DIVISION ONE
FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

	)	No. 1 CA-MH 09-0071
	)	
	)	DEPARTMENT A
	)	
	)	**MEMORANDUM DECISION**
IN RE MH 2009-001807	)	(Not for Publication -
	)	Rule 28, Arizona Rules
	)	of Civil Appellate
	)	Procedure)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001807

The Honorable Patricia Arnold, Commissioner

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

Richard M. Romley, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
Bruce P. White, 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 presented at a hospital emergency room with abdominal pain, which was diagnosed as acute alcohol intoxication, liver cirrhosis, and encephalopathy. While hospitalized, Urgent Psychiatric Care staff noticed appellant trying to "pick things up from the floor and from out of the sky." Dr. Michael Vines filed a Petition for Court-Ordered Evaluation, stating appellant had been "drinking 1 gallon of vodka per day barricading himself in his home stating he would shoot himself."[1] Appellant refused voluntary treatment, which Dr. Vines believed was necessary because appellant displayed "poor insight," had made suicidal statements, and was unable to care for himself. In an Application for Involuntary Evaluation, appellant's mother reported that appellant said he "was very tired and was going to shower and then kill himself . . . shoot self." She said appellant was "paranoid hallucinating," believing "others are out to get him," and that he had purchased a gun, which he shot once at others.

[1] The first page of the petition has the patient's name handwritten into the space provided for the name of the person filing the petition. We accept appellant's assumption, stated in his opening brief, that this is a typographical error.

¶3 Appellant was detained and an evaluation completed. Dr. Jacqueline Pynn filed a Petition for Court-Ordered Treatment, stating appellant was a danger to self and in need of combined inpatient and outpatient treatment because he was unwilling to accept voluntary treatment. In her affidavit, Dr. Pynn reported that appellant denied most of his mother's allegations, but admitted being a "heavy drinker," drinking while waiting to be placed on a liver transplant list, and crying every day. Appellant stated that the front door to his house was "shut down" because police officers had kicked it in when they accompanied his wife to retrieve her personal belongings when she moved out. Appellant stated he "uses the window to get in and out of his house." Dr. Pynn concluded appellant had a "high risk of engaging in danger to self" and "impulsive behavior when intoxicated."

¶4 Dr. Richard Burton also filed an affidavit stating appellant was a danger to himself and persistently or acutely disabled. Dr. Burton reported that appellant displayed "bizarre behaviors that are not typical of someone who is merely intoxicated such as finger painting his bathroom black, including the toilet, painting the floor with 16 coats of paint, being found early in the morning painting the house naked, and gouging flesh out of his arm with a Makita drill to see if the drill would cut skin." Dr. Burton expressed "great concern" for

appellant's well-being because of his "mental state and the fragile state of his brain . . . as well as his poor judgment." He concluded that appellant was at risk "for further emotional and physical harm to himself and possibly to others."

¶5 An involuntary commitment hearing was held. Appellant's counsel stipulated to admitting the evaluating physicians' affidavits in lieu of their testimony. Petitioner presented two witnesses who testified and were cross-examined. After petitioner rested, the court denied appellant's motion for a directed verdict based on "insufficient evidence." Appellant then presented one witness, but did not himself testify.

¶6 The court found by clear and convincing evidence that appellant was, as a result of a mental disorder, a danger to self and ordered a combination of inpatient and outpatient treatment not to exceed 365 days, with the period of inpatient treatment not to exceed ninety days. Appellant timely appealed. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") sections 12-2101(K) (2003) and 36-546.01 (2009).

DISCUSSION

¶7 Appellant contends the trial court erred by: (1) failing to engage in a colloquy to determine whether he "voluntarily, knowingly and intelligently understood and agreed to waive his right" to have the evaluating physicians testify at the hearing, and (2) finding he was a danger to self.

1. Admission of Physician Affidavits

¶8 Appellant asserts A.R.S. § 36-539[2] (2009) gave him a "statutory right to have both doctors testify" at the involuntary commitment hearing and that the court violated his due process rights by admitting the physician affidavits without first determining that he "knowingly, voluntarily, and intelligently agreed to the stipulation." We generally review constitutional and statutory claims *de novo*, but appellant did not make this argument below. *See In re MH 2007-001275,* 219 Ariz. 216, 219, ¶ 9, 196 P.3d 819, 822 (App. 2008) (citations omitted). "[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). Additionally, the alleged error in admitting the 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). S*ee also State v. Armstrong,* 208 Ariz. 345, 357 n.7, ¶ 59, 93 P.3d 1061, 1073 n.7 (2004) (stating

[2] The statute describes the involuntary commitment hearing. It provides that a patient "may subpoena and cross-examine witnesses and present evidence," but requires that "evidence presented by the petitioner or the patient shall include the . . . testimony of the two physicians who performed examinations in the evaluation of the patient." A.R.S. § 36-539(B).

that the invited error doctrine "exists to prevent a party from injecting error into the record and then profiting from it on appeal.") (citation omitted).

¶9 Even if we *were* to consider appellant's claim, we would find no error. 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 him. *See* A.R.S. § 36-537 (2009) (outlining the minimal duties of counsel for all hearings). Counsel was thus able to assess the effect of the evaluating physicians' testimony and determine whether they should appear in person. *See State v. Workman,* 123 Ariz. 501, 503, 600 P.2d 1133, 1135 (1979) (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).

¶10 This case is significantly different from other mental health cases where we have required trial courts to expressly determine whether a patient knowingly, intelligently, and voluntarily waived certain rights. *See, e.g., MH 2007-001275,*

219 Ariz. at 220-21, ¶¶ 17-19, 196 P.3d at 823-24 (waiver of the A.R.S. § 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). Here, we have a deliberate decision to forego presenting and cross-examining two physicians who presented all statutorily required information via sworn affidavit.

¶11 Whether to present and cross-examine a witness is an issue of trial strategy that is controlled, and may be waived, by counsel; it does not require a knowing, voluntary, and intelligent waiver by the patient. *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) ("[T]he power to control trial strategy belongs to counsel.") (citations omitted); *Workman,* 123 Ariz. at 502-03, 600 P.2d at 1134-35 (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 (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).

2. Need for Inpatient Treatment

¶12 Appellant claims the court violated his due process rights by ordering inpatient treatment "on less tha[n] clear and convincing evidence that he had a mental disorder which rendered him a danger to self." *See* A.R.S. § 36-540(A) (2009) (requiring clear and convincing evidence to support an involuntary commitment order); *In re MH 2007-001236,* 220 Ariz. 160, 165, ¶ 15, 204 P.3d 418, 423 (App. 2008) ("The degree of proof for court-ordered treatment is clear and convincing evidence.") (citations omitted). We will affirm an order for involuntary treatment if it is supported by substantial evidence, *In re Mental Health Case No. MH 94-00592,* 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995) (citation omitted), including expert medical opinions expressed "to a reasonable degree of certainty or probability to prove the elements of involuntary treatment." *MH 2007-001236,* 220 Ariz. at 169, ¶ 29, 204 P.3d at 427.

a. Danger to Self

¶13 According to appellant, there was not clear and convincing evidence that he was a danger to self because the evaluating physicians relied only on family members' accounts, rather than personal observations. Appellant asserts that

A.R.S. § 36-501(6) (2009) "requires that there be a reasonable expectation of imminent danger, that the threat to oneself be serious and real," and implies that Dr. Pynn's conclusion, based on "warning signs" of self-harm, is speculative and an insufficient basis for involuntary commitment. We disagree with this characterization of the evidence and find the petitions, physician affidavits, and witness testimony sufficient to support the court's order. Section 36-501(6) defines "danger to self" as:

> (a) Behavior that, as a result of a mental disorder, constitutes a danger of inflicting serious physical harm upon oneself, including attempted suicide or the serious threat thereof, if the threat is such that, when considered in the light of its context and in light of the individual's previous acts, it is substantially supportive of an expectation that the threat will be carried out.
>
> (b) Behavior that, as a result of a mental disorder, will, without hospitalization, result in serious physical harm or serious illness to the person, except that this definition shall not include behavior that establishes only the condition of gravely disabled.

¶14 The trial court had multiple sources of evidence regarding the risk of self harm. *See* A.R.S. § 36-501(12) (defining an "evaluation" as "a professional multidisciplinary analysis based on data describing the person's identity, biography and medical, psychological and social conditions").

Petitions alleged appellant had purchased a gun and threatened to shoot himself. He made "multiple suicidal statements" to family members. Appellant told Dr. Pynn he had "just recently" cashed in his 401K, and "would rather 'spend all my money before I die.'" Dr. Pynn believed appellant was a danger to himself based on his statements; symptoms of "major depressive disorder"; and "high risk" factors, including loss of a significant relationship, excessive alcohol use, and impulsive behavior when intoxicated.

¶15 Dr. Burton believed appellant was a danger to self because of his "erratic and impulsive" behavior, poor judgment, symptoms of depression, and "multiple suicidal statements." Appellant's mother testified appellant had purchased a shotgun approximately six weeks earlier and that he "sawed it off . . . [b]ecause it was cool." Appellant's mother also testified that, "when he was pretty drunk, he'd say that he didn't want to live any more or that . . . maybe he would just go off and kill himself." She admitted that, "as soon as the alcohol would wane off," appellant would say, "I really don't want to die," but she feared "he would do it without realizing he was doing it." Although conflicting evidence was presented, the trial court is in the best position to "weigh the evidence, observe the parties, judge the credibility of witnesses, and make

appropriate findings." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

b. Mental Disorder

¶16 Appellant also asserts there was insufficient evidence to support the conclusion that he suffered from a mental disorder, rather than a condition primarily related to alcohol abuse. Once again, we disagree.

¶17 A "mental disorder" is "a substantial disorder of the person's emotional processes, thought, cognition or memory" that is distinguished from "[c]onditions that are primarily those of drug abuse, alcoholism or mental retardation, *unless, in addition to one or more of these conditions,* the person has a mental disorder." A.R.S. § 36-501(26) (emphasis added). Both physicians were aware of appellant's alcohol consumption, yet both concluded he suffered from a mental disorder. Dr. Burton noted that appellant's behaviors "are not typical of someone who is merely intoxicated." Dr. Pynn stated that appellant's ongoing depressive symptoms put him "at increased risk of engaging in self harming behavior" and concluded inpatient treatment was necessary to address his depression.

¶18 A psychiatric mental health nurse practitioner who testified for appellant disagreed with the physicians' opinions.[3]

[3] The nurse testified that a mental health nurse practitioner is an "advanced practice nurse" with a "minimum of

She believed appellant suffered only from a "substance abuse disorder" and that his symptoms were "not unusual at all when somebody is coming off of either alcohol or drugs." The nurse testified she discussed her opinions with Dr. Pynn and that she and Dr. Pynn had come to different conclusions in other cases. In some of those cases, Dr. Pynn had dismissed the petition after discussing the case with the nurse; in this case, she did not.

¶19 Although conflicting evidence was presented, as we stated *supra,* the trial court was in the best position to weigh the evidence. *See Jesus M.,* 203 Ariz. at 280, ¶ 4, 53 P.3d at 205. Substantial evidence supports the trial court's

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a master's degree in nursing" and who completes "the nurse practitioner course," and who cannot, under Arizona law, complete the physician affidavits that accompany a petition for court-ordered treatment. *See* A.R.S. §§ 36-501(12)(a) (requiring the evaluation to be completed by "[t]wo licensed physicians, who shall be qualified psychiatrists, if possible, or at least experienced in psychiatric matters"), -533 (2009) (requiring the petition for court-ordered treatment to be accompanied by "the affidavits of the two physicians who conducted the examinations during the evaluation period").

determination that appellant suffered from a mental disorder.

CONCLUSION

¶20 For the foregoing reasons, we affirm the involuntary commitment order.

/S/
MARGARET H. DOWNIE, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
LAWRENCE F. WINTHROP, Judge