CHAPTER 631

TRIAL, JUDGMENT; SENTENCE

631.01 ISSUES OF FACT, HOW TRIED; APPEARANCE IN PERSON

Federal restrictions on evidence in state criminal cases. 34 MLR 489.

Admissibility of lie detector test results into evidence. 35 MLR 310.

Admissibility of uncommunicated threats. 35 MLR 316.

Effect of discovery of conclusive new evidence in a criminal case and after expiration of time limit on a motion for a new trial. 36 MLR 533.

Testimony of extra-judicial identification. 36 MLR 530.

Principal and agent as joint tortfeasors; liability of an agent for collusion of third party sellers. 37 MLR 401.

Due process; criminal prosecutions; examination of a juror by the court in the absence of the defendant. 37 MLR 407.

Evidence of defendant's other crimes; admissibility in Minnesota. The exclusion theory in practice. 37 MLR 608.

In a criminal prosecution the defendant cannot be required to produce a document in his possession for use in the trial, and showing that it is in his possession is sufficient foundation for the introduction of secondary evidence of its contents. State v Minor, 137 M 254, 163 NW(514).

Where evidence clearly established that the assault charged did not result from negligence of joint adventurers in pursuit of a joint adventure, the court properly refused to charge the jury on liability of all joint adventurers for negligence of any of them. To constitute a "conspiracy" the minds of alleged conspirators must meet upon a plan or purpose of action to achieve the contemplated result. Bukowski v Juranek, 227 M 313, 35 NW(2d) 427.

On the petition, return, reply, and stipulation relative to evidence taken below in a habeas corpus proceeding, the question before us is whether the absence of relator as the accused from his trial for murder in the district court was voluntary or involuntary. In a prosecution for a felony, the accused has the right to be present in person at all stages of the trial, from arraignment to and including the pronouncement of sentence. If after arraignment, plea, and the commencement of the trial in his presence he voluntarily flees the court, he thereby waives his right to be present at the further proceedings up to and including the rendition of the verdict. The absence of the accused from the court, voluntarily or involuntarily, when sentence is pronounced in such a case, results in an illegal sentence without due process of law, requiring a resentence when his presence is secured. State ex rel v Utecht, 228 M 44, 36 NW(2d) 126.

When the defendant in a criminal case testifies in his own behalf, he thereby assumes the position of an ordinary witness, and may be discredited on cross examination by inquiries as to his previous prosecution or conviction of crime in the same manner and under the same rules as any other witness. OAG Dec. 6, 1948 (494-A).

631.02 CONTINUANCE; DEFENDANT COMMITTED, WHEN

HISTORY. RS 1851 c 128 s 167; RS 1851 c 132 s 248; PS 1858 c 114 s 1; PS 1858 c 118 s 14; GS 1866 c 114 s 4, 5; GS 1878 c 114 s 4, 5; GS 1894 s 7321, 7322; RL 1905 s 5359; GS 1913 s 9201.

Denial of continuance by trial judge as a violation of due process. 34 MLR 489.

631.03 JOINT INDICTMENT, SEPARATE TRIAL

HISTORY. RS 1851 c 119 s 84; RS 1851 c 132 s 237; PS 1858 c 105 s 20; PS 1858 c 118 s 3; GS 1866 c 91 s 9; GS 1866 c 114 s 6; GS 1878 c 91 s 9; GS 1878 c 114 s 6; GS 1894 s 6267, 7323; RL 1905 s 5360; GS 1913 s 9202.

631.06 QUESTION OF LAW AND FACT, HOW DECIDED

The evidence being competent and sufficient to sustain a conviction beyond a reasonable doubt, it is for the jury to judge the credibility of the witnesses and to find the facts and draw inferences therefrom, and on appeal its verdict must stand. State v Waltz, 237 M 409, 54 NW(2d) 791.

631.07 ORDER OF ARGUMENT

The remarks of a county attorney in his closing argument prosecuting for first degree murder based on strychnine poisoning, where he asserted that when one used poison one used it to kill, made in connection with a long discussion of evidence directed at showing that defendant had used poison with intent to kill, was not erroneous. State v Gavle, 234 M 186, 48 NW(2d) 44.

Where in a carnal knowledge case the argument of the prosecuting attorney is such as to inflame passion and prejudice of the jury to the extent that the defendant may be denied a fair trial, it is the duty of the trial court sua sponte to intervene for defendant's protection, and its failure to do so constitutes reversible error. State v Morgan, 235 M 388, 51 NW(2d) 61.

In a prosecution for arson in burning an automobile, the prosecuting attorney's remarks that the defendant was under suspicion of murder as well as for the crime for which he was charged, and that he made no effort to find and produce as alibi witnesses persons with whom he claimed to have been with on the night of the crime; and that defendant was a desperate and dangerous man, were prejudicial and improper in view of the evidence that defendant had been convicted of a third degree murder and served part of the penitentiary sentence therefor and that his companion in the automobile at the time of the crime had disappeared. State v Kolander, 236 M 209, 52 NW(2d) 458.

If an improper argument was made to the jury it is permissible and proper for the court to instruct the jury thereon. State v Wilson, ... M ....., 57 NW(2d) 412.

While the argument of a prosecuting attorney need not be entirely colorless and may state conclusions and inferences which the human mind might reasonably draw from the facts in evidence, it should not include the attorney's own opinion or the opinion of the state as to the guilt of defendant; nor should it include reference to the amount of funds spent in the investigation of the case; nor should it be argued in prosecution for larceny when the sole defense is a nontaking, that a finding of not guilty would allow defendant to keep the money; and an argument containing such matter is so prejudicial that the defendant is entitled to a new trial. State v Gulbrandson, ... M ....., 57 NW(2d) 419.

While the argument of the prosecuting attorney was vigorous it was adequately answered by counsel for the defendant, and this coupled with occasional instructions by the trial court amply protected the defendant's right to a fair trial. State v Pancratz, ... M ....., 57 NW(2d) 635.

This section is not applicable to the trial of misdemeanor cases prosecuted by complaint. OAG April 10, 1952 (266-B-1).

631.08 CHARGE OF COURT

Federal restrictions on evidence in state criminal cases as applied to comment on evidence by the trial judge, and comment by the trial judge on defendant's failure to testify. 34 MLR 499.

Instructions that reasonable doubt is "a doubt for which a juror who says he has such doubt about a defendant's guilt can give a reason for entertaining" approved. 35 MLR 584.

Within reasonable limits a judge may urge the jury to agree on a verdict and may dwell to some extent upon the public expense of additional trials in case of inability to agree. State v Doan, 225 M 193, 30 NW(2d) 539.

Under the provisions of Minnesota Constitution, Article I, Section 7, a defendant in a criminal prosecution is entitled to be tried without prejudicial remarks by the presiding judge, and without any expressions on his part which would point to the defendant's guilt or discredit thereby prejudicing him with the jury. State v Shetsky, 229 M 566, 40 NW(2d) 337.

Ordinarily a pre-trial statement offered in evidence for an impeachment purpose should be received only to the extent reasonably necessary to accomplish that purpose, and when it incidentally contains matter which may be prejudicial when considered for any other purpose, such prejudicial matter cannot in a practical manner be separated from the statement as a whole and excluded. The jury should be cautioned to disregard such matter for all purposes except that of impeachment. State v De Zeler, 230 M 39, 41 NW(2d) 313.

It is proper in a criminal case to admonish the jury that punishment is a subject with which the jury has nothing to do and that responsibility of punishment rests exclusively with the court. State v Gensmer, 235 M 72, 51 NW(2d) 689.

Where there is direct evidence of guilt as well as substantial evidence, in the absence of a request for instructions on the weight to be given the substantial evidence, it was not error to submit such charge. In prosecution for grand larceny committed when the assailant attacked the victim on a dark night and took his billfold after administering a severe beating which the defendants believed had rendered the victim unconscious, but wherein the victim identified defendants as his assailants, the court's instruction as to the credibility of the prosecuting witness was sufficient. State v Bailey, 235 M 204, 50 NW(2d) 272.

In a prosecution for rape the evidence presented contained a finding that the crime had been committed. Not all cautionary instructions regarding an alibi as a defense are reversible error; but, if such instruction is given, extreme care must be exercised to the end that evidence tending to prove an alibi is given proper consideration by the jury. State v Wilson, ... M ....., 57 NW(2d) 412.

Where it is clear that a particular crime has been committed and there is no evidence justifying a verdict of any lesser degree than the one charged in the indictment, it is the duty of the court to instruct the jury that it is their duty to convict of the particular crime or acquit. State v Pancratz, ... M ....., 57 NW(2d) 635.

631.09 JURY; HOW AND WHERE KEPT WHILE DELIBERATING; SEPARATE ACCOMMODATIONS FOR WOMEN JURORS

A showing that no separate accommodations were provided for women jurors serving on a mixed jury, together with an affidavit by a 66-year old mail carrier that he had voted for a verdict of "guilty" because he could hold out no longer, were sufficient to impeach the jury where the jury was twice polled and twice affirmed its verdict in open court. State v Gavle, 234 M 186, 48 NW(2d) 45.

631.14 VERDICT FOR LESSER OFFENSE

Acquittal on the charge of illegal possession did not involve jeopardy of any element of the charge to attempt to take beaver. State v Ward, 225 M 208, 30 NW(2d) 349.

An information charging unlawful attempt to take a beaver does not involve any element of the crime of illegal possession of a raw beaver skin, and where, by consent, a defendant is tried on two informations, one for an unlawful attempt to take a beaver and one for illegal possession of a raw beaver skin, the trial and ac-

quittal on the charge of illegal possession does not involve jeopardy of any element of the charge of attempt to take. State v Ward, 225 M 208, 30 NW(2d) 349.

631.17 RECEPTION OF VERDICT

On the petition, return, reply, and stipulation relative to evidence taken below in a habeas corpus proceeding, the question before us is whether the absence of relator as the accused from his trial for murder in the district court was voluntary or involuntary. In a prosecution for a felony, the accused has the right to be present in person at all stages of the trial, from arraignment to and including the pronouncement of sentence. If after arraignment, plea, and the commencement of the trial in his presence he voluntarily flees the court, he thereby waives his right to be present at the further proceedings up to and including the rendition of the verdict. The absence of the accused from the court, voluntarily or involuntarily, when sentence is pronounced in such case, results in an illegal sentence without due process of law, requiring a resentence when his presence is secured. State ex rel v Utecht, 228 M 44, 36 NW(2d) 126.

631.18 INSANITY OF DEFENDANT

Where upon the trial of a person under indictment for forgery there were indications that the defendant was mentally defective, it was quite proper for the court to appoint a commission composed of two examining physicians and a judge of probate to pass upon the mental capacity of the prisoner. OAG Aug. 31, 1948 (88-A-26).

Where accused was found to be insane and, after being committed, escaped from the state hospital, being still under indictment, he could be returned from a sister state by extradition or by mutual exchange agreement. OAG Sept. 28, 1948 (248-A-3).

"I" was indicted for murder in the first degree in October, 1938. While awaiting trial his sanity was questioned and on being tested, under the provisions of section 631.18, he was found to be insane and the district court committed him to the state hospital at St. Peter. He escaped from that hospital on Aug. 28, 1948, and is still under indictment for murder. Under the provisions of section 525.762, the state hospital at St. Peter is required to file notice of the inmate's escape in the court of his commitment. Upon receiving notice it is the duty of the county attorney of the county of the inmate's commitment to determine whether or not he desires to institute extradition proceedings. If there are extradition agreements between Minnesota and the state to which "I" escaped, section 246.234 applies. OAG Sept. 28, 1948 (248-A-3).

An out-of-state resident, committed as insane to a Minnesota state hospital, after the filing of an information against him and before trial, cannot be transferred to a similar institution in the state of his residence unless the court of commitment so orders. OAG Feb. 26, 1953 (248-A-7).

Where a magistrate commits a person to the custody of the sheriff under a charge of murder in the first degree and a question arises as to the proper procedure when it is claimed that the accused is insane, the jurisdiction of the district court initiated by the commitment of the accused for action by the grand jury, cannot be divested by the probate court. The first step to be taken after the grand jury or special grand jury accuses him is to arraign the defendant upon the indictment. It is the filing of the indictment which gives the district court the power to proceed. The court may then proceed under the authority granted under section 631.18. The case is not before the district court until an indictment has been returned. OAG April 14, 1948 (248-C-2).

CHALLENGING JURORS

631.36 CHALLENGED JUROR EXAMINED, EVIDENCE

Admissibility of lie detector test results into evidence. 35 MLR 310.

Admissibility of uncommunicated threats. 35 MLR 315.

JUDGMENTS, EXECUTION THEREOF

631.40 JUDGMENT ON CONVICTION, JUDGMENT ROLL

Where the judgment roll fully complied with section 631.40, and where the information filed as part thereof disclosed the nature and extent of and all other essential information with reference to relator's three prior convictions, the relator was not lawfully detained because the judgment itself did not set forth the nature of such prior convictions, but referred to them only as "three prior convictions." State ex rel v Utecht, 230 M 582, 43 NW(2d) 258.

The trial court in pronouncing sentence must state the nature of the offense for which the prisoner has been convicted; but a description of the crime in the judgment is generally sufficient if, in connection with the record, it affords the defendant information sufficient to protect him against future prosecutions for the same offense. State ex rel v Utecht, 231 M 339, 43 NW(2d) 258.

Where the prisoner was placed in jail preliminary to his trial on Nov. 29, and thereafter convicted on Dec. 30, and thereafter sentenced on Jan. 21 of the following year, the judge may issue an order on May 18, 1953, changing the beginning of the sentence from Dec. 30 as stated in the original sentence, to Nov. 29, where it was the evident intention to give the prisoner credit on his term for the amount of time spent in jail preliminary to the date of the sentence. OAG June 19, 1953 (341-K-2).

Except as otherwise provided by statute a court may not change or modify a valid sentence after the court term at which the sentence was imposed has expired. OAG Aug. 24, 1953 (341-K-9).

631.42 FORM OF SENTENCE TO STATE PRISON

Due process in the sentencing of a criminal; right of offender to be informed of pre-sentence information in open court. 34 MLR 470.

Re-sentence without credit for time served; unequal protection of the law; including the void sentence doctrine used and the need for legislation. 35 MLR 239.

Right to presence of counsel at time of the verdict and sentencing. 35 MLR 300.

The court, in sentencing a prisoner to a reformatory, may give the prisoner credit for time spent in the county jail while awaiting sentence. OAG Sept. 23, 1947 (341-K-10).

A prisoner sentenced to a five-year term in the state penitentiary, whose sentence is stayed and who is sent to the workhouse for one year and thereafter placed on probation, should be given credit for the one year spent in the workhouse on his five-year sentence. OAG Sept. 30, 1948 (341-K-10).

CHAPTER 632

NEW TRIALS, APPEALS, WRITS OF ERROR

632.01 REMOVAL TO SUPREME COURT; APPEAL, WRIT OF ERROR

Appeals by the state in criminal cases; trial judge's decision after errorless trial is not subject to review. 34 MLR 344.

Effect of discovery of conclusive new evidence in a criminal case and after expiration of time limit on a motion for a new trial. 36 MLR 533.

Right of a parolee to a hearing upon revocation of commutation of sentence. 36 MLR 537.