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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. TITO MARTINEZ CERVANTES, Appellee.	)	2 CA-CR 2010-0181 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093146001

Honorable Howard Fell, Judge Pro Tempore

REVERSED

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K E L L Y, Judge.

¶1 In this appeal brought pursuant to A.R.S. § 13-4032(1), the State of Arizona appeals from the trial court's order dismissing without prejudice the charge of second-

degree burglary against appellee Tito Cervantes. After Cervantes requested a competency evaluation under Rule 11, Ariz. R. Crim. P., the court appointed one expert to conduct the evaluation, and subsequently found Cervantes was incompetent and could not be restored to competency. The state argues the trial court abused its discretion by appointing only one expert to conduct the Rule 11 evaluation. We agree and reverse.

Background

¶2 In a Rule 11 motion requesting a competency evaluation, Cervantes asserted he was "mentally handicapped," "diagnosed with mental retardation," and illiterate. At a status conference on the Rule 11 motion, the court asked defense counsel if one individual could be used to "do the [intelligence quotient ("I.Q.")] testing and so forth." After counsel responded in the affirmative, the court stated it would appoint "one psychologist to do I.Q. testing and to determine Mr. Cervantes'[s] ability, and . . . if the State or [Defense] . . . is uncertain about how to proceed, then [I will] have someone else evaluate Mr. Cervantes." A prosecutor for the state was present at the hearing, but did not participate in this exchange.

¶3 At a follow-up hearing, the state requested that a second expert be appointed to evaluate Cervantes. The trial court rejected this request, finding that "Cervantes suffers from a very low I[.]Q[.], and [it is] never going to change," adding, "[I am] not willing to pay the [money for an examination], particularly when there was an apparent stipulation that one mental health expert do the evaluation."

¶4 The state then filed a motion requesting that the trial court reconsider its refusal to appoint a second expert. At a status conference held after the competency

hearing, the court informed the prosecutor that the state had previously stipulated to the use of only one expert. Counsel noted that no such stipulation had been mentioned in the minute entries from the previous hearings, but deferred to the court and withdrew the motion. The court then found Cervantes was not competent and was not restorable to competency, and dismissed the case without prejudice.

Discussion

¶5 The sole issue on appeal is whether the trial court abused its discretion in finding the state had stipulated to the use of one expert in Cervantes's competency evaluation. We review the dismissal of an indictment pursuant to Rule 11.6, Ariz. R. Crim. P., for abuse of discretion. *See State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). An abuse of discretion occurs when "'the record fails to provide substantial support for [the court's] decision or [it] commits an error of law in reaching the decision.'" *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004), *quoting Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001).

¶6 Rule 11 protects a defendant's "due process 'right not to be tried or convicted while incompetent.'" *State v. Kuhs*, 223 Ariz. 376, ¶ 13, 224 P.3d 192, 196 (2010), *quoting State v. Amaya-Ruiz*, 166 Ariz. 152, 161, 800 P.2d 1260, 1269 (1990). Rule 11.3 provides that if "reasonable grounds for an examination exist, [the court] *shall* appoint *at least two* mental health experts." (Emphasis added.)[1] Although

[1]Rule 11.2(c) provides that the trial court "may order a preliminary examination . . . to assist the court in determining if reasonable grounds exist to order further examination of the defendant." However, this case does not involve a Rule 11.2(c) examination. Here, the court explicitly found that reasonable grounds existed to conduct

Rule 11.3(c) and A.R.S. § 13-4505 permit the prosecution and the defense to stipulate to the appointment of only one expert, we conclude that there was no such stipulation here.

¶7 A stipulation is defined as "'an agreement, admission or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect to some matter incident thereto.'" *State v. Virgo*, 190 Ariz. 349, 353, 947 P.2d 923, 927 (App. 1997), *quoting Harsh Bldg. Co. v. Bialac*, 22 Ariz. App. 591, 593, 529 P.2d 1185, 1187 (1975). In order for the state to have stipulated to the appointment of only one expert, it would have had to enter into an agreement to that effect. *See id.* Here, there was no agreement.

¶8 When the trial court announced it would appoint only one expert, it also advised the parties, "if the State or [Defense] after that is uncertain about how to proceed, then I'll have someone else evaluate Mr. Cervantes." At no point during this proceeding did the state "agree" to the appointment of only one expert. Nor did it have any basis for objecting, given that the court had indicated a second expert would be appointed if either side made the request. Because the court's minute entry gave no indication that there had been a stipulation, the state had no notice of the purported stipulation until the later competency hearing at which the court denied the state's request to appoint a second expert.

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a Rule 11 evaluation. Therefore, unless the parties stipulated otherwise, the court was required to appoint "at least two mental health experts." Ariz. R. Crim. P. 11.3(a). As we recently held, "the supreme court [has] evinced its intent that, once a court has made the reasonable grounds finding, the matter move on . . . and the issue of a defendant's competency be determined after full proceedings consistent with [Rule 11]." *Potter v. Vanderpool*, 592 Ariz. Adv. Rep. 33, ¶ 13 (Ct. App. Oct. 5, 2010).

¶9 The requirement that at least two experts conduct a competency evaluation is intended to reduce the "uncertainty as to [a] defendant's actual condition," *see State v. McClendon*, 101 Ariz. 285, 290, 419 P.2d 69, 74 (1966), and we have been unwilling to find it waived under circumstances falling short of the stipulation required by § 13-4505(A) and Rule 11.3(c). *See State v. Hansen*, 146 Ariz. 226, 232, 705 P.2d 466, 472 (App. 1985). Cervantes suggests that the state's failure to object effectively establishes that a stipulation existed. But the law does not support this contention.

¶10 Our supreme court has held that failure to have a written Rule 11.5 stipulation is not error, as long as there is "evidence in the record to show the mutual intention of the parties" to enter a stipulation. *State v. Blier*, 113 Ariz. 501, 504-05, 557 P.2d 1058, 1061-62 (1976); *cf. Hackin v. Rupp*, 9 Ariz. App. 354, 355, 452 P.2d 519, 520 (1969) ("No agreement or consent between parties or attorneys in any matter is binding . . . , unless it is in writing, or made orally in open court, and entered in the minutes."), *quoting* Ariz. R. Civ. P. 80(d). Likewise, we conclude that in order for a Rule 11.3 stipulation to be valid, the record must demonstrate the parties' "mutual intention" to be bound. Here, there is no such demonstration of intent by either party.

¶11 We do not construe the state's failure to challenge the court's recollection that there had been a stipulation as a waiver. Under Rule 11, failure to appoint two experts is clear error and, under the specific circumstances here, the state's failure to object to the appointment of one expert does not constitute a waiver of the issue. *See Hansen*, 146 Ariz. at 232, 705 P.2d at 472. Furthermore, we cannot fault counsel for

deferring to the court's recollections of the events that had taken place at the previous hearings.

¶12 In sum, the only exception to the requirement in § 13-4505(A) and Rule 11.3 that the trial court appoint two experts is the provision that both parties may stipulate to one expert. Ariz. R. Crim. P. 11.3(c). Here, because there was no such stipulation, the court was required to appoint two mental health experts.[2] Its failure to do so was an abuse of discretion.

Disposition

¶13 The trial court's order dismissing the case is vacated and the case is remanded for further proceedings consistent with this decision.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

[2]We are aware that the court was motivated in part by financial considerations in denying the state's request for a second expert. But Rule 11 specifically requires that two experts be appointed. *See Potter*, 592 Ariz. Adv. Rep. 33, ¶ 13.