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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2019AP592-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LANCE L. BLACK,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION OF THE
MILWAUKE COUNTY CIRCUIT COURT, THE
HONORABLE JANET C. PROTASIEWICZ, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

TIMOTHY M. BARBER
Assistant Attorney General
State Bar #1036507

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
barbertm@doj.state.wi.us

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STATEMENT OF THE ISSUE

Was the circuit court's determination that Lance L. Black was competent to stand trial clearly erroneous—that is, “totally unsupported by facts in the record”?

The circuit court concluded that Black was competent to stand trial based on its observations of his behavior during the proceedings and expert testimony that Black was not psychotic.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are warranted. This case involves a straightforward application of established law to the facts of record.

INTRODUCTION

Black appeals his judgment of conviction for possession of a firearm by a felon and possession of THC as a habitual offender and with use of a dangerous weapon. Black claims that the circuit court erroneously exercised its discretion in finding him competent to stand trial. Black's arguments are without merit.

First, contrary to Black's assertion, the circuit court did not prejudge his competency. It ordered a competency examination, heard expert testimony and arguments from the parties, reviewed the relevant law, and stated that it was “torn” before making its decision. Second, the circuit court was not required to accept the ultimate medical opinion of the expert who examined Black during a lunch recess. Third, the record supports the circuit court's competency determination. The court observed that Black was able to participate in the trial and control his behavior when he wanted to. The expert who examined Black indicated that there was no objective evidence of a mental illness, that Black was not psychotic, and

that he understood the legal proceedings; she acknowledged a “volitional component” to his outbursts and agreed it was possible his behavior was self-serving.

Black cannot show that the circuit court’s competency determination is wholly unsupported by facts in the record; therefore, this Court must affirm.

STATEMENT OF THE CASE

The State charged Black with possession of a firearm by a felon and possession of THC as a second and subsequent offense, with use of a dangerous weapon, contrary to Wis. Stat. §§ 941.29(1m)(a), 939.50(3)(g), 961.41(3g)(e), 939.50(3)(i), and 939.61(1)(b). (R. 1.)

Following a four-day trial in September 2017, the court declared a mistrial due to a hung jury. (R. 94:18.) When the court attempted to schedule a new trial date, Black was removed from the courtroom for causing a disturbance. (R. 94:19–23.)

The second trial began on October 9, 2017. (R. 95.) Before the jury was seated, Black complained that he did not have all the transcripts from the previous trial available to him. (R. 97:4.) Once the jury was empaneled, the State provided identification testimony implicating Black; Black then was removed from the courtroom after having a “temper tantrum.” (R. 97:115–17.) The court denied a defense motion for a mistrial. (R. 97:119.)

When the court reconvened for the afternoon session, Black refused to leave his jail cell and threatened to “fuck up his attorney.” (R. 98:3, 8.) The court then moved the trial to a high security courtroom so Black could observe the proceedings from a secure bullpen. (R. 98:7, 9.) Black prevented the trial from continuing by yelling and pounding on the bullpen glass. (R. 98:13–14.) The court determined that Black voluntarily absented himself from the courtroom

without leave, under Wis. Stat. § 971.04(3). (R. 98:17–18.) The trial continued with Black absent. (R. 98:23–75.)

The next day, Black’s attorney requested a competency examination. (R. 99:4.) The court stated it would allow the exam, provided it did not unduly delay the proceedings:

That being said, the jury’s not coming back until 9:30. If somebody from the forensic unit can make an emergency trip to his cell, I mean, I’ll allow it. I’ve already got one juror here. These jurors already were subjected to a four-hour delay yesterday. I certainly am not going to allow Mr. Black’s outbursts and behavior to result in more extreme delays or result in a mistrial, for that matter.

So let’s see if we can get somebody there promptly. If we can, I’ll send that person over and order it. If we can’t, we’ll just proceed with the trial once the jurors are here.

(R. 99:5–6, A-App. 1.) The court then decided to continue with the trial and have the competency exam take place over the noon hour to not further delay the proceedings. (R. 99:6, A-App 1.)

During the afternoon session, Dr. Deborah Collins testified that she evaluated Black for about one hour. (R. 99:69, A-App. 3.) Both parties stipulated to her credentials—although her credentials were not put on the record. (R. 99:69, A-App. 3.)

Dr. Collins testified that Black was not competent to proceed because, in her opinion, he was incapable of assisting in his defense based on his “present capacity to marshal his resources to maintain appropriate legally self-serving behavior and control when meeting with counsel, during courtroom proceedings, and anything related to this case.” (R. 99:70–71, A-App. 4–5.) Dr. Collins stated that Black was not psychotic but could not “maintain appropriate behavioral control.” (R. 99:72, A-App. 6.)

While acknowledging a “volitional component” to his behavior and the possibility that it was “merely convenient,” Dr. Collins opined that Black would benefit from a mood stabilizing agent to control his behavior. (R. 99:71–72, A-App. 5–6.) Dr. Collins’ opinion was based on Black’s self-reporting of past medications, but she acknowledged she had not seen any medical records that Black was prescribed a mood stabilizer in the past. (R. 99:73, A-App. 7.)

Dr. Collins acknowledged that Black possessed the capacity to understand the legal proceedings; however, she believed that Black failed to “appreciate the imperative” of “appropriate courtroom demeanor.” (R. 99:75, A-App. 9.) Dr. Collins emphasized that “there’s no evidence he’s psychotic whatsoever.” (R. 99:70, A-App. 4.) Finally, she admitted that “there is not an [sic] objective evidence of a mental illness.” (R. 99:74, A-App. 8.)

After Dr. Collins testified, the court declared a one-hour recess for everyone to “chew on what [they] just heard.” (R. 99:76, A-App. 10.) The court stated: “I quite frankly am a little bit torn based on what I’ve heard.” (R. 99:76, A-App. 10.)

When it reconvened, the court indicated that it had reviewed *State v. Garfoot*, 207 Wis. 2d 214, 558 N.W.2d 626 (1997), and heard argument. (R. 100:2, A-App. 11.) The State argued that Dr. Collins’ opinion on competency was not consistent with Black’s past behavior in court, which demonstrated he was able to control himself and consult with his attorney and only became disruptive when things did not go his way. (R. 100:4–6, A-App. 13–15.) The State also noted that Dr. Collins’ opinion was not supported by any medical records or previous diagnoses or treatment history. (R. 100:6, A-App. 15.)

The circuit court agreed with the State and found that Black was competent to stand trial based on Dr. Collins’ testimony that Black was “not psychotic” (R. 100:7–8, A-App.

16–17), and its own observations of Black’s behavior during the two trials (R. 100:8, A-App. 17). The court explained that although it respected Dr. Collins, she had “very limited information, and she had limited time with Mr. Black.” (R. 100:7, A-App. 16.) The court further explained that its own observation of Black indicated that he was able to participate in the proceedings and control his behavior when he wanted to:

I note that Mr. Black did conduct himself extremely well during the first trial. He took the stand. He behaved extremely well on the stand the first time.

. . . . In this trial, when the trial began, he was comporting himself very well. He had in front of him Wisconsin statute books. He had notepads. I think he had been reviewing the discovery. He could certainly make coherent statements about the discovery, what information he had, what information he thought he didn’t have.

. . . . But he was clearly able to comport himself. And I observed him becoming more and more, as I indicated before, agitated as the State’s evidence in regard to identification became stronger.

(R. 100:7–8, A-App. 16–17.) The court concluded that “knowing the history and the history that I have of Mr. Black, as compared to the limited history that Dr. Collins has of Dr. (sic) Black, I do see it differently.” (R. 100:9, A-App. 19.)

Thereafter, the jury found Black guilty of both charged offenses. (R. 60; 61.) Dr. Collins later submitted a written report of her findings. (R. 62, A-App. 19–21.) Black was sentenced to 14 years of imprisonment. (R. 66, A-App. 22–23.)

Black appeals.

STANDARD OF REVIEW

A circuit court’s competency determination “is functionally a factual finding” and is accorded a high degree of deference. *State v. Smith*, 2016 WI 23, ¶ 26, 367 Wis. 2d 483, 878 N.W.2d 135; *see also Garfoot*, 207 Wis. 2d at 224–25. Thus, appellate “review of a circuit court’s competency to stand trial determination is limited to whether that finding is totally unsupported by facts in the record and, therefore, is clearly erroneous.” *Smith*, 367 Wis. 2d 483, ¶ 29.

ARGUMENT

The circuit court’s competency determination is not “totally unsupported by the facts in the record.”

Black argues that the circuit court erroneously exercised its discretion when finding him competent to stand trial, asserting that the court “prejudged” the issue. (Black’s Br. 10.) Black concedes that “[t]he trial court’s statements of the law and facts would be a sufficient exercise of discretion but for” the fact that—according to him—it prejudged his competency. (Black’s Br. 13.) Nonetheless, Black also appears to challenge the sufficiency of the evidence to support the circuit court’s determination, by arguing that the “the only evidence going to Black’s competency was the testimony of Dr. Collins that he was incompetent” (Black’s Br. 11), and that “the state offered no evidence of competence.” (Black’s Br. 13.)

Black’s arguments are meritless because they ignore the standard of review and the circuit court’s specific factual findings supporting its competency determination.

A. Competency is a legal determination—not a medical one—based in large part on the court’s observation of the defendant.

A person is incompetent to proceed if he or she “lacks substantial mental capacity to understand the proceedings or assist in his or her own defense.” Wis. Stat. § 971.13(1)).

“Competency is a judicial rather than a medical determination. Not every mentally disordered defendant is incompetent; the court must consider the degree of impairment in the defendant’s capacity to assist counsel and make decisions which counsel cannot make for him or her.” Judicial Council Committee’s Note, 1981, Wis. Stat. § 971.13 (2017–18).¹ A circuit court’s competency determination “must necessarily rest to a large extent upon the judgment and experience of the trial judge and his own observation of the defendant.” *Garfoot*, 207 Wis. 2d at 224 (quoting *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980)).

B. The circuit court’s competency determination was not clearly erroneous because it did not prejudge Black’s competency, there was sufficient evidence to support its competency determination, and the court was not required to accept Dr. Collins’ ultimate medical opinion.

1. The circuit court did not prejudge Black’s competency and expressly stated it was “torn” on the issue.

Black’s primary argument is that the circuit court erred by prejudging his competency. This argument fails both as a matter of law and fact.

First, Black cites no authority for the notion that an otherwise valid factual finding may be overturned simply

¹ All statutory references are to the current edition.

because the circuit court expressed its initial views on the matter before hearing argument and issuing its decision. No such rule exists.

Second, the record demonstrates that the circuit court did not prejudge Black's competency. Black relies on the circuit court's remarks about the delays caused by his behavior as proof of prejudgment. (Black's Br. 10.) However, when read in context, the circuit court was saying no more than that it wanted to schedule the competency hearing promptly and not cause any further delays:

These jurors already were subjected to a four-hour delay yesterday. I certainly am not going to allow Mr. Black's outbursts and behavior to result in more extreme delays or result in a mistrial, for that matter.

So let's see if we can get somebody there promptly. If we can, I'll send that person over and order it. If we can't, we'll just proceed with the trial once the jurors are here.

....

And do you know what might actually even be a better idea is if we -- if they could do a competency eval with him in the jail over the noon hour. Then we don't halt any of the proceedings.

(R. 99:6, A-App. 1.)

Notably, Black admits that "[o]ne might find this statement was simply a matter of the court expressing frustration that the jury trial was not moving forward." (Black's Br. 10.) This concession dooms Black's argument, because under a clearly erroneous standard of review, this Court must accept all inferences that support the circuit court's determination. *State v. King*, 187 Wis. 2d 548, 562, 523 N.W.2d 159 (Ct. App. 1994).

Finally, the circuit court's comments after hearing Dr. Collins' testimony belie the notion that it prejudged the matter. After Dr. Collins testified, the court declared a one-

hour recess for everyone to “chew on what [they] just heard,” stating: “I quite frankly am a little bit torn based on what I’ve heard.” (R. 99:76, A-App. 10.) That is the exact opposite of prejudging.

Therefore, Black’s prejudging argument has no basis in law or fact.

2. The court’s observations of Black and Dr. Collins’ testimony support its competency finding.

Black’s argument that there was no evidence going to competency other than Dr. Collins’ ultimate medical opinion is not true. A circuit court is entitled to take judicial notice of its own records and proceedings, particularly where “the records are part of an interrelated or connected case, especially where the issues, subject matter, or parties are the same or largely the same.” *Johnson v. Mielke*, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970). Further, as stated above, a circuit court must rely on its own observation of the defendant in making a competency determination. *Garfoot*, 207 Wis. 2d at 224.

The circuit court observed Black’s behavior firsthand in the original trial and in the subsequent proceedings. (R. 100:7–9, A-App. 16–18.) It observed that “Black did conduct himself extremely well during the first trial. He took the stand. He behaved extremely well on the stand the first time.” (R. 100:7, A-App. 16.) And, the court noted that in the second trial, “when the trial began, he was comporting himself very well. He had in front of him Wisconsin statute books. He had notepads. I think he had been reviewing the discovery. He could certainly make coherent statements about the discovery” (R. 100:7, A-App. 16.) The court also noted that in both trials, Black was able to behave and assist in his defense and did not have any outbursts until things did not go his way. (R. 100:8, A-App. 17.) Therefore, the circuit court’s firsthand

observations support its conclusion that Black could control his behavior and assist in his defense.

Moreover, the circuit court's competency determination was also supported by portions of Dr. Collins' testimony. The court relied on Dr. Collins' testimony that Black was not psychotic. (R. 100:7–8, A-App. 16–17.) Also, Dr. Collins expressly acknowledged a “volitional component” of Black's outbursts and conceded the possibility that they were “merely convenient.” (R. 99:71–72, A-App. 5–6.) Dr. Collins further admitted that Black had the “capacity to understand legal proceedings.” (R. 99:75, A-App. 9.) And, Dr. Collins admitted that “there is not an [sic] objective evidence of a mental illness.” (R. 99:74, A-App. 8.)

Therefore, the court's observation of Black's behavior combined with portions of Dr. Collins' testimony are sufficient to support its competency determination.

3. The circuit court was not required to accept Dr. Collins' ultimate medical opinion on competency.

Black's argument that the circuit court was required to accept the opinion of Dr. Collins is contrary to law. As set forth above, competency to stand trial is a judicial determination—not a medical one. Judicial Council Committee's Note, 1981, Wis. Stat. § 971.13.

Further, the Wisconsin Supreme Court has unequivocally ruled: “This court has never bound the trier of fact to the opinion of an expert; rather, it can accept or reject it.” *In re Commitment of Kienitz*, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999); *see also State v. Randall*, 2011 WI App 102, ¶ 30, 336 Wis. 2d 399, 802 N.W.2d 194 (“the trial court correctly noted that it was not required to accept the experts' assessments of dangerousness”). “The credibility of witnesses and the weight given to their testimony are matters left to the trier of fact.” *Kienitz*, 227 Wis. 2d at 440. Therefore, a circuit

court is entitled to “accept some of a medical expert’s testimony while rejecting other portions of the same witness’s testimony.” *State v. Owen*, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996).

Here, the circuit court noted that Dr. Collins had limited time and information to evaluate Black and that her opinion on competence was contrary to its own observations of Black’s behavior. (R. 100:7–9, A-App 16–18.) And, as demonstrated above, Dr. Collins’ made several admissions—Black’s lack of psychosis, the lack of objective evidence of mental illness, and recognition that Black’s outbursts were, in part, volitional—that undercut her ultimate medical opinion that Black was not competent to stand trial.

In summary, the circuit court’s observations of Black’s behavior and portions of Dr. Collins’ testimony support the court’s determination that Black was competent to stand trial. The circuit court observed that Black was able to participate in the trial and control his behavior in the past; he only had outbursts when things did not go his way. Dr. Collins testified that Black did not have a mental illness, that he was not psychotic, that there was a “volitional component” to his actions, and that it was possible he was having outbursts when he believed it suited him.

Black accordingly cannot show that the circuit court’s competency determination “is totally unsupported by facts in the record.” *Smith*, 367 Wis. 2d 483, ¶ 29. Therefore, as the circuit court’s competency determination is not clearly erroneous, this Court must affirm. *Id.*

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 9th day of September, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

TIMOTHY M. BARBER
Assistant Attorney General
State Bar #1036507

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
barbertm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,002 words.

Dated this 9th day of September, 2019.

TIMOTHY M. BARBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of September, 2019.

TIMOTHY M. BARBER
Assistant Attorney General