a verdict. A written verdict not reflecting the jury's oral decision may be impeached by showing

in a timely manner and beyond a reasonable doubt that all jurors are in agreement that an error was made. State v. Williquette, 190 Wis. 2d 678, 526 N.W.2d 144 (Ct. App. 1995).

Outlining an analytical framework to be used to determine whether a new trial on the grounds of prejudice due to extraneous juror information. State v. Eison, 194 Wis. 2d 160, 533 N.W.2d 738 (1995).

Jurors may rely on their common sense and life experience during deliberations, including expertise that a juror may have on a particular subject. That a juror was a pharmacist did not make the juror's knowledge about the particular effect of a drug extraneous information subject to inquiry under sub. (2). State v. Heitkemper, 196 Wis. 2d 218, 538 N.W.2d 561 (Ct. App. 1995), 94–2659.

The extraneous information exception under sub. (2) is not limited to factual information but also includes legal information obtained outside the proceeding. State v. Wulff, 200 Wis. 2d 318, 546 N.W.2d 522 (Ct. App. 1996), 95–1732.

Generally, the sole area jurors are competent to testify to is whether extraneous information was considered. Except when juror bias goes to a fundamental issue such as religion, evidence of juror perceptions is not competent, no matter how mistaken, and cannot form the basis for granting a new trial. Anderson v. Burnett County, 207 Wis. 2d 587, 558 N.W.2d 636 (Ct. App. 1996), 96–0954.

The trial court, and not the defendant or the defendant's attorney, is permitted to question a juror directly at a hearing regarding juror bias. The trial court's discretion in submitting questions suggested by the defendant is limited, but the failure to submit questions is subject to harmless error evaluation. State v. Delgado, 215 Wis. 2d 16, 572 N.W.2d 479 (Ct. App. 1997), 96–2194.

It was reasonable to refuse to allow a former member of the jury from testifying as a witness in the same case. Broadhead v. State Farm Mutual Automobile Insurance Co., 217 Wis. 2d 231, 579 N.W.2d 761 (Ct. App. 1998), 97–0904.

For a juror to be competent to testify regarding extraneous information brought to the jury within the sub. (2) exception, the information must be potentially prejudicial, which it may be if it conceivably relates to a central issue of the trial. After determining whether testimony is competent under sub. (2), the court must find clear, satisfactory, and convincing evidence that the juror heard or made the comments alleged and, if it does, must then decide whether prejudicial error requiring reversal exists. State v. Broomfield, 223 Wis. 2d 465, 589 N.W.2d 225 (1999), 97–0520.

There is no bright line rule regarding the time lag between the return of a verdict and when evidence of a clerical error in a verdict must be obtained or be rendered insufficiently trustworthy. Grice Engineering, Inc. v. Szyjewski, 2002 WI App 104, 254 Wis. 2d 743, 648 N.W.2d 487, 01–0073.

Proof beyond a reasonable doubt to impeach a civil jury trial may be supplied by showing that five–sixths of the jurors agree that the reported verdict is in error and agree on the corrected verdict, provided each of these jurors was a part of the original group in favor of the verdict. This approach meets the "all of the jurors" requirement in *Williquette*, 190 Wis. 2d 678 (1995). Grice Engineering, Inc. v. Szyjewski, 2002 WI App 104, 254 Wis. 2d 743, 648 N.W.2d 487, 01–0073.

When a motion for a new trial is based on prejudicial extraneous information, the circuit court may grant an evidentiary hearing upon an affidavit that shows juror statements that are competent testimony and, if believed, are clear and convincing evidence of extraneous information that is potentially prejudicial. The hearing may be used to evaluate the credibility of the initial statements and to obtain additional competent testimony bearing on prejudice, such as the specific nature of the extraneous evidence and the circumstances under which it came to the jury's attention. Juror testimony on the effect of extraneous information is not competent. Manke v. Physicians Insurance Co., 2006 WI App 50, 289 Wis. 2d 750, 712 N.W.2d 40, 05–1103.

A specific dictionary definition of a word, even a common word, is not the type of general knowledge or accumulated life experiences that jurors are expected to possess. The dictionary definition of a word brought to the jury room and read aloud by a juror was extraneous information. There is no presumption that a hypothetical average juror would follow a jury instruction rather than a dictionary definition brought in by a juror. Instead, a court should base its prejudice analysis on a comparison of the jury instruction with the dictionary definition and on other relevant circumstances. Manke v. Physicians Insurance Co., 2006 WI App 50, 289 Wis. 2d 750, 712 N.W.2d 40, 05–1103.

When a juror makes a clear statement that indicates that the juror relied on racial stereotypes or animus to convict a criminal defendant, the 6th amendment requires that the no–impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Pena–Rodriguez v. Colorado, 580 U.S. 206, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017).

906.07 Who may impeach. The credibility of a witness may be attacked by any party, including the party calling the witness.

History: Sup. Ct. Order, 59 Wis. 2d R1, R169 (1973); 1991 a. 32.

906.08 Evidence of character and conduct of witness.

(1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness.

(b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross–examination of the witness or on cross–examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self–incrimination when examined with respect to matters which relate only to character for truthfulness.

History: Sup. Ct. Order, 59 Wis. 2d R1, R171 (1973); 1975 c. 184, 421; 1991 a. 32; 1995 a. 77, 225; Sup. Ct. Order No. 16–02A, 2017 WI 92, 378 Wis. 2d xiii.

NOTE: Sup. Ct. Order No. 16–02A states that: "The Judicial Council Notes to Wis. Stats. §§ 901.07, 906.08, 906.09, and 906.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Judicial Council Note, 2017: The following federal Advisory Committee Note regarding the 2003 amendment to Fed. R. Evid. 608 is instructive, though not binding, in understanding the scope and purpose of the amendments to s. 906.08 (2) and (3).

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case ... ").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty–four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). See also Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no–extrinsic–evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

The trial court committed plain error by admitting extrinsic impeaching testimony on a collateral issue. McClelland v. State, 84 Wis. 2d 145, 267 N.W.2d 843 (1978).

When credibility of a witness was a critical issue, exclusion of evidence offered under sub. (1) was grounds for discretionary reversal. State v. Cuyler, 110 Wis. 2d 133, 327 N.W.2d 662 (1983).

Impeachment of an accused by extrinsic evidence on a collateral matter was harmless error. State v. Sonnenberg, 117 Wis. 2d 159, 344 N.W.2d 95 (1984).

Absent an attack on credibility, a complainant's testimony that the complainant had not initiated a civil action for damages was inadmissible when used to bolster credibility. State v. Johnson, 149 Wis. 2d 418, 439 N.W.2d 122 (1989).

Confirmed. 153 Wis. 2d 121, 449 N.W.2d 845 (1990).

Allegations of professional misconduct against the prosecution's psychiatric expert initially referred to the prosecutor's office but immediately transferred to a special prosecutor for investigation and possible criminal proceedings were properly

excluded as a subject of cross–examination of the expert due to a lack of logical connection between the expert and the prosecutor necessary to suggest bias. State v. Lindh, 161 Wis. 2d 324, 468 N.W.2d 168 (1991).

Whether a witness's credibility has been sufficiently attacked to constitute an attack on the witness's character for truthfulness permitting rehabilitating character testimony is a discretionary decision. State v. Anderson, 163 Wis. 2d 342, 471 N.W.2d 279 (Ct. App. 1991).

Evidence that an expert in a medical malpractice action was named as a defendant in a separate malpractice action was inadmissible for impeachment purposes under this section because it did not cast light on the expert's character for truthfulness. Nowatske v. Osterloh, 201 Wis. 2d 497, 549 N.W.2d 256 (Ct. App. 1996), 93–1555.

Character evidence may be allowed under sub. (1) (b) based on attacks on the witness's character made in opening statements. Allegations of a single instance of falsehood cannot imply a character for untruthfulness. The attack on the witness must be an assertion that the witness is a liar generally. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), 96–1394.

It was appropriate for an expert to testify to the nature of witnesses' cognitive disabilities and how those mental impairments affected the witnesses' abilities to testify or recall particular facts, but the expert's testimony that the witnesses were incapable of lying violated the rule that a witness is not permitted to express an opinion on whether another physically and mentally competent witness is telling the truth. State v. Tutlewski, 231 Wis. 2d 379, 605 N.W.2d 561 (1999), 98–2551.

Evidence that a witness belongs to an organization, such as a street gang, is admissible to impeach the witness's testimony by showing bias. State v. Long, 2002 WI App 114, 255 Wis. 2d 729, 647 N.W.2d 884, 01–1147.

Asking a defendant whether the defendant's accusers, a citizen witness, or an investigating police officer are telling the truth has no tendency to usurp the jury's function in assessing credibility; indeed, if anything, it would help the jury evaluate each witness's demeanor. State v. Bolden, 2003 WI App 155, 265 Wis. 2d 853, 667 N.W.2d 364, 02–2974.

The opinion of an expert witness about whether another competent witness is telling the truth serves no useful purpose and may be detrimental to the process because the jury does not need any expert assistance in assessing credibility. When a prosecutor's cross–examination of a defendant's eyewitness account was to impeach the defendant's credibility by asking whether another eyewitness account was untruthful and not to bolster the credibility of the other witness, because both and the other witness were testifying to their personal observations about the same events, the cross–examination of the defendant was permissible. State v. Johnson, 2004 WI 94, 273 Wis. 2d 626; 681 N.W.2d 901, 02–2793.

906.09 Impeachment by evidence of conviction of crime or adjudication of delinquency. (1) GENERAL RULE. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. If the witness's answers are consistent with the previous determination of the court under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.

(2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:

(a) The lapse of time since the conviction.

(b) The rehabilitation or pardon of the person convicted.

(c) The gravity of the crime.

(d) The involvement of dishonesty or false statement in the crime.

(e) The frequency of the convictions.

(f) Any other relevant factors.

(3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the court determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) PENDENCY OF APPEAL. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

History: Sup. Ct. Order, 59 Wis. 2d R1, R176 (1973); 1991 a. 32; 1995 a. 77; Sup. Ct. Order No. 16–02A, 2017 WI 92, 378 Wis. 2d xiii.

NOTE: Sup. Ct. Order No. 16–02A states that: "The Judicial Council Notes to Wis. Stats. §§ 901.07, 906.08, 906.09, and 906.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Judicial Council Note, 2017: The amendment to sub. (1) is intended to conform the rule more closely to current practice. It is consistent with *Nicholas v. State*, 49 Wis. 2d 683, 183 N.W.2d 11 (1971) and *State v. Bailey*, 54 Wis. 2d 679, 690, 196 N.W.2d 664, 670 (1972).

The following federal Advisory Committee Note regarding the 2006 amendment to federal Rule 609 is instructive.

> The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction).

The amendment to sub. (2) continues to recognize the long–standing principle that this statutory exclusion is a "particularized application" of s. 904.03, *State v. Gary M.B.*, 2004 WI 33, ¶21, 270 Wis. 2d 62, 81, 676 N.W.2d 475, 485, and codifies the holding in *Gary M.B.* that circuit courts are required, in determining whether to admit or exclude prior convictions, to examine a number of factors. Majority op., ¶21; Chief Justice Abrahamson's dissent, ¶56; Justice Sykes' dissent, ¶85, *State v. Kuntz*, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991); *State v. Kruzycki*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995); *State v. Smith*, 203 Wis. 2d 288, 295–96, 553 N.W.2d 824 (Ct. App. 1996). However, the committee recognizes that in conducting the balancing test, the circuit court need only consider those factors applicable to the case. *Kuntz*, 160 Wis. 2d at 753, 467 N.W.2d 531. Subsection (2) does not include expungement because evidence of a conviction expunged under Wis. Stat. § 973.015(1) is not admissible under this rule. *State v. Anderson*, 160 Wis. 2d 435, 437 (Ct. App. 1991).

In *State v. Gary M.B.*, the majority observed that "in the future, it would be prudent for circuit courts to explicitly set forth their reasoning in ruling on § 906.09(2) matters in order to demonstrate that they considered the relevant balancing factors applicable in the case before them." 2004 WI 33, ¶35, 270 Wis. 2d 62, 87–88, 676 N.W.2d 475, 488. Chief Justice Abrahamson noted, "[t]he purposes of requiring a circuit court to perform this process on the record are many. The process increases the probability that a circuit court will reach the correct result, provides appellate courts with a more meaningful record to review, provides the parties with a decision that is comprehensible, and increases the transparency and accountability of the judicial system." Chief Justice Abrahamson's dissent, ¶48.

This section applies to both civil and criminal actions. When a plaintiff was asked by his own attorney whether he had ever been convicted of a crime, he could be asked on cross–examination as to the number of times. Underwood v. Strasser, 48 Wis. 2d 568, 180 N.W.2d 631 (1970).

It was not error to give an instruction as to prior convictions effect on credibility when the prior case was a misdemeanor. McKissick v. State, 49 Wis. 2d 537, 182 N.W.2d 282 (1971).

When a defendant's answers on direct examination with respect to the number of the defendant's prior convictions were inaccurate or incomplete, the correct and complete facts could be brought out on cross–examination, during which it was permissible to mention the crime by name in order to insure that the witness understood the particular conviction being referred to. Nicholas v. State, 49 Wis. 2d 683, 183 N.W.2d 11 (1971).

Proffered evidence that a witness had been convicted of drinking offenses 18 times in the last 19 years could be rejected as immaterial if the evidence did not affect the witness's credibility. Barren v. State, 55 Wis. 2d 460, 198 N.W.2d 345 (1972).

When a witness truthfully acknowledges a prior conviction, inquiry into the nature of the conviction may not be made. Voith v. Buser, 83 Wis. 2d 540, 266 N.W.2d 304 (1978).

A defendant's two prior convictions for burglary were admissible to prove intent to use gloves, a long pocket knife, a crowbar, and a pillow case as burglarious tools. Vanlue v. State, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).

Cross–examination on prior convictions without the trial court's threshold determination under sub. (3) was prejudicial. Gyrion v. Bauer, 132 Wis. 2d 434, 393 N.W.2d 107 (Ct. App. 1986).

An accepted guilty plea constitutes a "conviction" for purposes of impeachment under sub. (1). State v. Trudeau, 157 Wis. 2d 51, 458 N.W.2d 383 (Ct. App. 1990).

An expunged conviction is not admissible to attack witness credibility. State v. Anderson, 160 Wis. 2d 435, 466 N.W.2d 681 (Ct. App. 1991).

Whether to admit evidence of prior convictions for impeachment purposes requires consideration of: 1) the lapse of time since the conviction; 2) the rehabilitation of the person convicted; 3) the gravity of the crime; and 4) the involvement of dishonesty in the crime. If allowed, the existence and number of convictions may be admitted, but the nature of the convictions may not be discussed. State v. Smith, 203 Wis. 2d 288, 553 N.W.2d 824 (Ct. App. 1996), 94–3350.

Evidence that exposed a witness's prior life sentences and that the witness could suffer no penal consequences from confessing to the crime in question was properly admitted. State v. Scott, 2000 WI App 51, 234 Wis. 2d 129, 608 N.W.2d 753, 98–3105.

Even if the circuit court did not expressly state on the record that it considered the possible danger of unfair prejudice, the fact that the court gave a limiting instruction can reveal that the trial court considered the possibly prejudicial nature of evidence and was seeking to ensure that it was properly utilized by the jury in reaching its verdict. State v. Gary M.B., 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475, 01–3393.

Neither Seen nor Heard: Impeachment by Prior Conviction and the Continued Failure of the Wisconsin Rule to Protect the Criminal Defendant–Witness. Straka. 2018 WLR 1193.

906.10 Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

History: Sup. Ct. Order, 59 Wis. 2d R1, R184 (1973); 1991 a. 32.

906.11 Mode and order of interrogation and presentation. (1) CONTROL BY JUDGE. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:

(a) Make the interrogation and presentation effective for the ascertainment of the truth.

(b) Avoid needless consumption of time.

(c) Protect witnesses from harassment or undue embarrassment.

(2) SCOPE OF CROSS–EXAMINATION. A witness may be cross–examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross–examination with respect to matters not testified to on direct examination.

(3) LEADING QUESTIONS. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross–examination. In civil cases, a party is entitled to call an adverse party or witness identified with the adverse party and interrogate by leading questions.

History: Sup. Ct. Order, 59 Wis. 2d R1, R185 (1973); 1991 a. 32; 1999 a. 85.

A question is not leading if it merely suggests a subject rather than a specific answer that may not be true. Hicks v. State, 47 Wis. 2d 38, 176 N.W.2d 386 (1970).

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 Wis. 2d 327, 193 N.W.2d 26 (1972).

A defendant who testifies in the defendant's own behalf may be recalled for further cross–examination to lay a foundation for impeachment. Evidence that on a prior occasion the defendant did not wear glasses and that the defendant had a gun similar to that described by the complainant was admissible when it contradicted the defendant's earlier testimony. Parham v. State, 53 Wis. 2d 458, 192 N.W.2d 838 (1972).

A trial judge should not have stricken the entire testimony of a defense witness for refusal to answer questions bearing on the witness's credibility that had little to do with the guilt or innocence of the defendant. State v. Monsoor, 56 Wis. 2d 689, 203 N.W.2d 20 (1973).

A trial judge's admonitions to an expert witness did not give the appearance of judicial partisanship requiring a new trial. Peeples v. Sargent, 77 Wis. 2d 612, 253 N.W.2d 459 (1977).

The extent, manner, and right of multiple cross–examinations by different counsel representing the same party can be controlled by the trial court. Hochgurtel v. San Felippo, 78 Wis. 2d 70, 253 N.W.2d 526 (1977).

A defendant has no right to be actively represented in court both personally and by counsel. Moore v. State, 83 Wis. 2d 285, 265 N.W.2d 540 (1978).

Leading questions were properly used to refresh a witness's memory. Jordan v. State, 93 Wis. 2d 449, 287 N.W.2d 509 (1980).

By testifying to his actions on the day a murder was committed, the defendant waived the self–incrimination privilege on cross–examination as to previous actions reasonably related to the direct examination. Neely v. State, 97 Wis. 2d 38, 292 N.W.2d 859 (1980).

Under the facts of this case, the trial judge's last minute determination to a witness to testify by telephone was an abuse of discretion, which deprived the defendant of the opportunity to have a meaningful cross–examination of the witness. Town of Geneva v. Tills, 129 Wis. 2d 167, 384 N.W.2d 701 (1986).

Discussing the use of leading questions in direct examination of a child. State v. Barnes, 203 Wis. 2d 132, 552 N.W.2d 857 (Ct. App. 1996), 95–1831.

A chart prepared by the prosecutor during a trial, in the jury's presence, to categorize testimony was not a summary under s. 910.06 but was a "pedagogical device" admissible within the court's discretion under this section. State v. Olson, 217 Wis. 2d 730, 579 N.W.2d 802 (Ct. App. 1998), 96–2142.

The rule of completeness for oral statements is encompassed within this section. A party's use of an out–of–court statement to show an inconsistency does not automatically give the opposing party the right to introduce the whole statement. Under the rule of completeness, the court has discretion to admit only those statements necessary to provide context and prevent distortion. State v. Eugenio, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), 96–1394.

There was no misuse of discretion in allowing a three–year–old child witness to sit on her grandmother's lap while testifying regarding an alleged sexual assault. The trial court has the power to alter courtroom procedures in order to protect the emotional well–being of a child witness and is not required to determine that a child is unable to testify unless accommodations are provided. State v. Shanks, 2002 WI App 93, 253 Wis. 2d 600, 644 N.W.2d 275, 01–1372.

While sub. (1) provides the circuit court with broad discretion to control the presentation of evidence at trial, that discretion is not unfettered and must give way when the exercise of discretion runs afoul of other statutory provisions that are not discretionary. State v. Smith, 2002 WI App 118, 254 Wis. 2d 654, 648 N.W.2d 15, 01–1662.

Whether the trial court erroneously exercised its discretion under sub. (1) (a) to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth must be determined based upon the particular facts and circumstances of each individual case. The discovery provisions of s. 971.23 do not trump the trial court's ability to exercise its discretion to grant a continuance order. State v. Wright, 2003 WI App 252, 268 Wis. 2d 694, 673 N.W.2d 386, 03–0238.

Under the circumstances of this case, when the defendant sought to introduce evidence of prior specific instances of violence within the defendant's knowledge at the time of the incident in support of a self–defense claim, the circuit court had the authority under this section, in conjunction with s. 901.04 (3) (d), to order the defendant to disclose prior to trial any specific acts that the defendant knew about at the time of the incident and that the defendant intended to offer as evidence so that admissibility determinations could be made prior to trial. State v. McClaren, 2009 WI 69, 318 Wis. 2d 261, 767 N.W.2d 550, 07–2382.

There is no blanket rule barring or limiting the admission of the type of evidence that linked the cartridge case and bullet to the gun in this case. The admission and scope of such evidence is left to the reasonable discretion of the trial courts to exercise under this section and s. 904.03 and to cross–examination by adversary counsel. State v. Jones, 2010 WI App 133, 329 Wis. 2d 498, 791 N.W.2d 390, 09–2835.

906.12 Writing used to refresh memory. If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross–examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.

History: Sup. Ct. Order, 59 Wis. 2d R1, R193 (1973); 1991 a. 32.

906.13 Prior statements of witnesses. (1) EXAMINING WITNESS CONCERNING PRIOR STATEMENT. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown or its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel upon the completion of that part of the examination.

(2) EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:

1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.

2. The witness has not been excused from giving further testimony in the action.

3. The interests of justice otherwise require.

(b) Paragraph (a) does not apply to admissions of a party–opponent as defined in s. 908.01 (4) (b).

History: Sup. Ct. Order, 59 Wis. 2d R1, R197 (1973); 1991 a. 32; 1999 a. 85.

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 Wis. 2d 453, 190 N.W.2d 208 (1971).

A statement by a defendant, not admissible as part of the prosecution's case because it was taken without the presence of the defendant's counsel, may be used on cross–examination for impeachment if the statement is trustworthy. Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

A bright line test for determining whether a defendant's prior inconsistent statement is admissible for impeachment is whether it was compelled. State v. Pickett, 150 Wis. 2d 720, 442 N.W.2d 509 (Ct. App. 1989).

This section is applicable in criminal cases. A defense investigator's reports of witness interviews are statements under sub. (1) but only must be disclosed if defense counsel has examined the witness concerning the statements made to the investigator. State v. Hereford, 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct. App. 1995), 94–1596.

A prior inconsistent statement is admissible under sub. (2) without first confronting the witness with that statement. Under sub. (2) (a) 2. and 3. extrinsic evidence of prior inconsistent statements is admissible if the witness has not been excused from giving further testimony in the case or if the interest of justice otherwise requires its admission. State v. Smith, 2002 WI App 118, 254 Wis. 2d 654, 648 N.W.2d 15, 01–1662.

906.14 Calling and interrogation of witnesses by judge. (1) CALLING BY JUDGE. The judge may, on the judge's own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross–examine witnesses thus called.

(2) INTERROGATION BY JUDGE. The judge may interrogate witnesses, whether called by the judge or by a party.

(3) OBJECTIONS. Objections to the calling of witnesses by the judge or to interrogation by the judge may be made at the time or at the next available opportunity when the jury is not present.

History: Sup. Ct. Order, 59 Wis. 2d R1, R200 (1973); 1991 a. 32.

A trial judge's elicitation of trial testimony is improper if the cumulative effect of the judge's questioning and direction of the course of the trial has a substantial prejudicial effect on the jury. Schultz v. State, 82 Wis. 2d 737, 264 N.W.2d 245 (1978).

The practice of judicial interrogation is a dangerous one but does not require that no court should be allowed to call and question a witness prior to completion of the presentation of evidence. State v. Carprue, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31, 02–2781.

906.15 Exclusion of witnesses. (1) At the request of a party, the judge or a circuit court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The judge or circuit court commissioner may also make the order of his or her own motion.

(2) Subsection (1) does not authorize exclusion of any of the following:

(a) A party who is a natural person.

(b) An officer or employee of a party which is not a natural person designated as its representative by its attorney.

(c) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(d) A victim, as defined in s. 950.02 (4), in a criminal case or a victim, as defined in s. 938.02 (20m), in a delinquency proceeding under ch. 938, unless the judge or circuit court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact–finding hearing for the juvenile. The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant or a fair fact–finding hearing for the juvenile.

(3) The judge or circuit court commissioner may direct that all excluded and non–excluded witnesses be kept separate until called and may prevent them from communicating with one another until they have been examined or the hearing is ended.

History: Sup. Ct. Order, 59 Wis. 2d R1, R202 (1973); 1991 a. 32; 1997 a. 181; 2001 a. 61.

Under sub. (3), a circuit court has the authority to prevent an attorney from sharing with a nonparty witness who has yet to testify the testimony of prior witnesses during a recess, including barring a witness from reading a transcript of that testimony. State v. Copeland, 2011 WI App 28, 332 Wis. 2d 283, 798 N.W.2d 250, 08–2713.

906.16 Bias of witness. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

History: Sup. Ct. Order No. 16–02A, 2017 WI 92, 378 Wis. 2d xiii.

NOTE: Sup. Ct. Order No. 16–02A states that: "The Judicial Council Notes to Wis. Stats. §§ 901.07, 906.08, 906.09, and 906.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Judicial Council Note, 2017: This rule is adopted from the Uniform Rules of Evidence 616, which codifies *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L.Ed.2d 450 (1984). The rule codifies the common law in Wisconsin. *See State v. Long*, 2002 WI App 114, ¶18, 255 Wis. 2d 729, 647 N.W.2d 884 ("Wisconsin law is in accordance with the principle set forth in *Abel*."). The committee viewed codification of the rule as useful, however, to reiterate that bias, prejudice, or interest of a witness is a fact of consequence under Wis. Stat. § 904.01. Further, the rule should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence. *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely. . . . The extent of the inquiry with respect to bias is a matter within the discretion of the trial court.").