

2013 DRAFTING REQUEST

Bill

Received: 7/16/2013 Received By: phurley
Wanted: As time permits Same as LRB:
For: Frederick Kessler (608) 266-5813 By/Representing: Christina
May Contact: Drafter: phurley
Subject: Criminal Law - procedure Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email: Rep.Kessler@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Require a 12 person jury for felony cases

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 7/16/2013			_____			
/P1		jdyer 7/18/2013	phenry 7/18/2013	_____			State S&L
/1				_____	sbasford 7/18/2013	sbasford 7/18/2013	State S&L

FE Sent For:

<END>

→ At Intro.

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/?	phurley	7/18 jld	7/18 ph				

FE Sent For:

<END>

Hurley, Peggy

From: Tenuta, Christina
Sent: Tuesday, July 16, 2013 9:21 AM
To: Hurley, Peggy
Subject: 12 Person Jury Requirement Bil

756.06
(2)(a), too

Hi Peggy,

Are you enjoying the summer?

Rep. Kessler would like to draft a bill that requires a 12 person jury for a felony charge. Basically, he would like to change Wis. Stat. 972.02(2) by removing the first sentence that allows parties to stipulate to a jury of less than twelve in a felony case.

Please let me know if you have any questions.

Thanks!

Best,
Christina

Christina M. Tenuta, J.D.
Office of Wisconsin State Representative Frederick P. Kessler
608-266-5813

756.06 Jury selection.

(1) Whenever an issue is to be tried before a jury, the clerk of circuit court shall randomly select names from the jury venire until the desired number is obtained to create the jury panel. The random selection of names may include the provision that jurors reporting for service who have not been considered for assignment to a panel be considered before other jurors are considered for a second panel.

(2)

(a) A jury in a felony case shall consist of 12 persons unless both parties agree on a lesser number as provided in s. 972.02.

(am) A jury in a misdemeanor case shall consist of 12 persons.

NOTE: The provision that a jury in a misdemeanor case shall consist of 6 persons was held to violate Article I, s. 7 of the Wisconsin Constitution by the Supreme Court in *State v. Hansford*, 219 Wis. 2d 226 (1998).

(b) Except as provided in par. (c) and ss. 980.05 (2) and (2m) (c), 980.09 (3), and 980.095 (1), a jury in a civil case shall consist of 6 persons unless a party requests a greater number, not to exceed 12. The court, on its own motion, may require a greater number, not to exceed 12.

(c) A jury in a case involving an offense for which a forfeiture may be imposed or in an inquest under s. 979.05 shall consist of 6 persons.

(d) This subsection does not apply to cases under ch. 938.

History: 1977 c. 187 s. 95; Stats. 1977 s. 756.06; Sup. Ct. Order No. 96-08, 207 Wis. 2d xv (1997); 2005 a. 434; Sup. Ct. Order No. 08-01, 2008 WI 102, 307 Wis. 2d xxxvi.

Judicial Council Note, 1996: Based on prior s. 756.096, this section implements ABA Standard 17. [Re SCO No. 96-08 eff. 7-1-97]

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 in a felony case, 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. If the case is a misdemeanor case, the jury shall consist of 6 persons.

(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).

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 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 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, ___ Wis. 2d ___, ___ N.W.2d ___, 10-1192.

Waiver of jury in Wisconsin. 1971 WLR 626.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-2692/P1

PJH:.....

Handwritten initials: jld, rmnr

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

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Sum

Handwritten: ✓

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1

AN ACT ...; relating to: the number of jurors in felony cases. ✓

Analysis by the Legislative Reference Bureau

* Handwritten asterisk

Under current law, a defendant in a criminal case is entitled to have his or her case decided by a jury, unless he or she opts to have his or her case decided by the judge. Generally, a jury in a criminal case consists of 12 persons. However, under current law, a defendant charged with a felony may agree, before a verdict is rendered, to have his or her case decided by a smaller number of jurors.

Under this bill, a jury in a criminal case must consist of 12 persons. The bill removes the option for a defendant charged with a felony to have his or her case decided by a smaller number of jurors.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

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SECTION 1. 972.02 (2) of the statutes is repealed. ✓

SECTION 2. 756.06 (2) (a) of the statutes is amended to read: ✓

756.06 (2) (a) A jury in a felony case shall consist of 12 persons unless both parties agree on a lesser number as provided in s. 972.02. ✓

1 **SECTION 3.** 972.04 (1) of the statutes is amended to read:

2 972.04 (1) The number of jurors selected shall be prescribed in s. 756.06 (2) (a)

3 or (am), whichever is applicable, unless ~~a lesser number has been stipulated and~~
4 ~~approved under s. 972.02 (2)~~ or the court orders that additional jurors be selected.

5 That number, plus the number of peremptory challenges available to all the parties,
6 shall be called initially and maintained in the jury box by calling others to replace
7 jurors excused for cause until all jurors have been examined. The parties shall
8 thereupon exercise in their order, the state beginning, the peremptory challenges
9 available to them, and if any party declines to challenge, the challenge shall be made
10 by the clerk by lot.

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

(END)

Basford, Sarah

From: Williams, Ritch
Sent: Thursday, July 18, 2013 10:46 AM
To: LRB.Legal
Subject: Draft Review: LRB -2692/1 Topic: Require a 12 person jury for felony cases

Please Jacket LRB -2692/1 for the ASSEMBLY.