IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

KIMBERLY LACOUNT, *Petitioner*,

v.

THE HONORABLE ROSA MROZ, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

STATE OF ARIZONA, *Real Party in Interest*.

No. 1 CA-SA 22-0010
FILED 4-5-2022

Petition for Special Action from the Superior Court in Maricopa County
No. CR2016-132194-002
The Honorable Rosa Mroz, Judge (Deceased)

JURISDICTION ACCEPTED AND RELIEF GRANTED

COUNSEL

Maricopa County Office of the Legal Advocate, Phoenix
By Jabron Lynn Whiteside, Kristin M. Wrobel
Counsel for Petitioner

Maricopa County Attorney's Office, Phoenix
By Kristin L. Larish, Joshua D. Clark
Counsel for Real Party in Interest

OPINION

Judge Randall M. Howe delivered the opinion of the court, in which Presiding Judge Jennifer B. Campbell and Judge James B. Morse Jr. joined.

H O W E, Judge:

¶1 Defendant Kimberly LaCount petitions for special action relief from the trial court's ordering her to undergo an Arizona Rule of Criminal Procedure ("Rule") 11 evaluation after she expressed her desire to represent herself and waive her right to counsel. We accept jurisdiction first because LaCount has no adequate remedy by appeal, Ariz. R.P. Spec. Act. 1(a); if she waits to appeal her potential conviction and sentences after trial, the Rule 11 evaluation would already be completed and the issue moot. Second, whether LaCount should be subject to a Rule 11 evaluation relates to the interpretation and application of procedural rules, which is "of statewide importance to the judiciary and the litigants who come before it on criminal matters," *State v. Campoy*, 220 Ariz. 539, 542 ¶ 2 (App. 2009) (quoting *Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640, 646 ¶ 12 (App. 2003)), and is likely to arise again, *Devlin v. Browning*, 249 Ariz. 143, 146 ¶ 6 (App. 2020). We grant relief because the reasons cited by the trial court were inadequate to warrant a Rule 11 evaluation.

FACTS AND PROCEDURAL HISTORY

¶2 LaCount is a capital defendant charged with first-degree murder and conspiracy to commit murder. She moved three times to change counsel, citing irreconcilable differences. The court denied each motion. After the court denied her last motion, she informed the court that she wanted to represent herself. During the capital case management conference, the court asked LaCount whether that was still true. She answered, "Yes." The court responded that it would first order a Rule 11 competency evaluation to ensure "that [she] c[ould] proceed on [her] own." The court told LaCount that by representing herself, she was "literally putting [her] own life in [her] hands" and asked whether she had "thought this through." LaCount replied, "I have, Your Honor. . . . [M]y only other option is to represent myself."

¶3 Defense counsel objected to the evaluation, arguing that "nothing in the record [] indicates any issues or concerns with Ms.

LaCount's competency" and that she had previously written motions and argued before the court, giving counsel "no reason to believe" competency is at issue. The court denied the objection and ordered the evaluation, appointing two doctors to determine whether she was competent to stand trial and represent herself. Although the court "fully expected that she'[d] be found competent," the court reasoned that it needed to "protect the record" and ensure that she could "proceed on her own," "given the severe consequences if she loses at trial." The court also explained that it needed to ensure that its actions were "appropriate and lawful" because "every decision [it] make[s] will be scrutinized for years . . . possibly 20 or so more years after this case is over." The State also believed that she would be found competent, writing in an email to defense counsel after the hearing that "everyone believes that Ms. LaCount will be found competent without delay." This special action followed.

DISCUSSION

¶4 LaCount argues that the trial court abused its discretion by failing to state facts or reasonable grounds to support ordering the evaluation. Because the trial court has broad discretion to determine whether reasonable grounds exist to order a Rule 11 competency evaluation, we reverse only when it manifestly abuses its discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 162 (1990). The trial court abused its discretion here because its reasons for ordering the competency evaluation did not relate to whether LaCount was competent to waive her right to counsel and to represent herself. [1]

¶5 The United States and Arizona Constitutions guarantee the fundamental right to waive counsel and represent oneself in a criminal trial. U.S. Const. amends. VI, XIV; Ariz. Const. art. 2, § 24; *State v. Djerf*, 191 Ariz. 583, 591 ¶ 21 (1998) (stating that the right of self-representation is "fundamental"). These provisions reflect "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to h[er] basic right to defend h[er]self if [s]he truly wants to do so." *Faretta v. California*, 422 U.S. 806, 817 (1975). The decision to represent oneself is personal, and "although [s]he may conduct h[er] own defense ultimately to h[er] own detriment, h[er] choice must be honored out of 'that respect for the individual which is the lifeblood of the

[1] LaCount also argues that a Rule 11 evaluation could lead to involuntary medication and an invasion of privacy. Because we find that the court did not state sufficient grounds to order the evaluation, we need not address these arguments.

law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)). This applies even to capital defendants. *See State v. Gunches*, 240 Ariz. 198, 202 ¶ 10 (2016) (noting that a capital defendant has the right to represent herself "from arraignment through the direct appeal"); *see generally Djerf*, 191 Ariz. at 588 ¶ 1, 592 ¶ 25 (holding that the capital defendant's waiver of counsel was valid because no evidence indicated he was incompetent).

¶6 To exercise this right, a defendant must voluntarily and knowingly waive her right to counsel. *State v. Lamar*, 205 Ariz. 431, 435–36 ¶ 22 (2003). A valid waiver requires a competent defendant, *see State v. Cornell*, 179 Ariz. 314, 322 (1994), because waiver is "a knowing and intelligent relinquishment or abandonment of a known right or privilege," *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Self-representation at trial "requires the mental capacity to minimally participate in the process as an advocate. An advocate must have sufficient mental capacity to understand the nature of the dispute; formulate a defense strategy; and engage with the court, counsel, witnesses and, in some cases, the jury." *State v. Ibeabuchi*, 248 Ariz. 412, 416 ¶ 16 (App. 2020) (holding that the trial court may deny a defendant the right to self-representation if the defendant is not mentally competent to conduct a trial or hearing). Thus, a defendant who is competent to stand trial is not necessarily competent to represent herself. *Id.*

¶7 To determine whether a defendant is competent to stand trial and to waive the right to counsel, a trial court on its own motion may order competency evaluation and "must state facts for the requested mental examination." A.R.S. § 13–4503(A); Rule 11.2(a)(1)–(2). Such facts stem, for example, from evidence of a "history of irrational behavior, medical opinion, and the defendant's demeanor." *Cornell*, 179 Ariz. at 323. To appoint mental-health experts for the Rule 11 evaluation, the court must find that "reasonable grounds exist" for the evaluation. Rule 11.3(a)(2). Reasonable grounds exist when sufficient evidence indicates that a defendant is unable to understand the nature of the proceedings and cannot assist in defending against the charges. *Amaya-Ruiz*, 166 Ariz. at 162 (concluding that defendant's "uncooperative attitude" with counsel was not the sign of psychological problems but a volitional refusal to cooperate); *State v. Delahanty*, 226 Ariz. 502, 507 ¶ 28, 508 ¶¶ 33–34 (2011) (holding that no reasonable grounds existed to warrant a second competency evaluation after the defendant wished to waive mitigation in sentencing). The evidence must create reasonable doubt about the defendant's competency. *Djerf*, 191 Ariz. at 591 ¶ 22; *see also Cornell*, 179 Ariz. at 323 (stating the issue is whether the evidence "raise[s] some doubt" about the defendant's competence).

¶8 The trial court did not order the examination of LaCount's competency because of any history of irrational behavior, medical opinion, or evidence of improper demeanor, *Cornell*, 179 Ariz. at 323; any indication that she was unable to understand the nature of the proceedings, *Amaya-Ruiz*, 166 Ariz. at 162; or any indication that she lacked the mental capacity to participate in the legal process by formulating a defense strategy and engaging with the court, counsel, and the jury, *Ibeabuchi*, 248 Ariz. at 416 ¶ 16. In fact, on these traditional measures of competence, the court expected—as did the State—that an examination would show that she was competent to represent herself. At the hearing, LaCount's responses to the court's questioning were rational and collected. Her counsel assured the court at the hearing that she had no reason to believe that LaCount was incompetent. Counsel even noted that LaCount had previously written motions and argued before the court. Instead, the court questioned the wisdom of LaCount's "putting [her] own life in [her] hands," and ordered the competency examination "to protect the record" and to ensure that the court's actions were "appropriate and lawful" because the case will be scrutinized for "possibly 20 or so more years after this case is over."

¶9 Although these concerns are understandable, they do not constitute "reasonable grounds" for a competency evaluation. The wisdom of self-representation is irrelevant to whether a capital defendant is competent to represent herself. *See Faretta*, 422 U.S. at 834, 836, 852 (Blackmun, J., dissenting) (noting that the constitutional right to self-representation must be granted, unhindered, even if "one who is his own lawyer has a fool for a client."). Otherwise, nearly all criminal defendants, especially capital defendants, would be subject to a full Rule 11 evaluation. But both the statute and rule, *see supra* ¶ 7, are inconsistent with such a default approach. Instead, the trial court must identify specific grounds to find that defendants would not be found competent to represent themselves. But the Arizona Supreme Court has found that capital defendants have been competent to represent themselves without the need of a competency evaluation. *See, e.g., Gunches*, 240 Ariz. at 203 ¶ 14; *Djerf*, 191 Ariz. at 592 ¶ 25; *Cornell*, 179 Ariz. at 322–23; *State v. Williams*, 166 Ariz. 132, 139 (1987). And while the trial court must strive in every case to ensure that it acts appropriately and lawfully and to "protect the record," that goal is better served by identifying particular reasons for a competency evaluation rather than ordering one only because the case is a capital case.

¶10 This does not mean, of course, that the trial court cannot anticipate that competency might be an issue in the future and act prudently. Experience tells anyone involved in capital-punishment litigation that challenges to a capital defendant's competence to waive

constitutional rights certainly may arise during litigation. *See Gunches*, 240 Ariz. at 201 ¶ 5; *Djerf*, 191 Ariz. at 590–92 ¶¶ 20–28; *Cornell*, 179 Ariz. 321; *Williams*, 166 Ariz. at 139. Even if the record does not disclose reasonable grounds for a full competency evaluation under Rule 11.3(a)(2), the trial court may still order a preliminary examination under Rule 11.2(c) "to assist the court in determining if reasonable grounds exist to order the defendant's further examination." *Accord* A.R.S. § 13–4503(B) ("The court may request that a mental health expert assist the court in determining if reasonable grounds exist for examining a defendant."). Such a preliminary examination would allow the court to determine if a defendant's competency might be an issue and "protect the record" without invoking the extensive process of a full examination and infringing on the defendant's rights. *See Delahanty*, 226 Ariz. at 508 ¶ 31 (trial court used this limited procedure to determine competence to waive presentation of mitigation evidence). The trial court here did not take that limited step, however, and erred in ordering a full examination without stating reasonable grounds for one.

¶11 Our ruling does not mean that LaCount is competent to represent herself. The trial court has a "continuing duty" to evaluate LaCount's competence, *Amaya-Ruiz*, 166 Ariz. at 162, and the trial court may decide that a preliminary examination under Rule 11.2(c) is appropriate, or upon consideration of the record, that reasonable grounds exist for a full examination under Rule 11.3(a)(2). The State notes that LaCount filed a notice of mitigating circumstances claiming, among other things, that (1) her ability to appreciate the wrongfulness of her conduct was impaired, (2) she has a "history of mental health issues," and (3) she has a history of substance abuse. She also filed a second notice listing the witnesses who would testify to these circumstances.[2] Whether LaCount's notices of mitigating circumstances provide reasonable grounds is a matter for future proceedings in the trial court. The trial court might find that these notices

[2] The State also argues that LaCount's epilepsy is a factor in determining whether a competency examination is warranted. But epilepsy is not a mental illness that would trigger Rule 11. *See* A.R.S. § 36–551(22) ("Epilepsy" manifests as "various forms of physical activities called seizures."); *see also People v. Branson*, 475 N.E.2d 905, 912 (Ill. App. 1984) (concluding that defendant with epilepsy was not unfit for trial because no evidence showed that the ailment affected his ability to understand the proceedings or communicate with counsel); *People v. Martin*, 216 N.E.2d 170, 172 (Ill. App. 1966) ("Evidence of epilepsy is not evidence of incompetency.").

put LaCount's mental health at issue, presenting reasonable grounds for a full examination. *But cf. Cornell*, 179 Ariz. at 322 (noting that a competency hearing is not "mandated" simply because "a defendant was insane at some time in the past, or even whether [s]he was free of all mental illness at the time of the waiver"). If, after considering "the facts and circumstances," the trial court determines "a good faith doubt about the defendant's 'ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among the alternatives presented,'" it may order a full evaluation. *Id.* at 322–23 (quoting *Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987)). We take no view on this issue other than ruling that the trial court has not yet stated reasonable grounds to order a competency examination under Rule 11.3(a)(2).

CONCLUSION

¶12 For the foregoing reasons, we accept jurisdiction and grant relief.