DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	No. 1 CA-MH 09-0056
	DEPARTMENT A
IN RE MH 2009-001429	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001429

The Honorable Patricia Arnold, Commissioner

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

Andrew P. Thomas, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
Victoria Mangiapane, Deputy County Attorney
Attorneys for Appellee

D O W N I E, Judge

¶1 Appellant seeks reversal of the superior court's order for involuntary mental health treatment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant was admitted to a hospital emergency room after an overdose of prescription medication. Appellant's history includes multiple psychiatric hospitalizations, a diagnosis of bipolar disorder, and suicide attempts. While hospitalized, appellant threw a telephone at a staff person and threatened to "escape" from the facility, kill her husband, and harm herself. She refused voluntary treatment.

¶3 A Petition for Court-Ordered Evaluation, Application for Involuntary Evaluation, and an Application for Emergency Admission for Evaluation were filed. Appellant was detained and an evaluation completed. A Petition for Court-Ordered Treatment was filed, wherein two evaluating physicians recommended combined inpatient and outpatient treatment after concluding appellant was a danger to self and others and persistently or acutely disabled.

¶4 An involuntary commitment hearing was held. At that hearing, appellant's counsel stipulated to the admission of the two evaluating physicians' affidavits in lieu of their testimony at the hearing. Specifically, the following dialogue occurred at the outset of the hearing:

> [Counsel for Petitioner]: The parties have stipulated to the admission of the affidavits of Dr. Hughes and Dr. Sadar in lieu of their testimony here this morning. Dr. Sadar is in an AMA-approved psychiatric

> residency program here at Desert Vista and was supervised in this matter by Dr. Torio. Dr. Torio is a licensed and qualified psychiatrist. There are two witnesses who will be testifying this morning. They are Christina Driscoll and Erica Preece.
>
> THE COURT: Ms. Klopp [appellant's counsel].
>
> MS. KLOPP: That is true, Your Honor.

Petitioner then presented two witnesses who testified and were cross-examined. Appellant also testified and was cross-examined.

¶5 At the conclusion of the hearing, the court found, by clear and convincing evidence, that appellant was a danger to herself and others, persistently or acutely disabled, and in need of psychiatric treatment. It ordered a combination of inpatient and outpatient treatment not to exceed 365 days, with the period of inpatient treatment not to exceed 180 days.

¶6 Appellant timely appealed the treatment order. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") sections 12-2101(K) (2003) and 36-546.01 (2009).

DISCUSSION

¶7 Appellant raises two arguments on appeal: (1) the trial court was required to engage in a colloquy with her personally to determine whether she "knowingly, voluntarily and intelligently" waived her right to have the evaluating

physicians testify; and (2) the evaluating physicians' credentials were not satisfactorily established.

1. Admission of Physician Affidavits

¶8 Framing the issue as one of constitutional due process, Appellant asserts the trial court was required to determine whether she "knowingly, voluntarily, and intelligently agreed to the stipulation of the doctor's affidavits." We generally review constitutional and statutory claims *de novo*. *In re MH 2007-001275,* 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008). However, appellant did not make this argument below. "[W]e generally do not consider issues, even constitutional issues, raised for the first time on appeal." *Englert v. Carondelet Health Network,* 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000) (citation omitted).

¶9 Additionally, the alleged error in admitting the physicians' affidavits was invited by appellant. "By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error." *Schlecht v. Schiel,* 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953). *See also State v. Armstrong,* 208 Ariz. 345, 357 n.7, ¶ 59, 93 P.3d 1061, 1073 n.7 (2004) (the invited error doctrine exists to prevent a party from injecting error into the record and then profiting from it on appeal).

¶10 Even if we *were* to consider appellant's claim, we would find no error. Appellant relies almost entirely on a footnote in which we stated, in *dictum*, that, "[b]efore accepting a stipulation to the admission of the physicians' affidavits in lieu of testimony, the court *should* ascertain that the patient has voluntarily, knowingly and intelligently waived her statutory right to have the physicians testify."[1] *In re MH 2008-001752,* 222 Ariz. 225, 213 P.3d 374 (App. 2009) (emphasis added), *withdrawn and amended by*, 222 Ariz. 567, 218 P.3d 1024 (App. 2009). The footnote cited *MH 2007-001275*, where the patient waived the *entire adversarial hearing* by stipulating to the contents of the court's file, including the physician affidavits and witness statements, and agreeing that the witness statements "will support a finding of persistently and acutely disabled." 219 Ariz. at 217-18, ¶ 4, 196 P.3d at 820-21. We remanded for the trial court to determine whether "counsel's

[1] Section 36-539(B) (Supp. 2009) was amended, effective September 30, 2009, to expressly allow the parties to stipulate to the admission of evaluating physicians' affidavits. Amendments to A.R.S. § 36-537(D) (Supp. 2009) allow an attorney to "enter stipulations on behalf of the patient" and, under A.R.S. § 36-537(B)(1), defense counsel is obligated to discuss with the patient "whether stipulations at the hearing are appropriate." The opinion in *MH 2007-001752* was amended to reflect these changes and now states: "We note that to the extent recent legislative enactments have superseded *In re MH 2007-001275,* the case would not apply to matters arising after the effective date of the legislation." 222 Ariz. at 568 n.1, ¶ 4, 218 P.3d at 1025 n.1.

waiver on behalf of the patient was in fact voluntarily, knowingly and intelligently made by the patient"; if it was not, we required the court to "conduct *the A.R.S. § 36-539 hearing* and afford the patient the rights to subpoena witnesses, present evidence and confront and cross-examine witnesses." *Id.* at 221, ¶ 19, 196 P.3d at 824 (emphasis added). We further stated:

> We are not opining that this test would affect every decision made by counsel at the hearing, e.g., whether to cross-examine particular witnesses. Rather, we only address the issue before us-that it must be apparent from the record or from a discussion with the patient that waiving the rights attendant to a contested testimonial hearing were voluntarily, knowingly and intelligently made.

Id. at n.5.

¶11 In the case at bar, a hearing was held at which appellant presented evidence and cross-examined witnesses. The only right appellant waived was to confront and cross-examine two specific witnesses. Appellant's counsel had presumably reviewed the affidavits, interviewed the physicians and appellant, and explained appellant's rights to her. *See* A.R.S. § 36-537 (2009) (outlining the minimal duties of counsel before hearing). Counsel was thus able to assess the effect of the evaluating physicians' testimony and determine whether they

should appear in person.[2] *See Workman,* 123 Ariz. at 503, 600 P.2d at 1135 (distinguishing between "counsel failing to act because of ignorance of the facts or the law, and failing to act despite his knowledge of the facts or law. In the latter situation, counsel is presumed to have made an informed decision, even where the tactical advantage is not readily apparent to the appellate court.") (internal citations omitted).

¶12 This case is significantly different from other mental health cases where we have required trial courts to expressly determine whether a patient intelligently, knowingly, and voluntarily waived certain rights. *See, e.g., MH 2007-001275,* 219 Ariz. at 219-21, 196 P.3d at 822-24 (waiver of the A.R.S. §

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[2] Typically, whether and how to present and cross-examine witnesses is a question of trial strategy that is controlled by counsel and does not require a knowing, voluntary, and intelligent waiver by the client. *See State v. Lee,* 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984) ("[T]he decision as to what witnesses to call is a tactical, strategic decision. Tactical decisions require the skill, training, and experience of the advocate. A criminal defendant, generally inexperienced in the workings of the adversarial process, may be unaware of the redeeming or devastating effect a proffered witness can have on his or her case.") (internal citations omitted); *State v. Rodriguez,* 126 Ariz. 28, 33, 612 P.2d 484, 489 (1980) ("The power to control trial strategy belongs to counsel.") (internal citations omitted); *State v. Workman,* 123 Ariz. 501, 502-03, 600 P.2d 1133, 1134-35 (App. 1979) (finding attorney's decision whether to call a witness a tactical decision the court was reluctant to second-guess); *Wilson v. Gray,* 345 F.2d 282, 286-87 (9th Cir. 1965) (holding that a waiver of the right to cross examination and confrontation "may be accomplished by the accused's counsel as a matter of trial tactics or strategy.") (citations omitted).

36-539 hearing); *In re MH 2006-000749,* 214 Ariz. 318, 324, ¶ 27, 152 P.3d 1201, 1207 (App. 2007) (waiver of the patient's right to be present at a hearing); *In re Jesse M.,* 217 Ariz. 74, 80, ¶ 30, 170 P.3d 683, 689 (App. 2007) (waiver of right to counsel). Here, we have a deliberate decision to forego presenting and cross-examining two evaluating physicians who presented all statutorily required information via sworn affidavit.

2. Physician Qualifications

¶13 Finally, appellant claims "nothing in the record demonstrates" the evaluating physicians were psychiatrists, licensed physicians, or approved residents. By statute, evaluating physicians must be

> qualified psychiatrists, if possible, or at least experienced in psychiatric matters. . . . A psychiatric resident in a training program approved by the American medical association or by the American osteopathic association may examine the person in place of one of the psychiatrists if he is supervised in the examination and preparation of the affidavit and testimony in court by a qualified psychiatrist appointed to assist in his training . . . .

A.R.S. § 36-501(12)(a) (2009).

¶14 Once again, appellant failed to object on this basis in the superior court. "An objection to proffered testimony must be made either prior to or at the time it is given, and a failure to do so constitutes a waiver." *Estate of Reinen v. N.*

Ariz. Orthopedics, Ltd., 198 Ariz. 283, 286, ¶ 9, 9 P.3d 314, 317 (2000).

¶15 Moreover, the record includes sufficient proof of the physicians' credentials. Each affidavit states that the "affiant is a physician *and is experienced in psychiatric matters*." (Emphasis added.) The Resident Supervision Affidavit identifies the names of the supervising attending physician, the physician, and the patient; is "subscribed and sworn" before a notary public; and affirms "pursuant to ARS 36-501(12)(a)" that the physician signing it is the "supervising attending physician." Moreover, at the outset of the hearing, petitioner's counsel stated, "Dr. Sadar is in an AMA-approved psychiatric residency program . . . and was supervised . . . by Dr. Torio . . . [who] is a licensed and qualified psychiatrist." Appellant affirmed opposing counsel's avowal when questioned by the court.

¶16 Appellant had ample opportunity to address any concerns she had about the physicians' qualifications before the hearing. *See* A.R.S. § 36-536(A) (requiring that the affidavits be served upon the patient at least seventy-two hours before the hearing); A.R.S. § 36-537(B)(4) (requiring counsel to interview the physicians at least twenty-four hours before the hearing). If she had lingering concerns, she could have voiced them at the hearing. An objection would have given petitioner an

opportunity to address any legitimate foundational issues on the record. *See Reinen,* 198 Ariz. at 286, ¶ 9, 9 P.3d at 317 ("[A] contemporaneous objection also affords the party offering the evidence an opportunity to supply any missing foundation.").

CONCLUSION

¶17 For the foregoing reasons, we affirm the trial court's involuntary commitment order.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge