CHAPTER 957.

CRIMINAL TRIALS.

957.01 Jury trial; waiver. (1) Except as otherwise provided in this section, criminal cases in courts of record shall be tried by a jury of 12 jurors, drawn in the manner prescribed in ch. 270, unless the defendant waives a jury trial in writing or by statement in open court, entered in the minutes, with the approval of the court and the consent of the state.

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

History: 1955 c. 660.

957.02 Grand juror not to serve on trial jury. No member of the grand jury which found the indictment shall be a juror for the trial of the indictment if challenged for that cause.

History: 1955 c. 660.

957.03 Peremptory challenges. Each side is entitled to only 4 peremptory challenges except as provided otherwise in this section. When the crime charged is punishable by life imprisonment, each side is entitled to 12 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 16 if there are only 2 defendants and 18 if there are more than 2 defendants; in other cases 6 challenges if there are only 2 defendants and 9 challenges if there are more than 2.

History: 1955 c. 660.

957.04 Exercise of challenges. The parties shall exercise or waive their peremptory challenges alternately as nearly as practicable, the state beginning. Twenty jurors shall be called, and that number (exclusive of those challenged peremptorily and those excused for cause) shall be maintained in the jury box until all peremptory challenges in excess of 8 have been exercised or waived. From the 20 remaining the parties shall exercise in their order the remaining 8 challenges; and if any party declines to challenge in turn such challenge shall be made by the clerk by lot.

History: 1955 c. 660.

957.05 Alternate jurors. If the court is of the opinion that the trial of the action is likely to be protracted, it may, immediately after the jury is impaneled and sworn, call one or 2 alternate jurors. They shall be drawn in the same manner and have the same qualifications as regular jurors and shall be subject to like examination and challenge. Each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the oath or affirmation and shall be seated next to the regular jurors and shall attend the trial at all times. If the regular jurors are kept in custody, the alternates shall also be so kept. If before the final submission of the cause a regular juror dies or is discharged, the court shall order an alternate juror to take his place in the jury box. If there are 2 alternate jurors, the court shall select one by lot. Upon entering the jury box, the alternate juror becomes a regular juror.

History: 1955 c. 660.

957.07 Defendant to be present. A defendant accused of a felony shall be personally present during the trial. A defendant accused of a misdemeanor may at his writ-

ten request and by leave of court be tried in his absence if represented by his attorney duly authorized for that purpose.

History: 1955 c. 660.

Where 3 or 4 defendants were voluntarily absent from the courtroom when the trial court gave additional instructions at the request of the jury, such 3 defendants by their voluntary absence from the courtroom waived their right to be personally present at the giving of such additional instructions, and they cannot complain that it was error to give the same in their absence. State v. Biller, 262 W 472, 55 NW (2d) 414.

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

History: 1955 c. 660.

957.09 Conviction of included crime. When a defendant is tried for a crime and is acquitted of part of the crime charged and is convicted of the residue thereof, the verdict may be received and thereupon he shall be adjudged guilty of the crime which appears to the court to be substantially charged by such residue of the indictment or information and shall be sentenced accordingly.

History: 1955 c. 660.

957.11 Plea of insanity as defense. (1) No plea that the defendant indicted or informed against was insane or feeble-minded at the time of the commission of the alleged crime shall be received unless it is interposed at the time of arraignment and entry of a plea of not guilty unless the court for cause shown otherwise orders. When such plea is interposed the special issue thereby made shall be tried with the plea of not guilty; and if the jury finds that the defendant was insane or feeble-minded or that there is reasonable doubt of his sanity or mental responsibility at the time of the commission of the alleged crime, they shall find the defendant not guilty because insane or feeble-minded.

(2) The presumption of the defendant's sanity and mental normality at the time he committed the alleged crime shall prevail on the trial of the special issue unless the evidence creates in the minds of the jury reasonable doubt of his sanity or mental responsibility at said time.

(3) If found not guilty because insane or not guilty because feeble-minded, the defendant shall be committed to the central state hospital or to an institution designated by the state department of public welfare, there to be detained until discharged in accordance with law.

(4) A reexamination of his mental condition may be had as provided in s. 51.11, except that his application for rehearing shall be to the committing court. If upon such reexamination the court finds he is insane or feeble-minded, another reexamination shall not be had unless the court is satisfied there is reasonable cause to believe that his mental condition is improved, in which case the court may order another examination. No person so committed shall be discharged unless the court, in addition to finding him sane and mentally responsible, also finds that he is not likely to have a recurrence of insanity or mental irresponsibility as will result in acts which but for insanity or mental irresponsibility would be crimes.

History: 1955 c. 660.

A person acquitted on the ground of insanity existing at the time of the commission of the act is entitled to all of the protection of constitutional rights as if acquitted on any other ground. State v. King, 262 W 193, 54 NW (2d) 181.

See notes to 958.12, citing State v. King, 262 W 193, 54 NW (2d) 181.

See note to 51.18, citing 46 Atty. Gen. 43.

957.13 Insane at time of trial. (1) If the court is reliably advised before or at his trial or after conviction and before commitment that the defendant is probably insane or feeble-minded, the court shall in a summary manner make inquiry thereof.

(2) If the court finds that the defendant is insane or feeble-minded, his trial or sentence or commitment shall be postponed indefinitely and the court shall thereupon order him confined in the central state hospital or an institution designated by the department of public welfare.

(3) Upon the defendant's recovery the hospital superintendent shall notify the committing court thereof. The court shall thereupon issue an order remanding the defendant to the custody of the sheriff pending further proceedings in the cause.

(4) A person committed under this section shall be entitled to a rehearing as to his sanity, as provided by s. 51.11, except that his application for rehearing shall be to the court which committed him. If he is found insane or feeble-minded, another rehearing shall not be had unless the court is satisfied there is reasonable cause to believe that there is improvement in his mental condition, in which case the court may order another rehearing. If it is determined upon reexamination that the insanity or feeble-mindedness of the defendant is chronic, he shall be recommitted to such institution and shall not be discharged except upon the order of the court which committed him.

History: 1955 c. 660.

A trial in a criminal case should be indefinitely postponed if the defendant's mental condition renders him incapable of conferring with his attorneys in his own be-

half and, in connection therewith, the matter of the defendant's ability to distinguish between right and wrong at the time of trial is material as long as that ability remains a test of his sanity. Wilson v. State, 273 W 522, 78 NW (2d) 917.

See note to 51.18, citing 46 Atty. Gen. 43.

957.14 Rules of civil trials. The summoning of jurors; the impaneling and qualifications of the jury; the challenge of jurors for cause; 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 it is in civil actions, except that s. 270.18 shall not apply to criminal actions. Section 327.25 applies to criminal proceedings.

History: 1955 c. 660.

Permitting a deputy sheriff, who had been one of the arresting officers and one of the officers who had obtained an alleged confession and who was also a witness for the state at the trial, to act as bailiff in charge of the jury during its deliberations, constituted reversible error, requiring a new trial, although no objection was made until after the jury had returned their verdict of guilty, and although no showing was made that the defendants were actually prejudiced thereby. (La Valley v. State, 188 W 68, followed.) Surma v. State, 260 W 510, 51 NW (2d) 47.

In a trial before the court sitting by consent without a jury, the court deals with the facts in all respects as a jury would do. If there is credible evidence which in any reasonable view supports a verdict of guilty, the verdict cannot be disturbed on appeal. State v. Abdella, 261 W 393, 52 NW (2d) 924.

Where a sheriff, appointed to act as bailiff in charge of the jury during its deliberations, had taken part in the investigation of the case, and was a rebuttal witness for the state at the trial, and stated to the jury, after they had retired to the juryroom, that they would not hurt his feelings if they hurried, a verdict of guilty should have been set aside and a new trial granted, even though no prejudice to the defendant was shown and the instructions given to the jury to disregard the sheriff's statement would tend to eliminate prejudice. State v. Cotter, 262 W 168, 54 NW (2d) 43.

The general rule that juries will not be permitted to impeach a verdict by affidavit, but that evidence showing what the jury actually did agree on is to be considered if a mistake has been made so that the verdict is not correctly reported, applies to criminal actions as well as to civil actions. In a prosecution against 4 defendants for converting to their own use forest products on certain land in the value of $1,385.20, the jury's verdicts that each defendant was guilty of cutting forest products as charged in the information, and that the value thereof was $133.85, could not be impeached, so as to warrant the granting of a new trial, by affidavits of jurors which stated that they did not understand that this was a criminal case or that a guilty verdict provided for punishment, but which did not show that there had been any mistake in recording their verdicts but only a mistake of the jurors as to the legal effect of their verdicts. State v. Biller, 262 W 472, 55 NW (2d) 414.

For prejudice resulting from taking notes into jury room, see note to 274.37, citing State v. Sawyer, 263 W 218, 56 NW (2d) 811.

A trial judge has the right, in the exercise of a sound discretion, to examine or cross-examine a witness in a criminal case; but the right should be most carefully exercised, and the questions should not betray bias or prejudice nor carry to the jury the impression that the judge has made up his mind as to the facts, but should be framed to make clear that which is not clear. State v. Driscoll, 263 W 230, 56 NW (2d) 788.

See note to 943.20, citing Heyroth v. State, 275 W 104, 81 NW (2d) 56.

957.16 Variances disregarded; amendment. (1) The trial court may allow amendments in case of variance between the complaint or indictment or information and the proofs in all cases where the variance is not material to the merits of the action. After verdict the pleading shall be deemed amended to conform to the proof if no objection based on such variance was timely raised upon the trial.

(2) Upon allowing an amendment to the complaint or indictment or information, the court may direct other amendments thereby rendered necessary and may proceed with or postpone the trial.

History: 1955 c. 660.

957.20 Arraignment in county court; proceedings; sentence. (1) A defendant charged with a crime not punishable by more than 5 years' imprisonment may request in writing to be arraigned in the county court. Such request shall be delivered to the district attorney and by him filed in the circuit court to which defendant is bound for trial. Within 5 days after receipt thereof the district attorney shall file an information and give the defendant a copy. The clerk of the circuit court shall notify the county judge, who shall fix a time for the arraignment as soon as reasonably possible and notify the district attorney, the defendant and his counsel, if any.

(2) At the time fixed the defendant shall be produced or appear in the county court for arraignment. The clerk of the circuit court shall act as clerk of the county court and shall produce the file of the case. Thereupon the defendant shall be arraigned.

(3) If the defendant pleads not guilty, refuses to plead, or makes a motion under s. 955.09, he shall be remanded to jail or, if at large on bail, released, pending the action of the circuit court, and his plea or motion shall be entered of record.

(4) If the defendant pleads nolo contendere the court may either accept such plea and proceed under sub. (5) or reject it and return the case to the circuit court as provided in sub. (3), and the tendering of the plea and its rejection shall be entered of record.

(5) If the defendant pleads guilty the court shall proceed in the same manner as though it were the circuit court and all the proceedings shall be entered in a docket kept for that purpose in the county court as well as in the docket of the circuit court. The sentence or order of probation shall be certified and executed the same as if pronounced or made in the circuit court.

(6) All applicable provisions of law not inconsistent herewith shall apply to proceedings under this section.

(7) This section shall not apply to any county having a court other than the circuit court with trial jurisdiction of such crimes.

History: 1955 c. 660.

This section applies to all county courts including county courts with extra criminal jurisdiction. State v. Harrison, 260 W 89, 50 NW (2d) 38.

957.25 Plea of guilty or nolo contendere. Upon the request of a defendant stating that he desires to plead guilty or nolo contendere the trial court may at any time at a regular or special term require the district attorney to file an information against him and may receive his plea and enter judgment thereon. The defendant may be arraigned by reading to him the identical charge stated in the complaint as though it were an information, but the information as so read shall be reduced to writing and filed as soon as possible thereafter. The court may in its discretion refuse to accept a plea of nolo contendere.

History: 1955 c. 660; 1955 c. 696 s. 319.

See note to 959.01, citing Ellsworth v. State, 258 W 636, 46 NW (2d) 746.

957.26 Counsel for indigent defendants charged with felony; advice by court. (1) Courts of record may appoint counsel for defendants charged with felonies and who are without means to employ counsel. Such appointment shall be in time to enable counsel to attend at the taking of any deposition. The county shall pay the attorney so appointed such sum as the court shall order as compensation and expenses, not exceeding $25 for each half day in court, $15 for each half day of preparation not exceeding 5 days, $15 for each half day attending at the taking of depositions, and his actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 7 cents a mile. The certificate of the clerk of court shall be sufficient warrant to the county treasurer to make such payment.

(2) Upon arraignment and before plea, the court shall advise any person charged with a felony of his right to counsel and that if he is indigent the court will appoint counsel at his request. A record of such advice and of the defendant's reply, if any, shall be made in the docket or in a transcript of the proceedings.

(3) If appointment of counsel has not been so made as to include services upon appeal or writ of error, or if no counsel was appointed in the trial court, the supreme court or the chief justice, upon timely notice to the district attorney and upon being satisfied that review is sought in good faith and upon reasonable grounds (or if the appeal or writ of error is prosecuted by the state) may appoint counsel to prosecute or defend such appeal or writ of error. If no counsel was appointed in the trial court, the defendant shall be required to show his inability to employ counsel. Upon the certificate of the clerk of the supreme court the county treasurer shall pay the attorney such sum for compensation and expenses as the supreme court allows.

(4) Under like circumstances counsel may be appointed and compensated for representing prisoners upon writs of habeas corpus.

History: 1955 c. 660.

Cross References: See 270.125 (4) as to district attorney's duty to inform prisoner of his right to counsel and to compulsory process to procure attendance of witnesses.

See 256.49 for provision authorizing the court to fix customary attorneys' fees, notwithstanding specific provision.

(2) is not complied with by merely asking a defendant if he wishes counsel. The advice must be given to any defendant who appears without counsel so that if the defendant is indigent he can make application to the court. The defendant need not make a showing of indigency before being entitled to be so advised. An affidavit by the district attorney, stating generally that the defendant was advised of her rights, is not a proper substitute for the requirement of (2) that a record of the advice given to the defendant as to his rights shall be made in the docket or in a transcript of the proceedings. State v. Greco, 271 W 54, 72 NW (2d) 661.

957.27 Expert witnesses. (1) EXPERTS TO BE APPOINTED BY JUDGE. Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. Before entering upon such investigation such expert shall take and subscribe the following oath, before the judge making the appointment or some officer designated by him: "I do solemnly swear that I will make a faithful and impartial examination of the matters to be investigated by me and that I will make a true report thereon according to the best of my knowledge, belief and understanding. So help me God." The compensation of such expert witnesses shall be fixed by the court and paid by the county upon the order of the court as a part of the costs of the action. The receipt by any expert witness summoned under this section of any other compensation than so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation shall be unlawful and punishable as contempt of court. The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross-examination by

both parties, who may also summon other expert witnesses at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject.

(2) EXPERTS TO EXAMINE THE ACCUSED. No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been seasonably demanded.

(3) ACCUSED MAY BE COMMITTED TO HOSPITAL. Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under s. 957.13. In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of the said chief physician who may be cross-examined regarding the report by counsel for both parties. It shall be the duty of the sheriff to convey the accused to and from the place of commitment, and if the sheriff fails to call for the accused upon expiration of the time fixed by the court the accused shall be retained in custody in the hospital or asylum and if the accused is not removed upon the expiration of the time fixed by the court the superintendent shall give notice thereof by registered mail to the judge and the sheriff; and the county shall pay to the hospital or asylum for the keep and maintenance of the accused the sum of $10 per day after the expiration of the time fixed by the court until the accused is removed.

(4) EXPERTS, WRITTEN REPORTS OF. Each expert witness appointed by the court may be required by the court to prepare a written brief report under oath upon the mental condition of the person in question and such report shall be filed with the clerk at such time as may be fixed by the court. Such report may with the permission of the court be read by the witness at the trial.

History: 1951 c. 316; 1955 c. 660.

Physicians employed by Mendota state hospital and appointed as expert witnesses in a criminal case where the defendant pleaded insanity, who attended the trial and testified as expert witnesses, are entitled to such compensation as the court may allow pursuant to (1), where the time spent by them during the trial was charged against their vacations and other time off to which they were entitled. Mendota state hospital is not required to furnish service of such experts without charge. 40 Atty. Gen. 156.