

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Guardianship of:

THOMAS ROBINSON,

An Incapacitated Person.

No. 40966-6-II

UNPUBLISHED OPINION

Armstrong, P.J. — The Department of Social and Health Services petitioned for the appointment of a guardian of the person and estate of Thomas Robinson after receiving allegations of self-neglect. Robinson opposed the guardianship petition.

The jury found Robinson incapacitated as to his person and his estate and restricted his rights accordingly. The trial court ordered a limited guardianship for Robinson and his estate. Robinson appeals, arguing that (1) the testimony of a temporary financial manager improperly conveyed to the jury that he lacked capacity, (2) the trial court erred by allowing references to his evaluations at Western State Hospital, and (3) the medical reports do not satisfy RCW 11.88.045(4). We affirm.

FACTS

Adult Protective Services, a division of the Department of Social and Health Services, became involved with Robinson in 2007 after receiving a referral alleging that he was self-neglecting. Robinson suffers from alcoholism, diabetes, dementia, congestive heart failure, and Korsakoff's disease. Robinson has often been hospitalized because he is unable to handle his complex medication regimen and personal care, as well as his hydration needs. Frequently, Robinson left the hospital against medical advice, without filling his necessary prescription

medications, and without caregiving assistance.

In February 2009, Robyn Floor, an occupational therapist assisting with Robinson's independent living situation, concluded that based on her observations, Robinson could not safely live independently and that he needed assistance with daily living activities, medical decision-making, money management, transportation, and using the telephone. Floor provided her evaluations to Lisa Gilman, an adult protective services social worker investigating allegations that Robinson was self-neglecting.

In March 2009, the Department received a referral from Dr. Retailiau, Robinson's physician at the time, that Robinson was self-neglecting. Dr. Retailiau treated Robinson for atrial fibrillation and observed that Robinson did not know his medications or what they were for, nor could he describe what he was taking or eating. Dr. Retailiau could not safely prescribe the medication for Robinson's condition.

Later in March 2009, Gilman met with Robinson in his apartment. Gilman observed badly stained floors and furniture, beer bottles throughout the apartment, and clothes strewn about the bedroom. Gilman also observed that Robinson was not taking his medications as prescribed and was aware of needing only one medication, although he had been prescribed seventeen different medications.

When Gilman returned to Robinson's apartment in April 2009, Robinson was wearing the same stained clothes he had worn at her last visit. Robinson's apartment smelled of rotten food and Gilman observed more bottles of hard liquor in the apartment. Gilman returned to Robinson's apartment on five different occasions following this visit but she could not reach him

at home.

Gilman returned to Robinson's apartment again on May 8, 2009. Robinson was not home but Gilman smelled strong odors coming from his apartment. The apartment manager let Gilman into Robinson's apartment where she saw more empty alcohol bottles, food cartons, and garbage.

In May 2009, Robinson was hospitalized and his occupational therapist recommended 24-hour supervision. Robinson told his occupational therapist that he was unable to care for himself because he was sick, he provided inaccurate information about his children's ages, and he reported having difficulty with self-care. Robinson agreed to go to Roo-Lan, a skilled nursing facility, on June 12, 2009. But he left against medical advice in October 2009.

On June 25, 2009, the Department petitioned the trial court to appoint a guardian ad litem (GAL) for Robinson and his estate; Robinson opposed the guardianship petition. The trial court appointed Julie Weigand as his GAL. When Weigand met with Robinson in July 2010, he told her that he was 74, although he was 73, that it was May, he could not remember the name of the President, or what the name or address was for the Roo-Lan facility where he lived. Weigand informed Robinson that she was his GAL. Robinson responded angrily, telling Weigand that he opposed the guardianship and wanted an attorney. Weigand arranged for the appointment of independent counsel for Robinson.

In July 2009, Dr. Karanam, Robinson's physician, reported that Robinson was incapacitated due to alcoholism and medical noncompliance leading to safety issues specifically requiring "24-hour supervision for multiple complex medications . . . household chores, driving, shopping, monitoring alcohol use." Report of Proceedings (RP) (Apr. 21, 2010) at 245-47.

After Robinson left Roo-Lan in October 2009, he returned home. He was hospitalized in late October for acute renal failure, hyponatremia, diarrhea, abdominal pain, and a low heart rate. Robinson had an aortic valve replacement in November. He was hospitalized twice in December for mental health issues and not taking his medications.

In January 2010, Weigand visited Robinson's apartment. She discovered his apartment had feces on the floor, rotting food left out, and garbage strewn about. According to Weigand, the apartment was filled with a rancid odor and there was a pill box on the kitchen floor with some compartments open and others closed, but not in a consecutive order.

On February 12, 2010, Clifton Messerschmidt was appointed by the court to serve as Robinson's temporary financial and personal property manager. Messerschmidt managed Robinson's finances, paid his bills, obtained and handled his mail, managed his apartment lease, cleaned the apartment, and paid for storage of property. After his appointment, Messerschmidt removed approximately 20 bags of garbage from Robinson's apartment, including food, alcohol bottles, and soiled clothing. Messerschmidt also observed feces on chairs and on the mattress in the bedroom and a strong odor coming from the furniture. A handgun was in a box in the bedroom under some clothes, with six bullets in the gun.

Before trial on the guardianship petition, Robinson moved to exclude references to Western State Hospital. The trial court ruled that counsel could show that Robinson was a resident at Western State Hospital but could not disclose why he was there or how long he had been there. The trial court also precluded any evidence that Robinson was involuntarily committed at Western State Hospital, however, the trial court did not prohibit evidence that Dr.

Parmenter had evaluated Robinson at Western State Hospital where she worked. Robinson's counsel requested that the witnesses refer to Robinson being "hospitalized" at Western State Hospital when referring to his time there. RP (Apr. 21, 2010) at 189.

Dr. Parmenter, a Western State Hospital neuropsychiatrist, testified that during her evaluation of Robinson she observed semantic paraphasic errors¹ that signified he suffered from dementia. Dr. Parmenter also noted that Robinson's remote memory was impaired as evidenced by his inability to provide his childrens' correct ages or remember past events. Based on her testing, Dr. Parmenter concluded that Robinson was of at least average intelligence, had low verbal fluency, and exhibited significant difficulty learning and recalling information.

During Dr. Parmenter's testimony, the Department offered part of Robinson's medical file including a copy of the Kohlman Evaluation of Living Skills (KELS) and the Allen Cognitive Evaluation Tool; Robinson did not object. These tests evaluate the patient's ability to independently complete certain tasks of daily living. Robinson exhibited a need for assistance in daily living, including with self-care, safety and health, money management, transportation, telephone use, work, and leisure. His medical records reflect treatment for diabetes, coronary artery disease, congestive heart failure, cardiomyopathy, atrial fibrillation, hypertension, chronic obstructive pulmonary disease, transient ischemic attacks, alcoholic gastritis, and a long-standing history of alcohol abuse.

At trial, Weigand submitted medical reports from Dr. Karanam and Dr. Parmenter.

¹ Dr. Parmenter described that paraphrasic errors occur when a person says a word that is similar in meaning to the word that he means to use, but is not quite the right word. An example of a paraphrasic error is using the word "bouquet" to describe a "wreath." RP (Apr. 20, 2010) at 131.

Robinson moved to dismiss the guardianship petition arguing that the medical reports were insufficient. The trial court denied his motion finding the medical reports and testimony substantially complied with the requirements of the guardianship statute.

Robinson testified that he would like to live in an apartment with assistance, including nurse visits three times a week, but he did not need assistance with shopping or preparing food. Robinson stated it would be useful to have caregivers to help with routine matters. He was not able to provide the name of any of his medications, testifying, “I don’t even pay any attention to them. They’re so numerous.” RP (Apr. 22, 2010) at 302. He recognized that he suffered from a heart condition.

The jury found Robinson incapacitated as to his person and his estate. The trial court ordered a limited guardianship for Robinson and his estate.

ANALYSIS

I. Testimony of Temporary Financial Manager

Robinson states that RCW 11.88.010² and RCW 11.88.045(3)³ presume capacity of the person for which there is a petition for guardianship. He challenges the testimony of Messerschmidt, the court-appointed temporary financial manager for Robinson, asserting that he improperly conveyed to the jury that Robinson lacked capacity. The State responds that

² It is unclear which portion of the statute Robinson relies upon. RCW 11.88.010(2) provides, in relevant part, “[a] person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship. . . .”

³ RCW 11.88.045(3) provides that the alleged incapacitated person is “entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity.” The standard of proof is clear, cogent, and convincing evidence.

Robinson waived this issue because he did not object at trial.

We may refuse to review any claim of error not raised in the trial court. RAP 2.5(a). To preserve an issue for appeal, a party must object to the evidence during the trial. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (a litigant cannot remain silent as to claimed error during trial and later, for the first time, object on appeal). Robinson did not object to the evidence about Messerschmidt's role as temporary financial manager.⁴ Moreover, Robinson's general objection to the guardianship proceedings is not sufficient to preserve a challenge to the guardian's testimony at trial. *In re Det. of Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006). Accordingly, we decline to address the issue.⁵ RAP 2.5(a).

II. References to Western State Hospital

Robinson argues that evidentiary references to Western State Hospital, specifically the Department's questioning on direct examination of Dr. Parmenter, was improper because (1) by statute, mental health records are confidential; (2) jurors would presume Robinson was incapacitated because he was at Western State Hospital; and (3) this error was not harmless.

We review a trial court's rulings admitting evidence for an abuse of discretion. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.

⁴ Robinson does not allege that the testimony by Messerschmidt was a manifest constitutional error, nor does he argue that the testimony led to actual prejudice.

⁵ Robinson urges us to accept the issue in spite of his "technical" violation of the appellate rules, citing *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). See Reply Br. of Resp't at 4. But *Olson* dealt with the State's failure to assign error to the trial court's dismissal of a criminal charge, not the admission of evidence. We decline to apply it here. *Olson*, 126 Wn.2d at 318-19.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

RCW 71.05.390 protects from disclosure “all information and records compiled, obtained, or maintained in the course of providing” mental health treatment services. RCW 71.05.390(19) provides, in relevant part, that the fact of admission, as well as records, shall not be admissible in any legal proceeding without written consent of the person subject to the proceeding, except “in the case of a minor, a guardianship or dependency proceeding.” Moreover, RCW 71.05.390(3)(b)(iii) states that information may be disclosed as necessary to decide whether or not proceedings should be instituted to appoint a guardian.

The trial court ruled that the Department could not introduce evidence of Robinson’s involuntarily commitment at Western State Hospital. But the court did allow evidence that Dr. Parmenter’s evaluations occurred at Western State Hospital.

Dr. Parmenter testified that she worked at Western State Hospital as a clinical neuropsychiatrist. She testified that she saw patients at the hospital for interviews and evaluations. She also testified that she evaluated Robinson on five different occasions. Robinson concludes that this constitutes testimony that he had been detained at Western State Hospital. We disagree.

Dr. Parmenter never testified that Robinson was involuntary committed at the time of her evaluations; nor did she ever refer to him as a patient of the hospital. Furthermore, Robinson did not object to any testimony that may have been outside the scope of the trial court’s limiting instruction.

Notably, during trial, Robinson’s counsel made the only arguable reference to Robinson’s

status at Western State Hospital during cross-examination of Dr. Parmenter. Robinson's counsel asked, "[Robinson] was hospitalized at the time that he was evaluated by you, and he was hospitalized at the time that the KELS was performed?" Dr. Parmenter responded, "Yes." RP (April 21, 2010) at 166. Robinson's counsel then continued,

[Robinson's counsel]: In one instance, when Mr. Robinson performed the KELS exam, he was hospitalized. He was in an institution or circumstances where there was some level of supervision and care provided. And when the other examination, [sic] the Allen Cognitive Evaluation Tool was done, his appearance and frequency of self-care activities, he was judged to be independent. When you evaluated him, his appearance, in your words, was acceptable, it was okay and so forth.

So my question is that the institutional hospitalization setting applied in all these circumstances . . . would you consider the setting determining whether or not his appearance is going to be indicative of being independent or indicative of needing assistance?

RP (April 21, 2010) at 167-68.

Thus, Robinson's counsel elicited the only evidence from which the jury could infer that Robinson was hospitalized at Western State. And the error, if any, was invited. *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004). A party cannot set up an error below and then complain of it on appeal. *Bloor v. Fritz*, 143 Wn. App. 718, 740, 180 P.3d 805 (2008).

We hold that the trial court did not abuse its discretion by limiting references to Robinson's involuntary commitment as required under RCW 71.05.390. Any erroneous reference to Robinson's status as a patient of the hospital was invited error.

III. Incapacity

Robinson argues that the medical report did not meet the guardianship requirements as

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required under RCW 11.88.045.⁶ He further challenges the GAL's testimony as hearsay. The Department responds that the two medical reports and the supplemental testimony from the GAL complied with the statutory requirements for the appointment of the guardian.

We review questions of law de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). In a guardianship proceeding, we review the trial court's factual findings for substantial supporting evidence from which a rational trier of fact could find the necessary facts proved by clear, cogent, and convincing evidence. *In re Guardianship of Stamm*, 121 Wn. App. 830, 842, 91 P.3d 126 (2004). RCW 11.88.045(4) requires that the court be presented with a written report from a physician in a proceeding for appointment of a guardian or limited guardian.⁷

Robinson's first challenge to the medical reports asserts that Dr. Karanam's report was not filed with the trial court. This is incorrect. Dr. Karanam's report was filed as a sealed exhibit and is part of the record.

Robinson next argues that the medical reports filed in this case are statutorily inadequate

⁶ Robinson relies on the unpublished case of *In re Guardianship of Healey*, 140 Wn. App. 1020, 2007 WL 2411688 (2007), to support his assertion that RCW 11.88.045(4) requires a medical report submitted in a guardianship proceeding to include all medications of the alleged capacitated person. It is improper for a party to cite an unpublished opinion as authority under GR 14.1 and furthermore, this court does not consider arguments unsupported by authority.

⁷ RCW 11.88.045(4) requires that the medical report include: the name and address of the physician, education and experience of physician, dates of examination, summary of relevant medical, functional, neurological, or mental health history, findings of the physician as to the alleged incapacitated person's condition, current medications, effect of current medications on the alleged incapacitated person's ability to understand or participate in the proceedings, opinions on the specific instances of the alleged incapacitated person's needs, and identification of persons the physician has met with regarding the alleged incapacitated person.

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because they do not include a list of his current medications. This argument also fails. Dr. Karanam's medical report meets all statutory requirements of RCW 11.88.045(4), including a list of all of Robinson's current medications.

In addition, the GAL obtained a second medical report from Dr. Parmenter. This report was also filed with the court and Dr. Parmenter testified to the contents of the report. Robinson argues that Dr. Parmenter's medical report is deficient because it did not identify all of his medications as required by RCW 11.88.045(4). But his argument fails because the trial court already had a medical report before it that included a list of Robinson's medications and the second medical report was supplemental. *See* RCW 11.88.045(4). We conclude that the medical reports met the requirements of RCW 11.88.045(4).

In conclusion, we find no error in the guardianship trial. Thus, we affirm the jury's finding that Robinson is incapacitated and the trial court's order imposing a limited guardianship for Robinson and his estate.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Johanson, J.

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