**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
**See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

DIVISION ONE
FILED: 09/22/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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| IN RE MH2010-001938 | 1 CA-MH 10-0067<br><br>DEPARTMENT D<br><br>**MEMORANDUM DECISION**<br><br>Not for Publication –<br>(Rule 28, Arizona Rules of Civil Appellate Procedure) |

Appeal from the Superior Court in Maricopa County

Cause No. MH2010-001938

The Honorable Michael D. Hintze, Judge Pro Tempore

**AFFIRMED**

William G. Montgomery, Maricopa County Attorney — Phoenix
By Bruce P. White, Deputy County Attorney
Anne C. Longo, Deputy County Attorney
Attorneys for Appellee

Maricopa County Legal Defender — Phoenix
By Colin F. Stearns, Deputy Legal Defender
Attorneys for Appellant

G E M M I L L, Judge

**¶1** Appellant challenges an order of commitment for involuntary mental health treatment, making the following arguments: the evaluating physicians failed to comply with the complete physical examination statutory requirement, the

evidence presented was insufficient to support the trial court's finding that she was persistently or acutely disabled, the court erred in denying Appellant's request to waive counsel, and Appellant's counsel was ineffective. For the following reasons, we affirm.

## FACTS AND PROCEDURAL HISTORY

**¶2** A crisis therapist filed a Petition for Court-Ordered Evaluation ("PCOE") of Appellant in August 2010. The PCOE stated that Appellant had gone to the emergency room for heat stroke. The therapist noted that Appellant was "very paranoid" and "delusional." The therapist believed Appellant was "too confused to answer questions logically" and lacked "insight and judgment," and Appellant's thought process was "confused, loose, and tangential." Appellant reported that "people were trying to kill her, beat her up, drug her, take her belongings, break into her house, change her paperwork, make her join a cult, put chemicals on her to I.D. her and poison her." Appellant was not eating, drinking, or sleeping, and she was barricading herself in her home and R.V. Appellant stated that she was not eating because people were spraying her with chemicals. She witnessed seeing "covert ghost people" and people trying to break into her home. Appellant also believed "the devil [had] taken over the world." The court subsequently ordered that Appellant be detained for evaluation.

**¶3** Dr. Hughes filed a Petition for Court-Ordered Treatment ("PCOT"), stating that Appellant was persistently or acutely disabled as a result of a mental disorder. Dr. Hughes interviewed Appellant, and he identified Appellant as having psychotic disorder, not otherwise specified. In an affidavit attached to the PCOT, Dr. Hughes noted that Appellant voiced "delusional content" related to a perceived plot against her by her sister to take her inheritance money. Appellant also refused to pay her utility bill because she believed the utility company was "part of the conspiracy to take her house." Appellant also informed Dr. Hughes that "she has been sprayed by gases and that her food has been poisoned." Dr. Hughes observed Appellant's insight and judgment to be "poor." Further, Dr. Hughes opined that Appellant "lack[ed] insight into her psychiatric impairment."

**¶4** Dr. Hadziahmetovic also examined Appellant. Dr. Hadziahmetovic diagnosed Appellant as having psychotic disorder, not otherwise specified. Dr. Hadziahmetovic noted Appellant believed that there were "multi-number" of people trying to take her home from her. Appellant stated that these people included her sister, judges, the bank, and governmental agencies. She mentioned filing a lawsuit and claimed to be a "legal representative of the State Administrator." Appellant also stated that she had not seen anyone in particular in her home,

but that she could “smell them.” Appellant had not slept for an extended period of time due to her anxiety. Dr. Hadziahmetovic opined that Appellant’s “thought content was significant for paranoid delusions, as well as grandiose delusions.” The doctor also noted that Appellant’s judgment was impaired. Both physicians recommended that Appellant undergo involuntary treatment.

¶5 A one-day hearing on the PCOT was held in September 2010. At the beginning of the hearing, Appellant advised the court that she wanted to represent herself. Following a discussion between the court and Appellant, the court denied Appellant’s request. The court found that “based on the totality of the record, the patient is unable to knowingly and intelligently understand the request to waive counsel.” Counsel then stipulated to the affidavits of the two physicians, in lieu of their testimony. Jeffrey Rivera, an emergency room nurse, and Selena Hancock, a crisis therapist, testified as acquaintance witnesses. Appellant also testified at the hearing. The court found by clear and convincing evidence that Appellant suffered from a mental disorder, and, as a result, was persistently or acutely disabled and in need of treatment. The court ordered Appellant undergo combined inpatient/outpatient treatment for a period not to exceed 365 days, with the inpatient treatment not to exceed 180 days. In February 2011,

the court amended its order to return Appellant to inpatient treatment for a period not to exceed 135 days, following a report that Appellant was noncompliant with the order.

**¶6** Appellant timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-2101(K) (2003) and 36-546.01 (2009).

## ANALYSIS

**¶7** Appellant argues that the court's order should be vacated because the physicians failed to comply with statutory requirements for an examination; the court erred in finding Appellant was persistently or acutely disabled; the court erred in denying Appellant's request to waive counsel; and Appellant was forced to proceed with ineffective counsel.

### I. Complete Physical Examination

**¶8** Pursuant to A.R.S. § 36-533(B) (2009), a petition for court-ordered treatment must be supported by the affidavits of two physicians who have conducted examinations of the patient. An examination is defined as "an exploration of the person's past psychiatric history and of the circumstances leading up to the person's presentation, a psychiatric exploration of the person's present mental condition and a complete physical examination." A.R.S. § 36-501(14) (Supp. 2010).

**¶9** At the hearing, both parties stipulated to the admission of the affidavits of the two physicians in lieu of

their testimony. If any error occurred regarding the physicians' testimony, Appellant invited such error by stipulating to the affidavits. *See In re MH2009-002120,* 225 Ariz. 284, ___, ¶ 8, 237 P.3d 637, 640 (App. 2010) (finding that "[b]y stipulating to the admission of the affidavit of [the physician], Appellant may not assert lack of compliance with the essential statutory requirement that a physician conduct an examination"); *see also Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953) ("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."). The physicians' affidavits reveal that they conducted examinations of Appellant but details are not provided regarding the physical aspects of the examinations. Because Appellant stipulated to the physicians' affidavits and thereby waived the opportunity to cross examine them regarding the extent of their physical examinations, she cannot now assert this argument on appeal. *In re MH 2009-001264*, 224 Ariz. 270, 272, ¶¶ 7, 10, 229 P.3d 1012, 1014-15 (App. 2010) (finding waiver of the right to confront and cross-examine witnesses after appellant stipulated to the affidavits of the two physicians in lieu of their testimony).

**II. Persistently or Acutely Disabled**

**¶10** Appellant argues that the court's finding that Appellant was persistently or acutely disabled is not supported

by substantial evidence. We disagree.

**¶11** We will uphold the trial court's ruling unless it is clearly erroneous. *In re MH 2008-000438*, 220 Ariz. 277, 279, ¶ 6, 205 P.3d 1124, 1125 (App. 2009). A court may find a person to be persistently or acutely disabled if the person has a mental disorder and meets the following criteria:

> (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(33).

**¶12** At trial, a crisis therapist and ER nurse served as acquaintance witnesses, in compliance with statutory requirements. *See* A.R.S. § 36-539(B) (Supp. 2010). The ER

nurse, Jeffrey Rivera, testified that Appellant had come into the hospital for a dehydration-related headache and a cough. He believed she needed a psychiatric assistance based on her story, which was "extraordinary." Appellant told Rivera that she had barricaded herself in a house that had suffered from 600 break-ins and was not receiving any help from police. Appellant also informed Rivera that she "was concerned that the Hispanic population was basically taking over the neighborhood and that her house was next on the list."

**¶13** Selena Hancock, the crisis therapist, also met Appellant in the emergency room. She testified that Appellant reported that "people were trying to spray her with chemicals and mark her . . . so that they could identify her." Specifically, she told Hancock that "people were marking [her] and that everybody . . . [was] marked with their own chemical and color to identify them in the cult." Appellant informed Hancock that there was no drinking water or food in her home, and she also did not have running water or electricity.

**¶14** Both of the examining physicians diagnosed Appellant as having a psychotic disorder, not otherwise specified, and they both believed Appellant would benefit from involuntary treatment. Additionally, both physicians found Appellant to be persistently or acutely disabled. Dr. Hughes' affidavit reflected that Appellant voiced "delusional content" related to

a perceived plot against her by her sister to take her inheritance money. He noted that Appellant did not believe she was mentally ill, and she lacked insight into her current psychiatric impairment. In addition, Appellant revealed to Dr. Hughes that she refused to pay her utility bill because she believed the utility company was "part of the conspiracy to take her house," and she believed that she had been "sprayed by gases and that her food ha[d] been poisoned." Dr. Hughes noted that Appellant exhibited poor judgment and insight. Additionally, Appellant informed Dr. Hadziahmetovic that she had not slept for an extended period of time due to her anxiety, and she reported seeing "covered ghost people" and people who tried to break into her home. Appellant informed Dr. Hadziahmetovic that she had moved out of her house and slept in an RV. Dr. Hadziahmetovic opined that Appellant exhibited impaired judgment and paranoid delusions, and he noted that Appellant was unable "to make a mental connection that her symptoms are a result of her mental illness."

**¶15** On this record, we find substantial evidence existed to support the court's finding that Appellant was persistently or acutely disabled.

**III. Request to Waive Counsel**

**¶16** Appellant argues that the trial court erroneously denied Appellant's request to waive court-appointed counsel.

Appellant requests that we review this issue under a de novo standard of review because we would be reviewing the trial court's application of law to facts. In contrast, the Petitioner cites *In re Detention of J.S.*, 138 Wash. App. 882, 892, 159 P.3d 435, 440 (Wash. App. 2007), and argues that an abuse of discretion standard is appropriate. We find a de novo review to be the applicable standard of review. *In re Jesse M.*, 217 Ariz. 74, 76, ¶ 8, 170 P.3d 683, 685 (App. 2007) (applying de novo standard of review when determining whether Appellant could waive his right to counsel and represent himself because the issue involved the interpretation and application of a statute).

**¶17** In an involuntary treatment hearing, a patient may be allowed to waive court-appointed counsel as long as they can do so "knowingly, intelligently, and voluntarily." *In re Jesse*, 217 Ariz. at 78, ¶ 18, 170 P.3d at 687. In such cases, the trial court should:

> (a) advise the patient of his right to counsel;
> (b) advise the patient of the consequences of waiving counsel, namely, that the patient and not the lawyer will be responsible for presenting his case, cross-examining the petitioner's witnesses, calling witnesses, and presenting evidence as well as closing argument;
> (c) seek to discover why the patient wants to represent himself, which may involve a dialogue with counsel or others;

> (d) learn whether the patient has any education, skill or training that may be important to deciding whether he has the competence to make the decision;
> (e) determine whether the patient has some rudimentary understanding of the proceedings and procedures to show he understands the right he is waiving; and
> (f) consider whether there are any other facts relevant to resolving the issue.

*Id.* at 80, ¶ 30, 170 P.3d at 689. "Once that on-the-record discussion has been completed, the trial court should make specific factual findings supporting the grant or denial of the waiver." *Id.*

**¶18** Here, the court conducted a lengthy discussion with the Appellant, which extended over six pages of the transcript from the hearing. During that discussion, the Appellant stated she understood that she would have to present the case, evidence, and an opening and closing statement, and she understood that she would have to call her own witnesses and cross-examine opposing counsel's witnesses. Appellant informed the court that she wished to represent herself because she did not "trust any of the people . . . that [she] had to deal with [because] . . . [t]hey've all been very manipulative." She also stated that she did not "feel comfortable" with the attorney representing her. Appellant explained that she had graduated from high school, and she had completed four years of technical school and one year of junior college. As far as legal

training, Appellant stated that she had been the legal representative for her father's estate and had filed several lawsuits, and she had won fifty percent of those lawsuits. She admitted she did not know all of the Arizona Rules of Civil Procedure, and, when asked the standard of proof for the hearing, she stated "I believe it would be to prove that the allegations that are being made against me are not true; that I am competent to be on my own and that I do not have any mental illness." Appellant admitted that she did not know any of the hearsay exceptions to the Arizona Rules of Evidence, and she did not know the objections that could be made to presentations of information or testimony. Appellant stated, however, "as far as the documents that I intend to present to the [c]ourt, they've all been filed, and they're documents that were used in the probate case and lawsuit that all of this situation is stemming from."

**¶19** In reviewing the Appellant's answers to the court's questions, we conclude the court followed the steps outlined by *In re Jesse*. The totality of the record indicates that Appellant may not be capable of making a knowing waiver. *See In re Jesse*, 217 Ariz. at 81, ¶ 34, 170 P.3d at 690 (concluding that the evidence provided to the trial court presented "serious concerns about appellant's capability to make a knowing waiver"). Specifically, along with Appellant's lack of

knowledge of the procedural and evidentiary rules, Dr. Hughes and Dr. Hadziametovic opined, respectively, that Appellant displayed poor insight and impaired judgment. Additionally, both physicians noted that Appellant exhibited delusional thought content. On this record, we affirm the trial court's denial of Appellant's request to waive counsel and represent herself.

**IV. Ineffective Assistance of Counsel**

**¶20** Appellant argues that the trial court erred by forcing her to proceed with ineffective court-appointed counsel. While Arizona statutory law provides for assistance of counsel for persons facing a commitment hearing for involuntary treatment, *see* A.R.S. §§ 36-528(D) (2009), 36-535(A) (Supp. 2010), 36-536(A) (Supp. 2010), and 36-539(B) (Supp. 2010), Arizona case law has never interpreted whether this extended to include a right to *effective* assistance of counsel. We need not decide this legal issue here, however, because we conclude that the record supports the trial court's rulings on Appellant's argument of ineffective assistance of counsel.

**¶21** This court initially suspended this appeal, pursuant to *In the Matter of the Appeal in Pima County Mental Health Service Action No. MH-2116-1*, 157 Ariz. 314, 757 P.2d 118 (App. 1988), and revested jurisdiction in the superior court in order for Appellant to present a claim of ineffective assistance of

counsel. The superior court ordered briefing on the issue, to be submitted before March 11, 2011. This court subsequently extended the suspension of the appeal until March 30, 2011. On March 25, 2011, the superior court held a hearing and reviewed the transcript of the commitment hearing and the critical steps measuring effective assistance of counsel. The court found that Appellant's counsel "met the minimal duties of counsel during commitment proceedings pursuant to A.R.S. [§] 36-537," and counsel's actions did not rise to the level of ineffective assistance of counsel. Because Appellant has not provided us with a transcript of the March 25 hearing, we are compelled to assume the evidence at that hearing supports the court's findings. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Accordingly, we find no error by the trial court in its ruling finding no ineffective assistance of counsel.

**CONCLUSION**

**¶22** For the foregoing reasons, we affirm the trial court's order of commitment.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
JON W. THOMPSON, Judge