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

	1 CA-MH 09-0054
	DEPARTMENT D
IN RE MH 2009-001386	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH 2009-001386

The Honorable Shari Capra, Judge Pro Tempore

AFFIRMED

James J. Haas, Maricopa County Public Defender — Phoenix
By Kathryn L. Petroff, Deputy Public Defender
Attorneys for Appellant

Andrew P. Thomas, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
And Roberto Pulver, Deputy County Attorney
Attorneys for Appellee

O R O Z C O, Judge

¶1 Appellant appeals from the trial court's Order of Commitment for involuntary mental health treatment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On May 28, 2009, D. Lawrence (Lawrence), a mental health professional at the Fourth Avenue Jail, submitted an Application for Involuntary Evaluation (AIE) and an Application for Emergency Admission for Evaluation (AEAE) to the Magellan Urgent Psychiatric Care Center (Magellan) pursuant to Arizona Revised Statutes (A.R.S.) sections 36-520 and -524 (2009). In the applications, Lawrence indicated that as a result of a mental disorder, Appellant was persistently or acutely disabled (PAD) and a danger to others (DTO). Lawrence stated that Appellant "was arrested for assault on 5/28/09 at 8:40 a.m. While incarcerated she pushed and punched two other women." Lawrence said he believed Appellant suffered from a mental disorder because while incarcerated, she "talked to the walls and herself, danced and laughed at inappropriate times, spoke in nonsense syllables, and assaulted 3 people."

¶3 On May 29, 2009, Magellan's Deputy Medical Director D. Fletcher, M.D. (Dr. Fletcher), filed a petition for court-ordered evaluation (PCOE) of Appellant pursuant to A.R.S. § 36-523 (2009). Dr. Fletcher's PCOE reiterated Lawrence's allegations. On June 2, 2009, the trial court signed a

detention order for evaluation and notice (Order for Evaluation). The Order for Evaluation stated that it appeared Appellant was "unwilling to undergo a voluntary evaluation, . . . likely to present a Danger to Self, or Others, or . . . Persistently and Acutely Disabled." The Order for Evaluation gave Appellant notice of her right to a hearing and appointed the Public Defender to represent her.

¶4 On June 1, 2009, Appellant was evaluated by E. Boskailo, M.D. (Dr. Boskailo). Dr. Boskailo diagnosed Appellant with Psychotic Disorder, Not Otherwise Specified. Dr. Boskailo indicated Appellant was, as a result of her mental disorder, PAD and a DTO. Dr. Boskailo concluded Appellant was dangerous or disabled because Appellant "was at a local jail for an assault where she was assaultive to her inmates and she presented with psychotic symptoms and behavior." Additionally, Dr. Boskailo stated Appellant was "delusional, paranoid, [and] hearing voices, with no insight into her condition."

¶5 The same day, Appellant was evaluated by T. O'Grady, M.D. (Dr. O'Grady).[1] Dr. O'Grady also diagnosed Appellant with Psychotic Disorder, Not Otherwise Specified. Dr. O'Grady indicated Appellant was, as a result of her mental disorder, PAD, a DTO, and a Danger to Self (DTS). Dr. O'Grady concluded

[1] Dr. O'Grady was a resident physician supervised by attending physician J. Pynn, M.D. (Dr. Pynn).

Appellant was dangerous or disabled because prior to her evaluation Appellant "allegedly assaulted a woman at a bus stop and later without provocation assaulted two inmates unprovoked at the jail. She was homeless, disheveled and [was] not able to provide for basic necessities."

¶6 On June 3, 2009, Dr. Boskailo filed a petition for court-ordered treatment (PCOT) of Appellant pursuant to A.R.S. § 36-533 (2009), alleging that as a result of a mental disorder, Appellant was PAD and a DTO. On June 4, 2009, the trial court signed a detention order for treatment and notice (Order for Treatment) and set a hearing on the matter for June 9, 2009. At the hearing, the parties stipulated: (1) to the admission of the affidavits of Dr. Boskailo and Dr. O'Grady in lieu of their testimony; (2) that Dr. O'Grady was in an AMA-approved psychiatric residency program being supervised by Dr. Pynn, a licensed and qualified psychiatrist; and (3) to the admission of the 72-hour medication affidavit.[2]

¶7 At trial, the State called two acquaintance witnesses and Appellant also testified. The State's second witness was Lawrence. Lawrence testified that he met with Appellant and

[2] The 72-hour medication affidavit was sworn to by J. Zaharopolos, D.O. (Dr. Zaharopolos). Dr. Zaharopolos stated that "the medications, either individually or in combination, have not significantly hampered . . . [Appellant's] ability to prepare for, or participate in [Appellant's] hearing for Court-Ordered Treatment."

told her he watched a surveillance video of her assaulting two other inmates. Lawrence testified that Appellant responded by saying "she was in an altercation but she hadn't assaulted anyone." Lawrence was then asked to describe what he saw in the video. Appellant objected, citing the best evidence rule, Arizona Rule of Evidence 1002. The trial court overruled the objection and allowed Lawrence to testify as to what he saw in the video. Lawrence stated that the video, in part, showed Appellant assaulting two inmates. Lawrence testified that Appellant:

> [S]tarted talking to the wall. She then walked over and pushed the woman on the phone and then punched her in the ribs. She then kind of danced away from the woman and sat back down on the bench. A few moments later she talked to herself a little more. She got back up and approached the second woman. The second woman in the cell threw off her jacket, put up her hands to defend herself. [Appellant] grabbed her by the hair. The other woman grabbed [Appellant] by the hair and then [Appellant] began punching her with her right arm.

¶8 The trial court found by clear and convincing evidence that Appellant was, as a result of a mental disorder, PAD and a DTO. As a result, the trial court ordered Appellant to undergo treatment in a combined inpatient and outpatient treatment program for a period of time not to exceed 365 days. Appellant filed a timely notice of appeal and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution

and A.R.S. §§ 12-120.21.A.1, -2101.K (2003) and 36-546.01 (2009).

DISCUSSION

¶9 Appellant raises two issues on appeal: (1) whether the trial court violated her due process rights when it failed to expressly find that she knowingly, voluntarily, and intelligently stipulated to the admission of the medical affidavits; and (2) whether sufficient evidence existed on which the trial court could find Appellant was a DTO. We review the interpretation and application of a statute de novo. *See In re Maricopa County No. MH 2001-001139*, 203 Ariz. 351, 353, ¶ 8, 54 P.3d 380, 382 (App. 2002). We will affirm the trial court's findings of fact unless they are clearly erroneous or not supported by substantial evidence. *In re MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995).

Due Process Requirements

¶10 Court-ordered involuntary treatment is "'a serious deprivation of liberty.'" *In re MH 2006-000749*, 214 Ariz. 318, 321, ¶ 14, 152 P.3d 1201, 1204 (App. 2007) (citations omitted). Therefore, "the state must accord the proposed patient due process protection." *In re Maricopa County No. MH 90-566*, 173 Ariz. 177, 182, 840 P.2d 1042, 1047 (App. 1992). Appellant argues that the trial court violated her due process rights because it failed to determine whether Appellant's stipulation

to the admission of the physicians' affidavits was made knowingly, voluntarily, and intelligently.

¶11 The procedural requirements for an involuntary treatment hearing are governed by A.R.S. § 36-539 (2009).[3] Among other requirements, A.R.S. § 36-539.B mandates that

> [T]he patient's attorney may subpoena and cross-examine witnesses and present evidence. The evidence presented by the petitioner or the patient shall include the testimony of two or more witnesses acquainted with the patient at the time of the alleged mental disorder and testimony of the two physicians who performed examinations in the evaluation of the patient.

¶12 We have previously held that a would-be patient's waiver of the right to be present at a hearing "is not valid absent an express finding by the court that the patient has knowingly and intelligently waived her right to be present." *In re MH 2006-000749*, 214 Ariz. at 324, ¶ 27, 152 P.3d at 1207. Additionally, we have held that a would-be patient may waive the right to be represented by counsel only if the superior court conducts an on-the-record discussion and makes specific findings to determine whether the waiver of counsel is made knowingly, voluntarily, and intelligently. *In re Jesse M.*, 217 Ariz. 74, 80, ¶ 30, 170 P.3d 683, 689 (App. 2007).

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[3] Both parties recognize that A.R.S. § 36-539 was recently amended, taking effect September 30, 2009. *See* 2009 Ariz. Sess. Laws, ch. 153 (1st Reg. Sess.). Because the hearing in this case occurred prior to the amendment's effective date, we do not consider the effect of the amendment on the facts presented here.

¶13 Recently, this Court held that "when the rights to present evidence and subpoena, confront and cross-examine witnesses at a 539 hearing are purportedly waived," the trial court must "ascertain that a waiver of these rights is voluntarily, knowingly and intelligently made." *In re MH 2007-001275*, 219 Ariz. 216, 221, ¶ 18, 196 P.3d 819, 824 (App. 2008). In that case, we instructed the trial court that it "must determine either through conducting a colloquy with the patient or by review of the record, that there is sufficient evidence to conclude that counsel's waiver on behalf of the patient was in fact voluntarily, knowingly and intelligently made by the patient." *Id.* at 221, ¶ 19, 196 P.3d at 824.

¶14 Based on *In re MH 2007-001275*, Appellant argues that the trial court in this case was required to conduct a colloquy before accepting the medical affidavits in lieu of the physicians' testimony. However, *In re MH 2007-001275* involved a waiver of the right to an entire involuntary treatment hearing. *Id.* at 218, ¶ 4, 196 P.3d at 821. Moreover, we expressly stated in that case that "[w]e are not opining that this test would affect every decision made by counsel at the hearing, e.g., whether to cross-examine particular witnesses." *Id.* at 221 n.5, ¶ 19, 196 P.3d at 824 n.5. In this case, Appellant's stipulation was not a waiver of her right to an entire involuntary treatment hearing. Rather, by stipulating, she

merely waived her right to cross-examine the physicians who provided affidavits. Appellant cross-examined Lawrence, testified herself, and had an opportunity to cross-examine the State's first acquaintance witness, which she declined to do. We refuse to expand the holding of *In re MH 2007-001275* to the facts of this case.

Sufficiency of the Evidence

¶15 Appellant contends that there was insufficient evidence to find that Appellant was a DTO. Specifically, Appellant argues the court improperly relied on inadmissible testimony by Lawrence regarding his observations of Appellant's assaults caught on video. For purposes of this decision, assuming without deciding that this testimony was inadmissible, we find the trial court's ruling was supported by other substantial evidence. "We will affirm the trial court's findings of fact unless they are clearly erroneous or unsupported by substantial evidence." *In re MH 2006-000749*, 214 Ariz. at 321, ¶ 13, 152 P.3d at 1204. Lawrence's AIE and AEAE stated that Appellant was arrested for assault and, while incarcerated, assaulted two other inmates. Those allegations were restated by Dr. Fletcher in her PCOE. In addition, evidence of Appellant's recent assaults was admitted in the

affidavits of Dr. Boskailo and Dr. O'Grady.[4] Furthermore, Appellant never disputed these allegations; rather, she stated that she was in an "altercation" because "they said there was [sic] too many people there," and "she thought [Appellant] was her girlfriend." Because we find substantial evidence supports the trial court's findings, we affirm the trial court's order of commitment.

CONCLUSION

¶16 For the reasons previously stated, we affirm the trial court's Order of Commitment.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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DIANE M. JOHNSEN, Judge

/S/
_____
JON W. THOMPSON, Judge

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[4] Appellant argues that the medical affidavits admitted by stipulation were somehow insufficient because the doctor affiants may not have met the qualification requirements of A.R.S. §§ 36-359.B and -501.12(a) (2009). Section 36-501.12(a) requires a proposed patient's evaluation be conducted by "[t]wo licensed physicians, who shall be qualified psychiatrists, if possible, *or at least experienced in psychiatric matters*." In this case, Appellant stipulated to the fact that both doctors were physicians experienced in psychiatric matters. Accordingly, Appellant has waived this argument. *In re MH 2002-000767*, 205 Ariz. 296, 301, ¶¶ 23-25, 69 P.3d 1017, 1022 (App. 2003). For the same reasoning, Appellant has waived any argument regarding the sufficiency of the 72-hour medication affidavit. *Id.*