

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2711-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT HOFFA, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County:
JAMES M. MASON, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Higginbotham,¹ JJ.

DYKMAN, P.J. Robert Hoffa appeals from a judgment convicting him of second-degree intentional homicide while using a dangerous weapon,

¹ Circuit Judge Paul B. Higginbotham is sitting by special assignment pursuant to the Judicial Exchange Program.

contrary to §§ 940.05(1) and 939.63, STATS. He challenges the trial court's finding that he was competent to stand trial. We conclude that the trial court's finding that he was competent is not clearly erroneous. Accordingly, we affirm.

On August 3, 1995, Hoffa was charged with first-degree intentional homicide. The criminal complaint alleged that he shot and killed his fiancée at his residence on April 26, 1995, and then shot himself in the head. Hoffa was treated at University Hospital from April 26, 1995, to August 4, 1995, the date of his initial appearance. He was then transferred to Clearview Head Injury Rehabilitation Center, where he was found incompetent to stand trial. Hoffa was admitted to Winnebago Mental Health Institute on June 18, 1996, to obtain treatment to regain his competency. *See* § 971.14(5), STATS.

A competency hearing was held on December 6, 1996. After hearing testimony from several lay witnesses and professionals, the court found that Hoffa had the mental competency to understand the proceedings and to assist his attorney, and therefore, was competent to stand trial. *See* § 971.13(1), STATS.

On March 27, 1997, pursuant to a plea agreement, Hoffa pleaded no contest to the reduced charge of second-degree intentional homicide. He now appeals from the trial court's competency determination.²

Hoffa first contends that we should independently review the record to determine whether he was competent to stand trial. Hoffa relies on the

² The State contends that Hoffa waived the right to challenge the trial court's competency determination by pleading no contest. We see it as problematic to conclude that Hoffa waived the right to contest the trial court's competency determination without also inquiring into whether Hoffa was competent to enter a plea. Though the tests are different, we dispose of the appeal on the merits and therefore need not address the State's waiver argument. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

concurring opinion in *State v. Garfoot*, 207 Wis.2d 214, 558 N.W.2d 626 (1997), which states that “a determination of competency, a determination of constitutional fact, should be decided by this court independently of the decisions of a circuit court or court of appeals, yet benefiting from the analyses of those courts and the observational advantage of the circuit court.” *Id.* at 231-32, 558 N.W.2d at 634 (Abrahamson, C.J., concurring).

We reject Hoffa’s argument because only three of the seven supreme court justices joined in the concurring opinion. “It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court.” *State v. Dowe*, 120 Wis.2d 192, 194, 352 N.W.2d 660, 662 (1984). Therefore, we cannot follow the concurring opinion.

The standard of review that we must follow is contained in *Garfoot*’s majority opinion. The majority opinion states that “appellate courts should only reverse [competency] determinations when they are clearly erroneous.” *Garfoot*, 207 Wis.2d at 225, 558 N.W.2d at 631. Accordingly, we will review the trial court’s competency determination under the clearly erroneous standard.

A person is incompetent to stand trial when he or she “lacks substantial mental capacity to understand the proceedings or assist in his or her own defense.” Section 971.13(1), STATS. Several witnesses testified regarding whether Hoffa was competent to stand trial under this standard. Dr. Frederick Fosdal, a psychiatrist, testified that he examined Hoffa and believed that Hoffa’s mental impairment secondary to his head injury did not render him incapable of understanding the proceedings or assisting in his own defense. Dr. Steven Hull, a psychiatrist at Winnebago Mental Health Institute, testified that he was of the

opinion that Hoffa was competent to stand trial. And Mary J. Hensel, a psychiatric forensic social worker at Winnebago Mental Health Institute, testified that she worked with Hoffa to assist him in becoming competent and that she believed Hoffa was competent to proceed. Because the trial court's competency determination is supported by the testimony of Fosdal, Hull and Hensel, we conclude that it is not clearly erroneous.

Hoffa offers several arguments against the credibility of these witnesses and in favor of the credibility of his own witnesses. But it is the function of the trial court, not the appellate court, to determine the weight of the testimony and the credibility of witnesses. See *In re Estate of Dejmal*, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980). Accordingly, we reject Hoffa's argument and uphold the trial court's determination that he was competent to stand trial.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

