CHAPTER 972

CRIMINAL TRIALS

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Cross−reference: See definitions in s. 967.02.

972.01 Jury; civil rules applicable. The summoning of jurors, the selection 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 Wis. 2d 585, 784 (1975); Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997).

The charge as to the duty of a jury to try to reach agreement, was proper. Kelley v. State, 51 Wis. 2d 641, 187 N.W.2d 810 (1971).

Reinstruction presenting for the first time choices for lesser included offenses not presented in the initial instructions, if proper at all, would be a rare event, only done in exceptional circumstances. State v. Thurmond, 2004 WI App 49, 270 Wis. 2d 477, 677 N.W.2d 655, 03−0191.

972.02 Jury trial; waiver. (1) Except as otherwise provided in this chapter, criminal cases shall be tried by a jury selected as prescribed in s. 805.08, 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 the 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 Wis. 2d 784; Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1995 a. 427; Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997); 2013 a. 164.

Cross−reference: See also s. 756.06 regarding the number of jurors.

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]

Judicial Council Note, 1996: This proposal changes "drawn" to "selected" whenever a statute refers to choosing jurors or prospective jurors, for statutory uniformity. [Re Order effective 7−1−97]

A defendant could claim that his waiver of a jury, when the record was silent as to acceptance by the court and prosecution, made his subsequent jury trial invalid. Spiller v. State, 49 Wis. 2d 372, 182 N.W.2d 242 (1971).

A defendant can waive a jury after the state has completed its case. Warrix v. State, 50 Wis. 2d 368, 184 N.W.2d 189 (1971).

A defendant who demanded a jury trial cannot be held to have waived it by participating in a trial to the court and can raise this question for the first time on appeal. State v. Cleveland, 50 Wis. 2d 666, 184 N.W.2d 899 (1971).

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

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

The court abused its discretion in discharging an ill juror during deliberations without making any record as to the circumstances of the discharge and without counsel being present. Unless the defendant consents, it is reversible error for the court to substitute an alternate juror for a regular juror after jury deliberations have begun. State v. Lehman, 108 Wis. 2d 291, 321 N.W.2d 212 (1982).

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

A waiver of the right to a jury trial is effective if the defendant understands the basic purpose and function of a jury trial. Trial courts are prospectively ordered to advise defendants of the unanimity requirement before accepting a waiver. State v. Resio, 148 Wis. 2d 687, 436 N.W.2d 603 (1989).

A defendant has the right to a jury determination on each element of a charged offense. The right can be waived only by the defendant personally on the record. State v. Villarreal, 153 Wis. 2d 323, 450 N.W.2d 519 (Ct. App. 1989).

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

The verdict of a 13 member jury panel agreed to by the defense and prosecution was valid. State v. Ledger, 175 Wis. 2d 116, 499 N.W.2d 199 (Ct. App. 1993).

When there are grounds to believe the jury in a criminal case needs protection, the trial court may take reasonable steps to protect the identity of potential jurors. Preventing references on the record to juror's names, employment, and addresses while providing the defense with copies of the juror questionnaires during voir dire was within the court's discretion. State v. Britt, 203 Wis. 2d 25, 553 N.W.2d 528 (Ct. App. 1995), 95−0891.

The provision that a jury in a misdemeanor case shall consist of 6 persons violates Article I, s. 7. State v. Hansford, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), 97−0885.

The defendant was not automatically entitled to a new trial when, in waiving the right to a jury trial, the trial court did not advise that a jury verdict must be unanimous. The appropriate remedy is through a postconviction motion that, as a threshold requirement, must contain an allegation that the defendant did not know or understand the rights at issue. State v. Grant, 230 Wis. 2d 90, 601 N.W.2d 8 (Ct. App. 1999), 98−2206.

Sub. (1) applies when a defendant seeks to waive a jury in the responsibility phase of a bifurcated trial. The state has a legitimate interest in having the decision of mental responsibility decided by a jury. State v. Murdock, 2000 WI App 170, 238 Wis. 2d 301, 617 N.W.2d 175, 99−0566.

To prove a valid jury trial waiver, the circuit court must conduct a colloquy designed to ensure that the defendant: 1) made a deliberate choice, absent threats or promises, to proceed without a jury trial; 2) was aware that a jury trial consists of a panel of 12 people that must agree on all elements of the crime charged; 3) was aware that in a court trial the judge will make a decision on whether or not he or she is guilty of the crime charged; and 4) had enough time to discuss the decision with counsel. State v. Anderson, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2d 301, 00−1563.

If a defendant waives the right to a jury trial and the circuit court fails to conduct a colloquy with the defendant regarding the waiver, a reviewing court may not find, a valid waiver, based on the record. As a remedy, the circuit court must hold an evidentiary hearing on whether the waiver was knowing, intelligent, and voluntary. If the state is unable to establish by clear and convincing evidence that the defendant knowingly, intelligently, and voluntarily waived a jury trial, the defendant is entitled to a new trial. State v. Anderson, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2d 301, 00−1563.

Whether a defendant waived the right to have the jury determine all the elements of the crime or only some of them and whether the defendant gave up a jury trial in lieu of a determination by the circuit court or stipulated to the elements, the waiver analysis is the same. Any waiver must be made personally on the record by the defendant. State v. Hauk, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393, 01−1668.

If a court withholds any juror information in open court, it must: 1) find that the jury needs protection; and 2) take reasonable precautions to avoid prejudicing the defendant. When jurors' names are withheld, the court, at a minimum, must make a precautionary statement to the jury that the use of numbers instead of names should in no way be interpreted as a reflection of the defendant's guilt or innocence. State v. Tucker, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374, 00−3354.

There is no constitutional right to waive a jury and be tried by a judge. A prosecutor's decision to withhold consent to a defendant's requested waiver of the right to a jury trial is not reviewable. A trial court need not justify its refusal to approve the waiver. State v. Burks, 2004 WI App 14, 268 Wis. 2d 747, 674 N.W.2d 640, 03−0472.

Harmless error analysis applies when a court erroneously takes judicial notice of a fact that should have been submitted to the jury. State v. Smith, 2012 WI 91, 342 Wis. 2d 710, 817 N.W.2d 410, 10−1192.

Absent an unambiguous declaration that a party intends to bind itself for future fact−finding hearings or trials, a jury waiver applies only to the fact−finding hearing or trial pending at the time it is made. Walworth County Department of Health and Human Services v. Roberta J. W. 2013 WI App 102, 349 Wis. 2d 691, 836 N.W.2d 860, 12−2387.

The 6th amendment right to a public trial extends to voir dire. A judge's decision to close or limit public access to a courtroom in a criminal case requires the court to go through an analysis on the record in which the court considers overriding interests and reasonable alternatives. The court must make specific findings on the record to support the exclusion of the public and must narrowly tailor the closure. State v. Pinno, 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207, 11−2424.

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 felony cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2. In misdemeanor cases, the state is entitled to 3 peremptory challenges and the defendant is entitled to 3 peremptory challenges, except that if there are 2 defendants, the court shall allow the defense 4 peremptory challenges, and if there are more than 2 defendants, the court shall allow the defense 6 peremptory challenges. Each side shall be allowed one additional peremptory challenge if additional jurors are to be selected under s. 972.04 (1).

History: 1983 a. 226; 1995 a. 427; Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997).

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]

Judicial Council Note, 1996: This proposal changes "impaneled" to "selected" whenever a statute refers to choosing jurors or prospective jurors, for statutory uniformity. [Re Order effective 7−1−97.]

A defendant is not entitled to a new trial when both the prosecution and defense are given an equal number of peremptory strikes, even if the number is less than provided for by statute. State v. Erickson, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), 98−0273.

NOTE: For cases relating to discriminatory and otherwise improper use of peremptory strikes see the notes to Article I, Section 7 of the Wisconsin Constitution under the heading JURY TRIAL AND JUROR QUALIFICATIONS.

972.04 Exercise of challenges. (1) The number of jurors selected shall be prescribed in s. 756.06 (2) (a), unless a lesser number has been stipulated and approved under s. 972.02 (2) or the court orders that additional jurors be selected. 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; 1995 a. 427; Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997); 2013 a. 164.

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]

Guarantees of open public proceedings in criminal trials include voir dire examinations of potential jurors. Press−Enterprise Co. v. Superior Court of Cal. 464 U.S. 501 (1984).

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

The trial court, sitting as the trier of fact, committed an error of law in making and relying on an unrequested, unannounced, unaccompanied and unrecorded view of an accident scene in assessing evidence produced at trial. American Family Mut. Ins. Co. v. Shannon, 120 Wis. 2d 560, 356 N.W.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.

The federal rule that jeopardy attaches when the jury is sworn is an integral part of the guarantee against double jeopardy. Crist v. Bretz, 437 U.S. 28 (1978).

NOTE: See also the notes to Article I, section 8, of the Wisconsin Constitution.

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 under s. 968.26 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 the witness's 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 under s. 968.26 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 the person from the order of confinement.

History: 1979 c. 291; 1989 a. 122; 1993 a. 98, 486; 2009 a. 24.

Ordering a witness who has been granted immunity to answer questions does not violate the constitutional right against self incrimination. State v. Blake, 46 Wis. 2d 386, 175 N.W.2d 210 (1970).

The prosecutor 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 Wis. 2d 383, 184 N.W.2d 176 (1971).

An order by a judge to compel a witness in a John Doe proceeding to testify after a refusal on the ground of self−incrimination must be done in open court. State ex rel. Newspapers, Inc. v. Circuit Court, 65 Wis. 2d 66, 221 N.W.2d 894 (1974).

In considering whether to move for immunity for a witness, a prosecutor should consider the duty to not merely convict but to seek impartial justice and should not hesitate to move for immunity on the ground that the testimony thus elicited might exonerate the defendant. Peters v. State, 70 Wis. 2d 22, 233 N.W.2d 420 (1975).

Sub. (2) does not apply to preliminary proceedings. State v. Gonzales, 172 Wis. 2d 576, 493 N.W.2d 410 (Ct. App. 1992).

This section does not prevent a district attorney from entering into a nonprosecution agreement prior to filing charges in exchange for information in a criminal investigation. State v. Jones, 217 Wis. 2d 57, 576 N.W.2d 580 (Ct. App. 1998), 97−1806.

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

NOTE: See also the notes to Article I, section 8 of the Wisconsin constitution.

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, 551.602 (5), 553.55 (3), 601.62 (5), 767.87 (4), 885.15, 885.24, 885.25 (2), 891.39 (2), 968.26, 972.08 (1) and 979.07 (1) and ch. 769, 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; 1995 a. 225, 400; 1997 a. 35; 2005 a. 443 s. 265; 2007 a. 196.

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 the witness, the witness may be regarded as a hostile witness and examined as an adverse witness, and the party producing the witness may impeach the witness 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 Wis. 2d R1, R6 (1973); 1993 a. 486.

The defendant was not prejudiced by receipt in evidence of a hostile state witness's 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. When 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. Bullock v. State, 53 Wis. 2d 809, 193 N.W.2d 889 (1972).

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 Wis. 2d 311, 210 N.W.2d 755 (1973).

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 the defendant's 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. No instruction regarding the failure to call a witness at the trial shall be made or given if the sole basis for such instruction is the fact the name of the witness appears upon a list furnished pursuant to s. 971.23. 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 selected 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 Wis. 2d xi (1986); 1993 a. 486; 1995 a. 387; Sup. Ct. Order No. 96−08, 207 Wis. 2d xv (1997).

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.

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

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]

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, when 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 Wis. 2d 736, 190 N.W.2d 893 (1971).

No potential coercion was exerted by the trial court in its 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 Wis. 2d 703, 223 N.W.2d 442 (1974).

An objection to jury instructions will not be waived when the instructions misstate the law. Randolph v. State, 83 Wis. 2d 630, 266 N.W.2d 334 (1978).

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

A refusal to give a jury special instructions on identification was not an abuse of discretion. Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

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

A special instruction need not be given because a witness has been granted immunity. Linse v. State, 93 Wis. 2d 163, 286 N.W.2d 554 (1980).

A defendant who chose to be represented by counsel had no right to address the jury personally in closing arguments. Robinson v. State, 100 Wis. 2d 152, 301 N.W.2d 429 (1981).

A defendant is entitled to an instruction on a valid theory of defense if the instruction is supported by the evidence and is relevant to the to the issue being tried. It was not error to refuse to give an instruction regarding the defendant's theory of defense relating to the legal basis for the motive of a witness who was not a defendant. State v. Dean, 105 Wis. 2d 390, 314 N.W.2d 151 (Ct. App. 1981).

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

Under the separation of powers doctrine, ss. 805.13 (4), and 972.10 (5) require submission of written instructions to the jury on the substantive law but do not require automatic reversal when the trial court fails to do so. Instructions on the burden of proof and presumption of innocence are procedural, not substantive law. In Matter of E. B. 111 Wis. 2d 175, 330 N.W.2d 584 (1983).

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

The court must inform counsel of changes it makes to jury instructions following an instructions conference. State v. Kuntz, 160 Wis. 2d 722, 467 N.W.2d 531 (1991).

Under rare circumstances, a jury instruction creating a conclusive presumption regarding an element of a crime may be harmless error. State v. Kuntz, 160 Wis. 2d 722, 467 N.W.2d 531 (1991).

Instructional rulings are to be made at the close of the evidence. A party is not entitled to a mid−trial advisory ruling on whether an instruction will be given. Such a ruling, if given, is nonbinding and not subject to appeal. State v. Sohn, 193 Wis. 2d 346, 535 N.W.2d 1 (Ct. App. 1995).

Sub. (7) does not address whether a court may substitute an alternate juror for a deliberating juror with the consent of the parties under the procedure set forth in *Lehman*. In this case the defendant consented to the substitution and that consent satisfied the procedural requirements of *Lehman*. State v. Avery, 2011 WI App 124, 337 Wis. 2d 351, 804 N.W.2d 216, 10−0411.

The right to counsel includes the right to make a closing summary of the evidence to trier of fact. Herring v. New York, 422 U.S. 853 (1975).

Absent an overriding interest articulated in findings, a criminal trial must be open to the public. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

NOTE: See also the notes to Article I, section 7, of the Wisconsin Constitution.

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 and 995, 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, 942.09, 948.02, 948.025, 948.05, 948.051, 948.06, 948.07, 948.08, 948.085, 948.09, or 948.095, or under s. 940.302 (2), if the court finds that the crime was sexually motivated, as defined in s. 980.01 (5), 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.

(d) 1. If the defendant is accused of a crime under s. 940.225, 942.09, 948.02, 948.025, 948.05, 948.06, 948.085, or 948.095, evidence of the manner of dress of the complaining witness at the time when the crime occurred is admissible only if it is relevant to a contested issue at trial and its probative value substantially outweighs all of the following:

a. The danger of unfair prejudice, confusion of the issues or misleading the jury.

b. The considerations of undue delay, waste of time or needless presentation of cumulative evidence.

2. The court shall determine the admissibility of evidence under subd. 1. upon pretrial motion before it may be introduced at trial.

(2m) (a) At a trial in any criminal prosecution, the court may, on its own motion or on the motion of any party, order that the testimony of any child witness be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed−circuit audiovisual equipment if all of the following apply:

1. The court finds all of the following:

a. That the presence of the defendant during the taking of the child's testimony will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

b. That taking the testimony of the child in a room other than the courtroom and simultaneously televising the testimony in the courtroom by means of closed−circuit audiovisual equipment is necessary to minimize the trauma to the child of testifying in the courtroom setting and to provide a setting more amenable to securing the child witness's uninhibited, truthful testimony.

2. The trial in which the child may be called as a witness will commence:

a. Prior to the child's 12th birthday; or

b. Prior to the child's 16th birthday and, in addition to its finding under subd. 1., the court finds that the interests of justice warrant that the child's testimony be taken in a room other than the courtroom and simultaneously televised in the courtroom by means of closed−circuit audiovisual equipment.

(b) Among the factors which the court may consider in determining the interests of justice under par. (a) 2. b. are any of the following:

1. The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

2. The child's general physical and mental health.

3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.

5. The child's familial or emotional relationship to those involved in the underlying proceeding.

6. The child's behavior at or reaction to previous interviews concerning the events involved.

7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self−esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required.

(bm) If a court orders the testimony of a child to be taken under par. (a), the court shall do all of the following:

1. To the extent it is practical and subject to s. 972.10 (3), schedule the testimony on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are likely to be greatest.

2. Provide a room for the child to testify from that provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental level.

3. Order a recess whenever the energy, comfort or attention span of the child or other circumstances so warrant.

4. Determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate.

5. Before questioning by the parties begins, attempt to place the child at ease, explain to the child the purpose of the testimony and identify all persons attending.

6. Supervise the spatial arrangements of the room and the location, movement and deportment of all persons in attendance.

7. Allow the child to testify while sitting on the floor, on a platform or on an appropriately sized chair, or while moving about the room within range of the visual and audio recording equipment.

8. Bar or terminate the attendance of any person whose behavior is disruptive or unduly stressful to the child.

(c) Only the following persons may be present in the room in which the child is giving testimony under par. (a):

1m. Any person necessary to operate the closed−circuit audiovisual equipment.

2m. The parents of the child, the guardian or legal custodian of the child or, if no parent, guardian or legal custodian is available or the legal custodian is an agency, one individual whose presence would contribute to the welfare and well−being of the child.

3m. One person designated by the attorney for the state and approved by the court and one person designated by either the defendant or the attorney for the defendant and approved by the court.

(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.

(3m) A court may not exclude evidence in any criminal action or traffic forfeiture action for violation of s. 346.63 (1) or (5), or a local ordinance in conformity with s. 346.63 (1) or (5), on the ground that the evidence existed or was obtained outside of this state.

(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 Wis. 2d R1, R7 (1973); Sup. Ct. Order, 67 Wis. 2d 585, 784 (1975); 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; 1993 a. 16, 97, 227, 359; 1995 a. 456; 1997 a. 319; 1999 a. 185; 2001 a. 16; 2005 a. 155, 277; 2007 a. 116; 2011 a. 271; 2015 a. 292.

Writing about sexual desires or activities was not itself prior "sexual conduct." The victim's notes expressing sexual desires and fantasies were, therefore, admissible. State v. Vonesh, 135 Wis. 2d 477, 401 N.W.2d 170 (Ct. App. 1986).

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

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

This section does not violate the separation of powers doctrine. State v. Mitchell, 144 Wis. 2d 596, 424 N.W.2d 698 (1988).

In limited circumstances, expert testimony about the consistency of a sexual assault complainant's behavior with victims of the same type of crime may be offered for the purpose of helping the trier of fact understand the evidence to determine a fact in issue, as long as the expert does not give an opinion about the veracity of the complainant's allegations. State v. Jensen, 147 Wis. 2d 240, 256, 432 N.W.2d 913 (1988).

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

Summary judgment does not apply to cases brought under the criminal code. State v. Hyndman, 170 Wis. 2d 198, 488 N.W.2d 111 (Ct. App. 1992).

Section 805.03 authorizing sanctions for failure to comply with court orders is applicable to criminal actions. State v. Heyer, 174 Wis. 2d 164, 496 N.W.2d 779 (Ct. App. 1993).

Sub. (2) requires exclusion of testimony of a victim's possible prior sexual conduct although when the alleged victim is an 8−year−old child, physical evidence of sexual contact may create an unjust inference that the sexual contact was by sexual assault. In Interest of Michael R.B. 175 Wis. 2d 713, 499 N.W.2d 641 (1993).

That the complaining witness in a sexual assault case had previously consented to sexual intercourse has virtually no probative value regarding whether she consented to sexual intercourse under the use or threat of violence. State v. Neumann, 179 Wis. 2d 687, 508 N.W.2d 54 (Ct. App. 1993).

When the state questioned an alleged rapist about the victim's motive to lie it did not open the door for admission of evidence of prior acts of consensual sex. State v. Jackson, 216 Wis. 2d 646, 575 N.W.2d 475 (1998), 96−1618.

Evidence regarding prior sexual assault by a 3rd party does not fall within one of the statutory exceptions. The *Pulizzano* test is applied. State v. Dodson, 219 Wis. 2d 65, 580 N.W.2d 181 (1998), 96−1306.

Not all comparison testimony that an alleged sexual assault victim's behavior was consistent with that of child sexual assault victims opens the door to cross−examination about the alleged victim's sexual behavior prior to the alleged assault. State v. Dunlap, 2002 WI 19, 250 Wis. 2d 466, 640 N.W.2d 112, 99−2189.

This section does not allow a criminal defendant access to the civil subpoena duces tecum power embodied in s. 805.07(2). State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 06−1826.

In order to admit evidence of alleged prior untruthful allegations of sexual assault under sub. (2) (b) 3., the circuit court must first conclude from the proffered evidence that a jury could reasonably find that the complainant made prior untruthful allegations of sexual assault. The judge must determine whether a jury, acting reasonably, could find that it is more likely than not that the complainant made prior untruthful allegations of sexual assault. State v. Ringer, 2010 WI 69, 326 Wis. 2d 351, 785 N.W.2d 448, 08−0652.

The trial court erred when it essentially held that for evidence of the past sexual conduct between the defendant and victim to be admissible, it must be of the same type and nature that is charged as a crime. Neither the language of sub. (2) (b), nor relevant case law, require that the prior sexual conduct between the accuser and the accused be the same as that alleged in a criminal case. State v. Sarfraz, 2013 WI App 57, 348 Wis. 2d 57, 832 N.W.2d 346, 12−0337.

Under sub. (2) (b) 1. and s. 971.31 (11), evidence of the complainant's alleged past sexual conduct with the defendant is admissible only if the defendant makes a 3−part showing that: 1) the proffered evidence relates to sexual activities between the complainant and the defendant; 2) the evidence is material to a fact at issue; and 3) the evidence of sexual contact with the complainant is of sufficient probative value to outweigh its inflammatory and prejudicial nature. In determining that evidence of prior sexual conduct has a highly prejudicial effect, the legislature crafted into the rape shield law a balancing test that assumes, absent an evidentiary showing to the contrary, that the proffered evidence is more prejudicial than probative. State v. Sarfraz, 2014 WI 78, 356 Wis. 2d 460, 851 N.W.2d 235, 12−0337.

The exceptions to this section do not require proffered evidence of past sexual conduct between the accuser and the defendant to be the same as the criminal conduct alleged against the defendant. State v. Sarfraz, 2014 WI 78, 356 Wis. 2d 460, 851 N.W.2d 235, 12−0337.

This section protects complaining witnesses in sexual assault cases from being questioned about sexual conduct, but a false charge of sexual assault is not sexual conduct. Redmond v. Kingston, 240 F.3d 590 (2001).

Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You? Berry. 2002 WLR 1237.

972.115 Admissibility of defendant's statement. (1) In this section:

(a) "Custodial interrogation" has the meaning given in s. 968.073 (1) (a).

(b) "Law enforcement agency" has the meaning given in s. 165.83 (1) (b).

(c) "Law enforcement officer" has the meaning given in s. 165.85 (2) (c).

(d) "Statement" means an oral, written, sign language, or nonverbal communication.

(2) (a) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant as provided in s. 972.10 (5) and unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case:

1. The person refused to respond or cooperate in the interrogation if an audio or audio and visual recording was made of the interrogation so long as a law enforcement officer or agent of a law enforcement agency made a contemporaneous audio or audio and visual recording or written record of the subject's refusal.

2. The statement was made in response to a question asked as part of the routine processing of the person.

3. The law enforcement officer or agent of a law enforcement agency conducting the interrogation in good faith failed to make an audio or audio and visual recording of the interrogation because the recording equipment did not function, the officer or

agent inadvertently failed to operate the equipment properly, or, without the officer's or agent's knowledge, the equipment malfunctioned or stopped operating.

4. The statement was made spontaneously and not in response to a question by a law enforcement officer or agent of a law enforcement agency.

5. Exigent public safety circumstances existed that prevented the making of an audio or audio and visual recording or rendered the making of such a recording infeasible.

6. The law enforcement officer conducting the interrogation or the law enforcement officer responsible for observing an interrogation conducted by an agent of a law enforcement agency reasonably believed at the commencement of the interrogation that the offense for which the person was taken into custody or for which the person was being investigated, was not a felony.

(b) If a statement made by a defendant during a custodial interrogation is admitted into evidence in a proceeding heard by the court without a jury in a felony case and if an audio or audio and visual recording of the interrogation is not available, the court may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement unless the court determines that one of the conditions under par. (a) 1. to 6. applies.

(4) Notwithstanding ss. 968.28 to 968.37, a defendant's lack of consent to having an audio or audio and visual recording made of a custodial interrogation does not affect the admissibility in evidence of an audio or audio and visual recording of a statement made by the defendant during the interrogation.

(5) An audio or audio and visual recording of a custodial interrogation shall not be open to public inspection under ss. 19.31 to 19.39 before one of the following occurs:

(a) The person interrogated is convicted or acquitted of an offense that is a subject of the interrogation.

(b) All criminal investigations and prosecutions to which the interrogation relates are concluded.

History: 2005 a. 60.

Instituting Innocence Reform: Wisconsin's New Government Experiment. Kruse. 2006 WLR 645.

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.

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 ...., ... (year), 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 ordered to serve a bifurcated sentence consisting of .... year(s) of confinement in prison and .... months/years of extended supervision.

*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 placed on lifetime supervision by the department of corrections under section 939.615 of the Wisconsin Statutes.

*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 ...., ... (year)

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 ...., ... (year), 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 ...., ... (year)

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; 1997 a. 250, 275, 283; 1999 a. 32.

The trial court can, on a motion or on its own motion, modify a criminal sentence if the motion is made within 90 days after sentencing. The first judgment should be amended, not vacated. Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970).

A trial court must inform the defendant of the right to appeal. If it does not, the defendant may pursue a late appeal. Peterson v. State, 54 Wis. 2d 370, 195 N.W.2d 837 (1972).

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 when the defendant had a long record and interposed a frivolous defense in the later trials. Lange v. State, 54 Wis. 2d 569, 196 N.W.2d 680 (1972).

Hayes does not impose a jurisdictional limit on the power of a court to review a sentence. State ex rel. Warren v. Shawano−Menominee County Court, 54 Wis. 2d 613, 197 N.W.2d 1 (1972).

Following sentencing, the trial court must not only advise the defendant of the right to appeal but also advise the defendant and defense counsel of the obligation of defense counsel to continue representation pending a decision as to appeal and until other counsel is appointed. Whitmore v. State, 56 Wis. 2d 706, 203 N.W.2d 56 (1973).

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

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

When *Whitmore* instructions are given, the defendant must show that the failure to move for a new trial constituted an unintentional waiver of rights. Thiesen v. State, 86 Wis. 2d 562, 273 N.W.2d 314 (1979).

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

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

A written judgment of conviction is not a prerequisite to sentencing. State v. Pham, 137 Wis. 2d 31, 403 N.W.2d 35 (1987).

When the court allowed voir dire after polling the jury on its guilty verdict and when one juror's responses seriously undermined the previous vote of guilty, the jury's verdict was no longer unanimous, requiring a new trial. State v. Cartagena, 140 Wis. 2d 59, 409 N.W.2d 386 (Ct. App. 1987).

There is no error in noting dismissed charges on a judgment of conviction. State v. Theriault, 187 Wis. 2d 125, 522 N.W.2d 254 (Ct. App. 1994).

There was no impropriety in a trial court's inclusion of its parole recommendation in a judgment of conviction. State v. Whiteside, 205 Wis. 2d 685, 556 N.W.2d 443 (Ct. App. 1996), 95−3458.

It was not fatal to a conviction under sub. (1) on a plea of no contest, that the defendant did not personally state "I plead no contest" when the totality of the facts, including a signed guilty plea questionnaire and colloquy with the judge on the record, indicated an intent to plead no contest. State v. Burns, 226 Wis. 2d 762, 594 N.W.2d 799 (1999), 96−3615.

No statute authorizes a clerk of court's office to correct a clerical error in the sentence portion of a judgment of conviction. The circuit court, and not the clerk's office, must determine the merits of a request for a change in the sentence portion of a written judgment because of an alleged clerical error. State v. Prihoda, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857, 98−2263.

Under sub. (1) a judgment of conviction may not be entered if there is no guilty verdict, guilty finding, or guilty or no contest plea. Sub. (1) does not mandate entry of judgment immediately following the verdict, finding, or plea. State v. Wollenberg, 2004 WI App 20, 268 Wis. 2d 810, 674 N.W.2d 916, 03−1706.

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

(ag) "Crime considered at sentencing" means any crime for which the defendant was convicted and any read−in crime, as defined in s. 973.20 (1g) (b).

(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, 1993 stats., or ch. 938 or has had a similar adjudication in any other state in the 4 years immediately preceding the date the criminal complaint relating to the present offense was issued.

(2m) Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with s. 971.095 (2) and with sub. (3) (b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing.

(3) (a) Before pronouncing sentence, the court shall determine whether a victim of a crime considered at sentencing wants to make a statement to the court. If a victim wants to make a statement, the court shall allow the victim to make a statement in court or to 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, if the district attorney knows of a victim of a crime to be considered at sentencing, the district attorney shall make a reasonable attempt to contact that person to inform him or her of the right to make or provide a statement under par. (a). 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; 1995 a. 77; 1997 a. 73, 181, 205; 1999 a. 32.

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

The right, under sub. (2), of a defendant to make a statement prior to sentencing does not apply to an extension of a placement under the intensive sanctions program. State v. Turner, 200 Wis. 2d 168, 546 N.W.2d 880 (Ct. App. 1996), 95−1295.

Denial of the defendant's right to speak at sentencing is harmless error when a life sentence without parole is mandatory. State v. Lindsey, 203 Wis. 2d 423, 554 N.W.2d 215 (Ct. App. 1996), 95−3392.

The good character of a victim killed as the result of a crime is relevant in sentencing. State v. Gallion, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, 01−0051.

This section does not specify any particular party to read a victim's statement. The sole limitation on the victim's statement is that it be "relevant to the sentence." If a judge does not ensure compliance with the victims' rights statutes, the judge can be fined under s. 950.11. State v. Bokenyi, 2014 WI 61, 355 Wis. 2d 28, 848 N.W.2d 759, 12−2557.

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

(1m) If a person is convicted for a felony that requires him or her to register under s. 301.45 and if the victim was under 18 years of age at the time of the offense, the court may order the department to conduct a presentence investigation report to assess whether the person is at risk for committing another sex offense, as defined in s. 301.45 (1d) (b).

(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.

(2b) If the defendant is subject to being sentenced under s. 973.01 and he or she satisfies the criteria under s. 302.05 (3) (a) 1., the person preparing the presentence investigation report shall include in the report a recommendation as to whether the defendant should be eligible to participate in the earned release program under s. 302.05 (3).

(2c) If the defendant is subject to being sentenced under s. 973.01 and he or she satisfies the criteria under s. 302.045 (2) (b) and (c), the person preparing the presentence investigation report shall include in the report a recommendation as to whether the defendant should be eligible for the challenge incarceration program under s. 302.045.

(2g) If the defendant is subject to being sentenced under s. 973.01 and a factor under s. 973.017 is pertinent to the offense, the person preparing the presentence investigation report shall include in the report any such factor.

(2m) The person preparing the presentence investigation report shall make a reasonable 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 deter-

mine whether the defendant has been adjudged delinquent under ch. 48, 1993 stats., or ch. 938 or has had a similar adjudication in any other state in the 4 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) Except as provided in sub. (4m), (4r), (5), or (6), after sentencing the presentence investigation report shall be confidential and shall not be made available to any person except upon specific authorization of the court.

(4m) The district attorney, the defendant's attorney, and, following a conviction for a felony in which an assistant attorney general has original jurisdiction, served at the request of a district attorney under s. 978.05 (8) (b), or served as a special prosecutor under s. 978.045, the assistant attorney general are entitled to have and keep a copy of the presentence investigation report. If the defendant is not represented by counsel, the defendant is entitled to view the presentence investigation report but may not keep a copy of the report. Except as provided in s. 950.04 (1v) (p), a district attorney, the defendant's attorney, or an assistant attorney general who receives a copy of the report shall keep it confidential. A defendant who views the contents of a presentence investigation report shall keep the information in the report confidential.

(4r) The victim of the crime is entitled to view all sentencing recommendations included in the presentence investigation report, including any recommendations under sub. (2b) or (2c), and any portion of the presentence investigation report that contains information pertaining to the victim that was obtained pursuant to sub. (2m). A victim who views any contents of a presentence investigation report may not keep a copy of any portion of the report and shall keep the information he or she views confidential.

(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 extended supervision 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 employees of the department, agency or person as necessary for purposes related to correctional programming, parole consideration, care and treatment, or research.

(6) The presentence investigation report and any information contained in it or upon which it is based may be used by any of the following persons in any evaluation, examination, referral, hearing, trial, postcommitment relief proceeding, appeal, or other proceeding under ch. 980:

(a) The department of corrections.

(b) The department of health services.

(c) The person who is the subject of the presentence investigation report, his or her attorney, or an agent or employee of the attorney.

(d) The attorney representing the state or an agent or employee of the attorney.

(e) A licensed physician, licensed psychologist, or other mental health professional who is examining the subject of the presentence investigation report.

(f) The court and, if applicable, the jury hearing the case.

History: 1983 a. 102; 1987 a. 27, 227; 1991 a. 39; 1993 a. 213; 1997 a. 73, 181, 205, 283; 1999 a. 32; 2001 a. 109; 2003 a. 33; 2005 a. 311, 434; 2007 a. 20 s. 9121 (6) (a); 2007 a. 80, 97; 2011 a. 273; 2013 a. 108, 338, 362; 2015 a. 196.

The 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 Wis. 2d 203, 179 N.W.2d 909 (1970).

It is not error for the court to fail to order a presentence investigation, especially when the record contains much information as to the defendant's background and criminal record. State v. Schilz, 50 Wis. 2d 395, 184 N.W.2d 134 (1971).

Section 48.78 does not prevent a judge from examining DHSS records. Restrictive rules of evidence do not apply to sentencing procedures. Hammill v. State, 52 Wis. 2d 118, 187 N.W.2d 792 (1971).

Refusal to accept a recommendation of probation does not amount to an abuse of discretion if the evidence justifies a severe sentence. State v. Burgher, 53 Wis. 2d 452, 192 N.W.2d 869 (1972).

If a presentence report is used by the trial court, it must be part of the record. Its absence is not error if the defendant and counsel saw the report and had a chance to correct it and if counsel approved the record without moving for its inclusion. Chambers v. State, 54 Wis. 2d 460, 195 N.W.2d 477 (1972).

It is error for the sentencing court to consider pre−*Gault*, 387 U.S. 1, juvenile adjudications where juveniles were denied counsel, even to the extent of showing a pattern of conduct. Stockwell v. State, 59 Wis. 2d 21, 207 N.W.2d 883 (1973).

A presentence report, consisting of information concerning the defendant's personality, social circumstances, and general pattern of behavior and a section entitled "Agent's Impressions" contained neither biased nor incompetent material as such reports are not limited to evidence that is admissible in court, and the 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 Wis. 2d 266, 230 N.W.2d 832 (1975).

Consideration by the trial court of a presentence report prior to defendant's plea of guilty, in violation of sub. (1), constituted at most harmless error, since the evil the statute is designed to prevent — receipt by the judge of prejudicial information while still considering the defendant's guilt or innocence or presiding over a jury trial — cannot arise in the context of a guilty plea, especially when the trial court had already assured itself of the voluntariness of the plea and the factual basis for the crime. Rosado v. State, 70 Wis. 2d 280, 234 N.W.2d 69 (1975).

The sentencing judge does not deny due process by considering pending criminal charges in determining a sentence. The scope of judicial inquiry prior to sentencing is discussed. Handel v. State, 74 Wis. 2d 699, 247 N.W.2d 711 (1976).

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

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

A defendant challenging a sentence on due process grounds based upon failure to receive a copy of the presentence investigation report is entitled to a hearing only upon a showing that the court had a blanket policy of denial of access and that the policy was specifically applied to defendant, or that before sentencing the defendant personally sought access and was denied it. State v. Flores, 158 Wis. 2d 636, 462 N.W.2d 899 (Ct. App. 1990).

A public defender appointed as postconviction counsel is entitled to the presentence investigation report under s. 967.06. Access may not be restricted under sub. (4). Oliver v. Goulee, 179 Wis. 2d 376, 507 N.W.2d 145 (Ct. App. 1993).

Although sub. (2s) requires a presentence report to include juvenile adjudications that are less than 3 years old, it does not prohibit the inclusion and consideration of adjudications that are older. State v. Crowe, 189 Wis. 2d 72, 525 N.W.2d 291 (Ct. App. 1994).

Sub. (5) does not provide a defendant with a means to obtain his or her presentence report. Access is provided by subs. (2) and (4). State ex rel. Hill v. Zimmerman, 196 Wis. 2d 419, 538 N.W.2d 608 (Ct. App. 1995), 94−1861.

A marital relationship between a case's prosecutor and the presentence report writer was sufficient to draw the objectivity of the report into question. It was error not to strike the report. State v. Suchocki, 208 Wis. 2d 509, 561 N.W.2d 332 (Ct. App. 1997), 96−1712.

The use of presentence reports from the underlying criminal proceeding in a ch. 980 sex offender commitment is not allowed under the sub. (5) provision for use of the reports for care and treatment, but allowing the state's psychologist to use, and allowing the ch. 980 jury to hear, the reports is within the court's discretion under sub. (4). State v. Zanelli, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997), 96−2159.

Having disputed relevant portions of the presentence investigation at the sentencing hearing, it was trial counsel's duty to see that the disputes were fully resolved by a proper hearing. Failure to do so constituted ineffective assistance of counsel. State v. Anderson, 222 Wis. 2d 403, 588 N.W.2d 75 (Ct. App. 1998), 97−3070.

A mental health professional who conducted a psychological assessment of a defendant convicted of sexual assault, which was incorporated into the presentence investigation report and admitted into evidence at the sentencing hearing, had a conflict of interest due to the fact that she had treated the victim in the case justifying modification of the defendant's sentence. State v. Stafford, 2003 WI App 138, 265 Wis. 2d 886, 667 N.W.2d 370, 02−0544.

This section applies only to court−ordered presentence investigation reports and does not refer to memorandum submitted by a defendant at sentencing nor prevent the use of the memorandum submitted at one trial at a subsequent trial. State v. Greve, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479, 02−2332.

Under *Greve*, defense counsel's failure to object to the testimony of the court−ordered presentence investigator constituted deficient performance, but failure to

object to the testimony of the defense presentence investigator did not. State v. Jimmie R.R. 2004 WI App 168, 276 Wis. 2d 447, 688 N.W.2d 1, 02−1771.

For the limited purposes of determining the procedure for accessing the presentence investigation report under sub. (4m), a defendant in a no−merit appeal is in the same shoes as a defendant who is unrepresented. The defendant is entitled to a meaningful viewing of the report, but may not retain a copy of it, subject to the requirement that the defendant keep the information in the report confidential and the circuit court's prerogative to redact identifying information of persons who provided information for the report. State v. Parent, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915, 05−0661.

In a no−merit appeal, as the attorney general is often the state's successor to the district attorney for purposes of this section, the attorney general's office after sentencing must make its request to obtain a copy of the presentence investigation report and to disclose its contents in the state's brief with the circuit court. State v. Parent, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915, 05−0661.

Suchocki does not extend to a situation in which the probation agent who prepared the PSI was married to another probation agent, and the two agents together were responsible for his supervision. *Suchocki* was based on the conflict of interest between the prosecutor, as an agent of the state and the adversary of the defendant, and the presentence investigator, who must serve as the neutral agent of an independent judiciary. When both the author of the PSI and his or her spouse are probation agents with joint responsibility for supervision, there is no inherent conflict of interest. State v. Thexton, 2007 WI App 11, 298 Wis. 2d 263, 727 N.W.2d 560, 05−3109.

The right to consultation with counsel before a presentence interview does not include a right to be apprised of all lines of questioning before the interview occurs. State v. Thexton, 2007 WI App 11, 298 Wis. 2d 263, 727 N.W.2d 560, 05−3109.

In a merit appeal, parties who are entitled "to have and keep a copy" of a presentence investigation report (PSI) under sub. (4m) need not ask any court's permission to reference the PSI in an appellate brief. Parties may reference information from the PSI that does not reveal confidential information and that is relevant to the appeal. In the Matter of State v. Michael B. Buchanan, 2013 WI 31, 346 Wis. 2d 735, 828 N.W.2d 847, 12−0544.

Courts do not have either express or implied statutory authority to order the destruction of presentence investigation reports. This section, the administrative code, and Supreme Court Rules on record retention implicate principles of preservation and confidentiality, not destruction. State v. Melton, 2013 WI 65, 349 Wis. 2d 48, 834 N.W.2d 345, 11−1770.

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