

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-1682-FT

Cir. Ct. No. 03JV000004

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF JACOB M.W.,
A PERSON UNDER THE AGE OF 17:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

JACOB M.W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

¶1 ANDERSON, P.J.¹ Jacob M.W. appeals from a dispositional order and an order denying postdispositional relief, both determining that he was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

competent to stand trial. He argues that the trial court applied the incorrect legal standard for competency. We conclude that the trial court properly applied the competency standard set forth in WIS. STAT. § 971.13 and affirm.

FACTS

¶2 In February 2003, the State filed a delinquency petition against Jacob, alleging that he had committed three counts of first-degree sexual assault of a child. Subsequently, upon Jacob's request, the court ordered that he undergo a competency assessment. The court-appointed expert, Dr. Frank J. Cummings, a licensed clinical psychologist who had also conducted a psychological evaluation of Jacob following the filing of the delinquency petition, performed the competency examination. In his written report submitted to the court, Dr. Cummings concluded:

Jacob appears to understand the charges against him, and has the capacity to appreciate and understand the basic elements of due process. Furthermore, he appears to appreciate the wrongfulness of his illegal behavior (i.e., touching privates). Thus, he appears to be competent to understand the proceedings, and should be able to assist his attorney in his defense. Finally, there is little evidence to suggest that Jacob is suffering from a mental illness or defect at the time of this evaluation.

¶3 Dr. Cummings and Dr. Paul Hamilton, the defense expert, both testified at the competency hearing held in May 2003. Dr. Cummings testified that he believed that Jacob was competent to stand trial. He explained that Jacob was of average intelligence, fairly well versed in understanding the legal terms and the people involved in the court process, had very good comprehension of the legal system, had very good vocabulary and understood the function of the legal terms very well. Dr. Cummings further testified that Jacob had the capacity to acquire knowledge to understand and participate in the legal proceedings against

him. He testified that Jacob could assist his attorney in his defense and that Jacob's Attention Deficit Hyperactivity Disorder (ADHD) would not impact his ability to comprehend the proceedings.

¶4 Dr. Cummings also testified about the process he used to draw his competency conclusion. He stated that he administered the "Understanding and Appreciation of Miranda Rights" (UAMR) test to aid him in his competency determination. Dr. Cummings recognized that the UAMR instrument was not designed to gauge a juvenile's competency to stand trial, but explained that there was no single test available that would assess the competency of a ten- or eleven-year-old child. He stated that because the UAMR would not adequately address competency, he asked Jacob additional questions not included in the UAMR instrument. His testimony also demonstrated that he relied on his earlier psychosexual examination to reach his conclusion.

¶5 Dr. Hamilton, who had not been qualified in the past as an expert on the issue of juvenile competency, testified that Jacob was not competent to stand trial. Dr. Hamilton explained that while Jacob was of average intelligence, he was in the low average range in verbal comprehension and processing speed. He stated that he was concerned that due to his age, maturity and his ADHD, Jacob would struggle to participate in and fully understand the legal proceedings and the consequences of the proceedings. He testified that Jacob understood the concepts of right and wrong in relationship to the acts forming the basis for the charge, but did not comprehend why the acts were wrong. He stated that Jacob could distinguish between being truthful and untruthful and that if another witness lied on the stand, he would be able to recognize it as a lie. He also related that Jacob was capable of learning about the legal system. Finally, Dr. Hamilton agreed with

Dr. Cummings' statement that with a ten-year-old child, it is difficult to find an instrument that properly assesses his or her competency.

¶6 After hearing the testimony of the two experts and considering the arguments of both counsel, the trial court determined that Jacob was competent to stand trial. The court recognized that the test for competency was whether "Jacob has a sufficient ability to consult with his attorney with a reasonable degree of rational understanding and, secondly, whether he has a rational, as well as a factual understanding of the proceedings against him." The court then applied this test to the facts.

¶7 The court found that Jacob was of average intelligence and he did not suffer from any sort of mental illness or emotional disorder that would interfere with his ability to perceive reality. The court accepted Dr. Hamilton's testimony that Jacob was oriented as to time, place and person and that Jacob could recognize the difference between both a lie and the truth and right and wrong. The court further determined that Jacob understood the proceedings against him, the consequences of the proceedings, his rights and the roles of different individuals in a courtroom. The court also stated that Jacob would be able to ask questions of his attorney, exercise his right to testify if he so chose, and that Jacob would be able to understand whether a witness had lied and to communicate his understanding to his attorney. The court concluded that Dr. Cummings' testimony was more directly "on point" than Dr. Hamilton's testimony and that Dr. Cummings had a better grasp of what needed to be addressed at a competency hearing. Finally, the court rejected Jacob's claim that because he was ten years old, he was incompetent as a matter of law, explaining that the legislature had already granted the court jurisdiction over children ten years of age and older in delinquency dispositions.

¶8 Following the finding of competency, Jacob entered an admission to one count of first-degree sexual assault of a child and the remaining two counts were read in for dispositional purposes. The court imposed and stayed a placement at Lincoln Hills School and placed Jacob in a type II correctional placement.

¶9 Jacob filed a postdispositional motion, arguing that the trial court erred in finding Jacob competent and that such error created “a manifest injustice warranting withdrawal of Jacob’s admission and requiring the court to order the district attorney’s office to file a JIPS petition as provided for by WIS. STAT. § 938.30(5)(d)2.” Attached to the motion was a competency evaluation prepared by Dr. Harlan Heinz. Dr. Heinz determined, based on his own examination of Jacob and his review of the court records, that Jacob lacked substantial mental capacity to understand the proceedings and assist in his own defense. Dr. Heinz explained that while Jacob was of average intelligence and was not suffering a psychotic mental condition, he did lack significantly in his depth of understanding concepts. He wrote that Jacob’s ADHD “substantiates [his] immaturity” and that Jacob lacked the ability to fully consider the charges and the meaning associated with possible long-term consequences. He further averred that Jacob had significant limitations in his ability to assist in his own defense. Dr. Heinz noted that to assist him in his evaluation he used the MacArthur Competency Tool-Criminal Adjudication and the Competency to Stand Trial: Assessment Instrument, which are both adult instruments.

¶10 At the postdispositional motion hearings, Dr. Heinz, Dr. Cummings and Mandy O’Malley, Jacob’s caseworker, all testified. Dr. Heinz testified that Jacob did not understand the necessary legal concepts and words; he lacked the “ability for more complete comprehension.” He stated:

If we were just considering his age, that is a significant factor. But you need to go beyond that. You need to see if that lack of understanding is really there, because there are some kids who probably would be okay. But, in his case, it's very clear to me, once you begin to probe for his conceptual understanding, that it just was not there.

On cross-examination, Dr. Heinz testified that Jacob was able to accurately define witness and prosecutor and identify the range of possible penalties for his behavior and additional consequences of his adjudication. He admitted that Jacob would be able to explain to his attorney the behaviors that landed him in court and alert his attorney to any untruthful testimony.

¶11 Dr. Cummings reaffirmed his opinion that Jacob was competent to stand trial. On cross-examination, Dr. Cummings testified that Jacob only had a “superficial understanding” of courtroom proceedings, but that Jacob had the capacity to understand those proceedings.

¶12 O'Malley testified that as Jacob's caseworker, she had the opportunity to talk with Jacob two to three times a week. She stated that Jacob did not fully understand what he did was wrong or the consequences of his actions.

¶13 The trial court also admitted into the record a series of e-mails between Dr. Thomas Grisso, a preeminent expert of juvenile competency, and Jacob's counsel. The e-mails concerned the appropriateness of the tests used by the various experts in this case. Dr. Grisso noted that it was the first time he had ever heard of someone “using the Miranda instruments to assess competence to stand trial.” He further wrote:

If the examiner's opinion about competence to stand trial was based solely on the UAMR, then it would be possible for me to write a brief letter simply saying that as the author of the UAMR, I can verify that the instrument was not designed to assess competence to stand trial and that I've never heard of anyone using it for that purpose.

On the other hand, if the examiner did anything else at all to assess the youth's understanding of the trial process and ability to assist counsel (even an interview that explored those questions, with no special competence to stand trial instrument) then such a letter would not be of much value, because the examiner could reasonably base his/her opinion on that interview information as well.

¶14 After hearing the testimony and considering “the entire file” of the case, the court determined that Jacob was competent to stand trial and denied Jacob's postdispositional motion. The court further found that Dr. Cummings testimony was entitled to much greater weight than Dr. Heinz's testimony.

DISCUSSION

¶15 WISCONSIN STAT. § 938.12 grants the court exclusive jurisdiction over any juvenile ten years of age or over whom, like Jacob, is alleged to be delinquent. WISCONSIN STAT. § 938.30(5)(a)3 requires a court that has reason to doubt a juvenile's competency to proceed to hold a competency hearing. If the court, after holding the hearing, finds that the juvenile is competent to proceed, the court shall resume the delinquency proceeding. Sec. 938.30(5)(bm). If, however, the court determines that the juvenile is not competent to proceed, as described in WIS. STAT. § 971.13, the court shall suspend the proceedings and, if appropriate under the circumstances, order the district attorney to file a petition alleging that the juvenile is in need of protection or services. *See* § 938.30(5)(d)2. On appeal, Jacob urges this court to hold that Jacob was incompetent pursuant to the standards set forth in § 971.13, to vacate the trial court's disposition and postdispositional orders and to direct the district attorney to file a JIPS petition.²

² The State suggests, without citation to any legal authority, that we should not consider the evidence Jacob submitted following the trial court's dispositional order. Because this evidence does not alter our holding, we need not address the State's argument.

¶16 In Wisconsin, “No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.” WIS. STAT. § 971.13(1); *see also State v. Garfoot*, 207 Wis. 2d 214, 221, 558 N.W.2d 626 (1997). “[A] person whose mental condition is such that he [or she] lacks the capacity to understand the nature and object of the proceedings against him [or her], to consult with counsel, and to assist in preparing [a] defense may not be subjected to a trial.” *Garfoot*, 207 Wis. 2d at 222 (citation omitted). Conversely, “[a] person is competent to proceed if: 1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and 2) he or she possesses a rational as well as factual understanding of a proceeding against him or her.” *Id.* If the juvenile claims to be incompetent, the State bears the burden of proving by the greater weight of the credible evidence that he or she is competent. *See id.* at 221-22.

¶17 Competency to stand trial must be reviewed under the deferential clearly erroneous standard. *State v. Byrge*, 2000 WI 101, ¶33, 237 Wis. 2d 197, 614 N.W.2d 477.

[T]he Supreme Court classifies competency to stand trial within a discrete category in which the resolution of the legal issue is better left to the trial court. Although more than the “what happened” types of historical facts arise in a competency determination, the decision pivots on factors only a trial court can appraise. In a competency proceeding, the ultimate resolution of the legal issue rests on the court’s observation of witness credibility and demeanor.... We therefore are persuaded that the circuit court is the judicial actor best positioned to apply a legal standard to the facts of a competency decision.

Id. at ¶44 (citations and footnotes omitted). We affirm the discretionary rulings of the trial court if the court examines the relevant facts, applies the correct legal

standard, and using a rational process, reaches a reasonable conclusion. *See Hokin v. Hokin*, 231 Wis. 2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). We may search the record for reasons to support a discretionary decision. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). However, when the issue is whether the court applied the proper legal standard in exercising its discretion, we review that issue de novo. *Sulzer v. Diedrich*, 2002 WI App 278, ¶9, 258 Wis. 2d 684, 654 N.W.2d 67, *aff'd as modified and remanded* by 2003 WI 90, 263 Wis. 2d 496, 664 N.W.2d 641 (No. 02-0036).

¶18 Here, we cannot conclude, as Jacob invites us to do, that the trial court's determination of his competency was clearly erroneous. First, contrary to Jacob's assertions, the trial court applied the correct legal standard for competency. Prior to announcing its ruling, the trial court specifically recited the two-part standard set forth in WIS. STAT. § 971.13 for competence and then proceeded to properly apply the standard to the facts before it. There is nothing in the record demonstrating that the trial court misunderstood the standard during either the dispositional or postdispositional phase. Second, Dr. Cummings' report and testimony unequivocally supported the trial court's finding of competency. According to Dr. Cummings, Jacob understood the charges against him, had the capacity to appreciate and understand the basic elements of due process, appreciated the wrongfulness of his illegal behavior, knew the difference between the truth and a lie, had the capacity to learn about the legal system and could assist his attorney in his defense. Finally, Dr. Heinz and Dr. Hamilton both offered testimony suggesting limited agreement with some of Dr. Cummings' conclusions. Dr. Hamilton indicated that Jacob could differentiate between lies and the truth and had the capacity to understand the legal system. On cross-examination, Dr. Heinz testified that Jacob had the ability to identify the range of possible

penalties for his behavior and additional consequences of his adjudication and to explain to his attorney the behaviors that landed him in court and alert his attorney to any untruthful testimony.

¶19 Jacob suggests that because Dr. Cummings based his competency determination on the UAMR, a test that all parties admit is not designed to gauge competency, the trial court should not have given Dr. Cummings' report and testimony any weight. First, we find nothing in the statute that dictates what tests a competency examiner must perform in making his or her competency determination. Second, and most importantly, Jacob mischaracterizes the basis for Dr. Cummings' competency conclusion; he did not solely rely on the UAMR. Dr. Cummings explained that he supplemented the UAMR instrument with additional questions so that he could adequately address Jacob's competency. Dr. Cummings also had the benefit of his earlier psychosexual examination to assist him in rendering his competency determination. Furthermore, while both Dr. Hamilton and Dr. Heinz used other instruments that may have used tests that Dr. Grisso and others deem more relevant to a competency determination, Dr. Hamilton admitted that it was difficult to find any instrument that properly assesses juvenile competence. As Dr. Grisso indicated in his e-mail, it would be entirely reasonable for a competency examiner to rely on the UAMR in addition to information obtained during other interviews; this is precisely what Dr. Cummings did. Accordingly, Jacob's argument must fail.

¶20 Jacob also seems to hint at an argument that ten-year-old children, as a matter of law, are not competent to stand trial. In support, Jacob cites to several studies which question the accuracy of tests used to judge juvenile competency and provide statistical evidence demonstrating that children between the ages of nine to twelve are rarely found competent to stand trial. *See, e.g.*, Thomas Grisso,

The Competence of Adolescents as Trial Defendants, 3 PSYCH. PUB. POL. & L. 3, 7 (1997); Vance L. Cowden and Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings-Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. OF FAM. L. 629, 645-47, 652 (1995). However, Jacob's argument is better directed at the legislature, which has already determined, as a matter of policy in Wisconsin, that the courts have jurisdiction over ten-year-old children who, like Jacob, are alleged to be delinquent. *See* WIS. STAT. § 938.12.

¶21 In sum, the trial court had before it the competing testimony of three experts on juvenile competency. While we may question whether a ten-year-old child is competent to stand trial and while both Dr. Heinz and Dr. Hamilton presented evidence suggesting that Jacob was not competent to stand trial, the trial court is in the best position to observe the witnesses and the juvenile and to weigh the credible evidence on both sides. Given Dr. Cummings' status as a qualified expert on juvenile competency and his findings regarding Jacob, the trial court reasonably concluded that Jacob possessed more than the competence necessary to stand trial, as described in WIS. STAT. § 971.13(1) and (2).

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

