DIVISION ONE
FILED: 12/27/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE GARY S.	1 CA-MH 12-0055
	DEPARTMENT D
	MEMORANDUM DECISION (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. S8015MH201200024

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Matthew J. Smith, Mohave County Attorney — Kingman
By Dolores H. Milkie, Civil Deputy County Attorney
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant, Gary S., appeals from an order entered pursuant to Arizona Revised Statutes ("A.R.S.") section 36-540

(Supp. 2012)[1] finding Gary to be persistently or acutely disabled and requiring court-ordered, involuntary mental-health treatment. Gary argues the evidence was insufficient and did not comply with the statutory requirements. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Gary was arrested in June 2012 after his girlfriend called 9-1-1 and reported that Gary had "trashed" his home and wandered the neighborhood in a delusional state. Police arrived and found Gary at a neighbor's house exhibiting "bizarre behavior." Police took Gary to Western Arizona Regional Medical Center ("WARMC") where he was reportedly kept for ten days. Gary was then admitted to the Mohave Mental Health Clinic ("MMHC") on June 29, 2012 under an application for emergency admission from WARMC. Gary was described as "delusional," paranoid and "experiencing auditory hallucinations." Gary was evaluated by two medical doctors, Dr. Tavakoli and Dr. Zegarra, and two licensed social workers. All four evaluations included a recommendation that Gary receive court-ordered mental health treatment. Dr. Tavakoli filed a petition for court-ordered treatment pursuant to A.R.S. § 36-533 (Supp. 2012), and a civil commitment hearing was held. During the hearing, the court

[1] We cite to the most recent version of the statute when there are no relevant material changes.

heard testimony from Dr. Tavakoli, Dr. Zegarra, Gary, Gary's son, Gary's girlfriend, and a MMHC nurse who treated Gary.

¶3 The court found by clear and convincing evidence that Gary was persistently or acutely disabled and ordered Gary to undergo a combined inpatient and outpatient treatment program for a minimum of 365 days with the period of inpatient treatment not to exceed 180 days. Gary timely appealed. This Court has jurisdiction pursuant to A.R.S. §§ 36-546.01 (2009) and 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶4 Gary contends that the court's order for involuntary treatment must be vacated because there was insufficient evidence to support a finding that he suffered from a mental disorder and that he was persistently or acutely disabled. Gary also contends that his due process rights were violated because the evidence presented at the hearing did not comply with the statutory requirements set forth in A.R.S. § 36-539 (Supp. 2012).

I. Sufficiency of the Evidence

¶5 "We view the facts in a light most favorable to upholding the court's ruling and will not reverse an order for involuntary treatment unless it is 'clearly erroneous and unsupported by any credible evidence.'" *In re MH2009-002120*,

225 Ariz. 284, 290, ¶ 17, 237 P.3d 637, 643 (App. 2010) (citation omitted).

A. The Evidence Was Sufficient to Establish That Appellant Was Persistently or Acutely Disabled

¶6 Section 36-539(B) requires that two evaluating physicians testify as to whether the patient has a mental disorder, the result of the mental disorder is that the patient is persistently or acutely disabled, and whether the patient requires treatment. To prove that a patient is persistently or acutely disabled, a petitioner must establish that the patient suffers from a severe mental disorder that meets the following requirements:

> (a) If not treated has a substantial probability of causing the person to suffer or continue to suffer severe and abnormal mental, emotional or physical harm that significantly impairs judgment, reason, behavior or capacity to recognize reality.
>
> (b) Substantially impairs the person's capacity to make an informed decision regarding treatment, and this impairment causes the person to be incapable of understanding and expressing an understanding of the advantages and disadvantages of accepting treatment and understanding and expressing an understanding of the alternatives to the particular treatment offered after the advantages, disadvantages and alternatives are explained to that person.
>
> (c) Has a reasonable prospect of being treatable by outpatient, inpatient or combined inpatient and outpatient treatment.

A.R.S. § 36-501(32) (Supp. 2012). Gary argues that because Dr. Tavakoli did not testify specifically as to whether or not Gary

understood the advantages and disadvantages of treatment as she explained them to him, but only that she tried to explain the advantages and disadvantages, her testimony does not satisfy the requirements of A.R.S. § 36-501(32)(b).[2] Gary does not challenge the court's findings related to subsections (a) and (c); therefore, we accept that those elements of the statute have been established.

¶7 During the hearing, Dr. Tavakoli testified:

> Q. And have you had an opportunity to explain to him the advantages and disadvantages of treatment and placement?
>
> A. I have tried to.
>
> Q. And in your opinion is he able to understand the advantages and disadvantages of treatment and placement?
>
> A. I think the advantages is he is not going to stay in the hospital.
>
> Q. And what are the advantages and disadvantages of treatment and placement?
>
> A. He would be receiving further treatment and improvement. And the disadvantages are the possible side effects of any medications that he uses. That he would have to stay in the hospital.
>
> Q. Has he expressed any willingness to undergo voluntary treatment?

[2] The opening brief cites A.R.S. § 36-501(33) (2009), an identical earlier version of A.R.S. § 36-501(32) (Supp. 2012). The substance and content of the statute remain the same. For purposes of this decision, we treat the discussion in the opening brief as referring to the current renumbered version in A.R.S. § 36-501(32).

A. No he has not.

¶8 Dr. Zegarra testified:

Q. And did you attempt to explain to him the advantages and disadvantages of treatment and placement?

* * *

A. The advantages include for him to have improvement of his psychosis. And that will increase his level of functioning of the individual. He will also continue improving some insight that he currently did not have. He continues to improve and that he has some business to attend during the time that I did the evaluation.

Q. And what are the disadvantages of treatment and placement?

A. The disadvantages I would say would be that if he did not receive treatment and treated properly for his conditions it can further deteriorate over time. Also the medications if he doesn't take his medications he will continue to have the same symptoms that he suffers from.

Q. And in your opinion was he able to understand the advantages and disadvantages of treatment and placement as you explained them to him?

A. No, at that point he had basically stated he didn't need treatment.

Q. And in your opinion is he capable of subjecting him to voluntary treatment?

A. No.

Q. And why do you think that?

A. Because he doesn't believe that he has a psychosis.

¶9 In addition to this testimony, Dr. Zegarra testified that "[s]pecifically [Gary] has poor attention and concentration; tends to be easily distracted. . . . He also expressed some delusions of grandiosity, at times tangential, changing from one topic to another and unable to keep logical conversation. . . . He has no insight for his behavior . . . ." Furthermore, both doctors indicated in their addendums attached to the petition for court-ordered treatment that Gary's impairment caused him to be "incapable of understanding and expressing an understanding of the advantages and disadvantages of accepting treatment, and understanding and expressing an under-standing of the alternatives to the particular treatment offered." Stating specifically in their addendums why Gary was incapable of understanding the doctors' explanations, Dr. Tavakoli stated that Gary was "[d]elusional" and had "poor concentration," and Dr. Zegarra stated that Gary was "expressing delusional thought content and [was] not understanding the process by which he [was] currently on an inpatient unit or why he need[ed] to be [there]."

¶10 Under the provisions of A.R.S. § 36-501(32)(b), a mentally ill person is not acutely disabled if he or she can make an informed decision regarding treatment. *In re MH 91-00558*, 175 Ariz. 221, 225, 854 P.2d 1207, 1211 (App. 1993) (citing former A.R.S. § 36-501(29)(b)). The determination of

whether a person is able to make an informed decision depends on whether the person "is incapable of understanding *and* expressing an understanding of the advantages and disadvantages of the treatment and the alternatives to the treatment *after* such matters are explained to the patient." *Id.* "[A] physician's opinion that the patient is incapable of understanding the explanations required by the statute does not satisfy the requirements of [A.R.S. § 36-501(32)(b)] . . . unless the physician[] also relate[s] the specific reasons why the patient is incapable of understanding and expressing an understanding of such explanations." *Id.* at 226, 854 P.2d at 1212. Thus, A.R.S. § 36-501(32)(b) requires physicians to either involve the patient in the decision-making process about treatment and alternatives or explain specifically why the patient's disorder prevents him from making a decision about treatment. *Compare Id.* (holding the doctors' testimony insufficient under A.R.S. § 36-501(32)(b) when the doctors never explained why the patient's mental disorder interfered with or impaired the patient's decision-making ability), *with Maricopa County Cause No. MH-90-00566*, 173 Ariz. 177, 185-86, 840 P.2d 1042, 1050-51 (App. 1992) (holding a doctor's testimony was sufficient to determine that the patient was incapable of understanding treatment alternatives when the doctor testified that the patient's

"command hallucinations" influenced his decision-making capacity).

¶11 Here, both examining physicians testified during the hearing and indicated on their addendums to the petition for court-ordered treatment that they had attempted to explain to Gary the advantages and disadvantages of the proposed treatment as well as alternative treatment options. Both doctors opined in their addendums and Dr. Zegarra testified that Gary was incapable of understanding the statutorily required explanations. Both doctors explained specifically in their addendums why they felt Gary was incapable of understanding such matters. Dr. Zegarra's additional testimony regarding Gary's inability to stay focused and think logically further supports the doctors' conclusions. The requirements of A.R.S. § 36-501(32)(b) are met when doctors attempt to provide the required explanations, but the patient's mental disorder impedes his or her ability to make decisions about treatment. *See MH-90-00566*, 173 Ariz. at 185-86, 840 P.2d at 1050-51; *Pima County Mental Health Serv. Action No. MH-1140-6-93*, 176 Ariz. 565, 568, 863 P.2d 284, 287 (App. 1993).

¶12 This case is different than *MH 91-00558*, in which we vacated the court-ordered treatment because the doctors simply concluded that there were no alternative treatments, and they neither explained the proposed treatment to the patient nor the

reason why there were no other alternatives. 175 Ariz. at 225-26, 854 P.2d at 1211-12. In contrast, here, the doctors testified that they not only tried to explain the advantages and disadvantages of treatment and the treatment options, but also opined specifically why Gary was incapable of understanding their explanations and why Gary's disorder impeded his ability to make decisions about his treatment. Thus, we find sufficient evidence established that Gary was persistently or acutely disabled as defined by A.R.S. § 36-501(32)(b).

B. The Evidence Was Sufficient to Establish That Appellant Had A Mental Disorder

¶13 Gary also argues that the evidence was insufficient to support a finding that he suffered from a mental disorder as defined by A.R.S. § 36-501(25).[3] A "mental disorder" is

> [A] substantial disorder of the person's emotional processes, thought, cognition or memory. Mental disorder is distinguished from . . . [c]onditions that are primarily those of drug abuse, alcoholism or intellectual disability, unless, in addition to one or more of these conditions, the person has a mental disorder.

A.R.S. § 36-501(25).

¶14 First, Gary argues that Dr. Tavakoli's testimony and her opinion as set forth in her affidavit is equivocal on Gary's

[3] The opening brief cites A.R.S. § 36-501(26) (2009), an identical earlier version of A.R.S. § 36-501(25) (Supp. 2012). The substance and content of the statute remain the same. For purposes of this decision, we treat the discussion in the opening brief as referring to the current renumbered version in A.R.S. § 36-501(25).

diagnosis and, therefore, insufficient as clear and convincing evidence. Gary argues that Dr. Tavakoli's affidavit indicated only a "probable diagnosis," and she testified that Gary's symptoms were only "mostly consistent" with bipolar disease, and that more tests were needed. We disagree and find the evidence established Gary suffered from a mental disorder as defined by statute.

¶15 To meet the clear and convincing evidentiary standard on a petition for court-ordered, involuntary treatment, the doctors' opinions regarding a person's mental illness must be "expressed to a reasonable degree of medical certainty." *In re MH 2011-000914*, 229 Ariz. 312, 315, ¶ 9, 275 P.3d 611, 614 (App. 2012) (citation omitted). Medical expert opinions need not be based on absolute certainty. *See In re MH 2007-001236*, 220 Ariz. 160, 169, ¶¶ 28-29, 204 P.3d 418, 427 (App. 2008). For purposes of determining if a patient has a mental disorder, this Court has equated the terms "reasonable certainty" and "reasonable probability." *Id.* at n.12, ¶ 26. "This is not to say that any mere recitation of the specific words 'reasonable degree of medical probability or certainty' is sufficient or the lack thereof is insufficient . . . . Courts use varying levels of certainty in determining whether evidence amounts to a reasonable degree of medical certainty or probability." *Id.* at 169-70, ¶ 30, 204 P.3d 427-28 (quoting *Saide v. Stanton*, 135

Ariz. 76, 78, 659 P.2d 35, 37 (1983)). Ultimately, the superior court must consider all of the evidence and decide if clear and convincing proof establishes that the doctors' opinions satisfy the statutory requirements. *Id.; see also In re MH-1049-3-85*, 147 Ariz. 313, 315, 709 P.2d 1372, 1374 (App. 1985) ("The findings of the trier of fact should be sustained if the evidence furnishes reasonable or substantial support therefor.").

¶16 Here, Dr. Tavakoli's opinion as set forth in both her testimony and in her affidavit constituted more than just conjecture or speculation. Dr. Tavakoli testified unequivocally that in her opinion, Gary suffered from a mental disorder which caused him to be persistently or acutely disabled. Dr. Tavakoli's affidavit listed the following facts that supported her conclusion:

> [Gary is] [v]erbose, with rapid [and] pressured speech; loose associations. He is delusional with hallucinations—he says he hears God's voice at times. . . . Difficult to evaluate, due to psychotic symptoms. . . . Seems to have difficulties with his memory at times. . . . Bizarre behaviors, carrying guns in the neighborhood. . . . Needs inpatient treatment, but refuses voluntary stay.

Dr. Tavakoli's testimony that Gary's symptoms were "mostly consistent with bipolar disorder, a severe type, manic with psychotic features" in addition to the facts set forth in her affidavit are sufficient to establish Dr. Tavakoli expressed her

opinion with a reasonable degree of medical certainty or probability.

¶17 Second, Gary argues that the doctors' testimony about the effects of alcohol consumption in addition to witnesses' testimony about Gary's history of alcohol abuse establishes that if Gary's symptoms were caused by alcoholism, Gary did not have a mental disorder as defined by A.R.S. § 36-501(25) because the statute specifically excludes alcoholism as a mental disorder. Gary cites Dr. Tavakoli's testimony that Gary could have been suffering from a "substance related psychotic disorder," and that alcohol consumption can lead to mental problems, as well as Dr. Zegarra's testimony that alcohol consumption could cause delusions and psychosis.

¶18 This Court interprets statutes by their plain meaning "unless an absurdity would result." *Maricopa County Superior Court No. MH2003-000240*, 206 Ariz. 367, 369, ¶ 6, 78 P.3d 1088, 1090 (App. 2003). By the plain language of the statute, the court is not precluded from finding that a patient has a mental disorder just because he or she may also abuse alcohol. *See* A.R.S. § 36-501(25). Here, substantial evidence existed to support the conclusion that Gary's symptoms were related to a psychotic disorder. Although both doctors testified that alcohol could lead to mental problems, neither doctor opined that Gary's symptoms were caused by alcohol consumption. Dr.

Tavakoli testified that Gary's symptoms were "mostly consistent with bipolar disorder, a severe type, manic with psychotic features and he has other psychoses as well." When asked what the "other disorders" could include, Dr. Tavakoli responded, "schizoaffective disorder or it could also be substance related psychotic disorder." Dr. Tavakoli's testimony supports the conclusion that Gary suffered from a mental disorder as defined by statute in addition to a possible alcohol-related disorder, which under the statute, does not preclude a finding that Gary had a mental disorder. Furthermore, Dr. Zegarra testified that while alcohol may cause some delusions, the delusions generally occur over a short period of time. Because Gary's symptoms were very consistent, she had to consider making other diagnoses. Thus, we find there was sufficient evidence from which the court could find that Gary's symptoms were a result of his mental disorder, independent of any alcohol dependence.

II. Due Process and Compliance with A.R.S. § 36-539

¶19 We review the application and interpretation of statutes as well as constitutional claims *de novo* because they are questions of law. *In re Jesse M.*, 217 Ariz. 74, 76, ¶ 8, 170 P.3d 683, 685 (App. 2007). The statutory requirements for civil commitment must be strictly construed because of the serious deprivation of liberty that may result. *In re MH2010-002637*, 228 Ariz. 74, 82, ¶ 31, 263 P.3d 82, 90 (App. 2011). "A

lack of strict compliance renders the proceedings void." *Pinal County Mental Health No. MH-201000029*, 225 Ariz. 500, 501, ¶ 5, 240 P.3d 1262, 1263 (App. 2010) (citation and internal quotation marks omitted).

¶20 Gary argues that his due process rights were violated because the evidence presented at the civil commitment hearing did not comply with the statutory requirements set forth in A.R.S. § 36-539. "Because involuntary treatment by court order constitutes a serious deprivation of liberty, a proposed patient is accorded due process protection, including a full and fair adversarial proceeding." *Pima County Mental Health No. MH 3079-4-11*, 228 Ariz. 341, 342, ¶ 5, 266 P.3d 367, 368 (App. 2011) (citation and internal quotation marks omitted). The procedural requirements that ensure a patient's due process rights are outlined in A.R.S. § 36-539, which includes the following:

> [T]o ensure that at the time of the hearing the proposed patient shall not be so under the influence of or so suffer the effects of drugs, medication or other treatment as to be hampered in preparing for or participating in the hearing. The court at the time of the hearing shall be presented a record of all drugs, medication or other treatment that the person has received during the seventy-two hours immediately before the hearing.
>
> . . . The evidence presented by the petitioner or the patient shall include the . . . testimony of the two physicians who participated in the evaluation of the patient . . . . The physicians shall testify as to their personal observations of the patient. They shall also testify as to their opinions concerning whether the patient is, as a result of mental disorder

> . . . persistently or acutely disabled . . and as to whether the patient requires treatment. Such testimony shall state specifically the nature and extent of . . . the persistent or acute disability . . . . Witnesses shall testify as to placement alternatives appropriate and available for the care and treatment of the patient.

A.R.S. § 36-539(A), (B).

A. Both Doctors Testified As To The Nature And Extent Of Appellant's Disability

¶21 Gary argues that Dr. Tavakoli did not testify specifically as to the nature and extent of the persistent or acute disability. Gary argues that Dr. Tavakoli testified only that Gary's symptoms were "mostly consistent with bipolar disorder, manic type with psychotic features," and that Gary had "psychotic tendencies as reported by his family," but she did not testify specifically as to what the psychotic features or tendencies were. Gary argues that the doctors' affidavits also lack specific statements about the nature and extent of the disability, and even if those specific statements were contained in the affidavits, the affidavits cannot replace the required

testimony without the parties' stipulation.[4] Furthermore, Gary contends that the evaluations and addendums attached to the petition for court-ordered treatment are not part of the affidavits and do not satisfy the testimony requirement under A.R.S. § 36-539(B).

¶22 We find the doctors' in-court testimony satisfied the requirements of A.R.S. § 36-539(B). Dr. Tavakoli testified that Gary was "given medication for his anxiety and his disorganized and delusional difficulties," and that "his speech [was] still very disorganized. He believes that he was chosen by God to do God's work and to help children. He said he will be helping 7.2 million children who are depending on him to get out of the hospital for him to be able to complete God's work. And God is having him do certain things." Dr. Zegarra testified that Gary's speech was "verbose and loud," he expressed "delusions of grandiosity," and that he believed he had to "take[] care of his

[4] Because we find the doctors' in-court testimony consistent with the affidavits and sufficient to meet the requirements of A.R.S. § 36-539(B), we need not determine whether information contained in the affidavits can substitute for in-court testimony without the parties' stipulation to such. We are inclined, however, to find that because there were no objections to the affidavits, both affidavits were part of the record for the court's consideration, and the doctors were subject to cross-examination regarding their affidavits, the court could properly consider the information contained therein to satisfy the requirements of A.R.S. § 36-539. *See Coconino County No. MH 1425*, 176 Ariz. 525, 528, 862 P.2d 898, 901 (App. 1993) ("Nothing in the statute requires that the testimony be *oral* . . . ."), *vacated on other grounds by In re Commitment of Alleged Mentally Disordered Person*, 181 Ariz. 290, 293, 889 P.2d 1088, 1091 (1995).

millions of children" to whom he "provides supervision in a big house with a roof." Thus, we find that the doctors' testimony satisfies the statutory requirement that testimony relate the specific nature and extent of the disability.

B. Both Doctors Testified As To Appellant's Need For Treatment And The Placement Alternatives

¶23 Gary argues that neither Dr. Tavakoli nor Dr. Zegarra testified regarding Gary's placement alternatives or specifically that Gary needed treatment. Both doctors clearly testified that Gary needed treatment when they testified that Gary's disorder could be treated and that without treatment, Gary would continue to suffer severe and abnormal mental, emotional or physical harm that would significantly impair his judgment, reason, behavior, or capacity to recognize reality. Both doctors also testified as to Gary's treatment options. Dr. Tavakoli testified that the proper form of treatment would be evaluation in an inpatient unit, and that if he was not treated, Gary would continue to suffer harm. Dr. Tavakoli testified that one advantage to treatment and evaluation in an inpatient unit would be that he would improve and not have "to stay in the hospital." Dr. Zegarra testified that in her opinion, the proper form of treatment would be a combined inpatient and outpatient program with mandatory medication, laboratory monitoring, scheduled appointments with MMHC, day treatment

programs, and substance abuse programs. Dr. Zegarra testified that with treatment, Gary would increase his level of functioning and experience improved insight into his disorder, and that without treatment, he would further deteriorate over time and he would continue to suffer from the same symptoms. This testimony satisfies the requirements of A.R.S. § 36-539(B).

C. The Court Was Provided Information Regarding The Medications Appellant Received Prior To The Hearing

¶24 Gary argues that the superior court was never provided a record of all drugs, medication or other treatment that Gary received during the seventy-two hours prior to the hearing, as is required by A.R.S. § 36-539(A). Gary's counsel made no objection on this ground before the court and the record does not reflect any concerns that Gary was hampered by any medication at the hearing. "Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994).

¶25 Furthermore, Dr. Tavakoli testified that during the last seventy-two hours, Gary had taken Risperdal, medication for anxiety, and Lexicomp, a heart medication. Dr. Tavakoli also testified that she had not observed any significant changes in

Gary's behavior since he began to take the medications, but she believed those medications were "helpful" to Gary in preparing for and assisting in the hearing. A MMHC nurse who treated Gary also testified that Gary had been taking Risperdal, which he had initially refused, and blood pressure medication, which he refused on one occasion. Nothing in the record indicates that Gary had received any additional medications in the seventy-two hours prior to the hearing or that his behavior was hampered by any medication during the hearing. Thus, we find the testimony regarding Gary's medications was sufficient to satisfy the requirements of A.R.S. § 36-539(A).

¶26 Consistent with the requirements of A.R.S. § 36-539(A) and (B), Dr. Tavakoli and Dr. Zegarra evaluated Gary, testified as to their personal observations of Gary, opined that Gary suffered from a mental disorder and, as a result, was persistently or acutely disabled. They also testified as to the nature and extent of the disability, opined that Gary needed treatment, testified regarding the proper treatment and placement and the advantages and disadvantages to treatment, and provided information to the court regarding the medication Gary received during the seventy-two hours prior to the hearing. Thus, we find no due process violation.

CONCLUSION

¶27 For the foregoing reasons, we affirm the superior court's order requiring involuntary treatment.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MICHAEL J. BROWN, Presiding Judge

/S/
ANDREW W. GOULD, Judge