IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| WILLIAM TY HAND, as a single person, Respondent, v. CHLOE E. PARR, as a single person, Appellant. | ) | No. 30503-1-III |
| | ) | UNPUBLISHED OPINION |

Siddoway, A.C.J. — Chloe Parr appeals the trial court's judgment determining that her neighbor, William Ty Hand, enjoys a prescriptive easement to a footpath that encroaches on the north end of her property, south of Mr. Hand's garage. Mr. Hand's evidence was sufficient and we find no reversible error by the trial court. We affirm.

## FACTS AND PROCEDURAL BACKGROUND

William Ty Hand and Chloe Parr own neighboring homes in Bremerton, with Mr. Hand's home located just north of Ms. Parr's. Mr. Hand purchased his home in 2000 from John DeClements, who had lived there since 1955. Ms. Parr has lived at her home since 1946.

In 1966, Ms. Parr's stepfather planted a hedge row along the northern edge of her property that ran approximately parallel to Mr. DeClements' garage situated at the southern end of his property. From 1966 to 2009, a dirt footpath ran between the hedge and the DeClementses' garage. When Mr. Hand was shown the property before purchasing it in 2000, Mr. DeClements led him to believe that the property line between the lots was marked by the hedge. Mr. Hand understood that Mr. DeClements and his late wife had used the footpath for access and to maintain rosebushes and other flowers and plants that Ms. DeClements had planted in a narrow garden next to the garage. After purchasing the home, Mr. Hand continuously used the footpath for access between the front and back of his lot on its south side.

In 2006, Marvin Sindt began living with Ms. Parr and in late 2008 or early 2009 he undertook to re-landscape her property. He tore out the hedge and, based on a 1971 survey, taped off what he believed to be her ground. The lines he taped off passed over the footpath and came to within several feet of Mr. Hand's garage. When Mr. Sindt installed a bamboo privacy fence along the asserted property line—roughly the middle of the path—Mr. Hand commenced an action in Kitsap County Superior Court seeking to establish a prescriptive easement to use the footpath. By the time of the property line dispute and commencement of this action, Mr. DeClements had passed away.

To establish a prescriptive easement, Mr. Hand would be required to show that his

use of Ms. Parr's land had been "'(1) open and notorious, (2) over a uniform route, (3) continuous and uninterrupted for 10 years, (4) adverse to the owner of the land sought to be subjected, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.'" *Imrie v. Kelley*, 160 Wn. App. 1, 7, 250 P.3d 1045 (2010) (quoting *Kunkel v. Fisher*, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)), *review denied*, 171 Wn.2d 1029 (2011). When there is privity between successive occupants, as there was between Mr. Hand and the prior owner, Mr. DeClements, the successive periods of adverse use may be tacked to each other to compute the prescriptive period. *See Roy v. Cunningham*, 46 Wn. App. 409, 413-14, 731 P.2d 526 (1986).

The superior court granted an injunction stopping further work on the disputed ground. Mr. Hand later amended his complaint to include an adverse possession claim.

Mr. Hand's claims were tried in a two-day bench trial. There was no dispute by the time of trial that at least a portion of the footpath was on Ms. Parr's property. The parties testified to differing opinions as to the width of the former footpath, now partially destroyed as a result of Mr. Sindt's landscape work. They generally described its width in terms of the distance that had formerly existed between the garage and the northern edge of the hedge.

Mr. Hand conceded at trial that he would need to tack on Mr. DeClements' prior use of the property in order to establish his claims, since he had owned the home for only

9 of the 10 years required to assert prescriptive rights or adverse possession. RCW 4.16.020; *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989). The most clearly contested material issues at trial were (1) whether Mr. DeClements or his late wife had used the path for at least a year in a manner that, when tacked onto Mr. Hand's use, would give rise to prescriptive rights and (2) the width of the footpath used by Mr. DeClements and later by Mr. Hand.

On the issue of the required 10 years' nonpermissive use, both Mr. Hand and his real estate agent testified, without objection, that Mr. DeClements told them that the hedge line was the property line when shown the property in 2000. They, a colleague who had lived at Mr. Hand's home for extended periods beginning in 2000, and two friends who had visited his home all testified to Mr. Hand's regular and continuous use of the footpath and to the fact that the footpath appeared at the time he purchased the home to have existed and been in use for many years. Mr. Hand presented evidence that the water line and a drain line for his home had been in place under the hedge line since the mid-1950s. He presented a 1992 Department of Transportation aerial photograph showing the hedge row. Finally, he presented testimony about the garden originally planted by Ms. DeClements along the side of the garage and circumstantial evidence that she would have to have used the footpath to maintain her garden.

For her part, Ms. Parr indicated in her trial brief that she would testify that she

gave the DeClementses permission to walk on her portion of the footpath. But while she began to offer testimony, twice, about conversations she had with Ms. DeClements, Mr. Hand objected on the basis of the "dead man's" statute, RCW 5.60.030, and his objections were sustained. As a result, no evidence was admitted that any use by the DeClementses was permissive.

On the issue of the width of the easement, Mr. Hand testified that there had been approximately eight feet of space between his garage and the northern edge of the hedge, as did his colleague and tenant. Mr. Hand's real estate agent estimated the width to be six to eight feet, adding that "it was certainly more than five feet," because the side yard setback requirement in Kitsap County had been five feet for as long as he could remember, and, if the width had appeared to be any less, he would have been concerned that the garage was too close to the property line. Report of Proceedings (RP) (Feb. 7, 2011) at 13. Mr. Sindt, on the other hand, testified that the property line was only a few inches from the hedge, which, based on his other testimony, implied that the footpath between the garage and the hedge had always been significantly narrower—perhaps less than three feet, even when combined with the garden along the garage.

Ms. Parr's last proposed witness was a surveyor, whom she wished to call to authenticate a survey of her property the surveyor had prepared in 1971. Mr. Hand objected because the surveyor had not been disclosed in response to discovery. Ms.

Parr's lawyer responded that he wished to call the surveyor for the sole purpose of authenticating the survey on which Ms. Parr and Mr. Sindt relied, which the lawyer only belatedly realized had never been recorded and therefore could not be certified and offered as self-authenticated. *See* ER 902(d). The trial court excluded the testimony due to the failure to disclose the surveyor as a witness.

After considering the parties' evidence, making a site visit as requested by the parties, and hearing their argument, the trial court found that while Mr. Hand failed to establish his adverse possession claim, he had established his entitlement to a prescriptive easement. The court's judgment awarded Mr. Hand "a perpetual easement for use as a pathway beginning at a point eight feet from Plaintiff's garage and extending along the line of a previously existing hedge line as shown on [the photograph admitted as] Exhibit 2 in the trial." Clerk's Papers (CP) at 123.

Ms. Parr timely appealed.

## ANALYSIS

Ms. Parr assigns error to three of the court's findings, to its conclusion that Mr. Hand is entitled to a prescriptive easement, to its excluding her testimony of a conversation with Ms. DeClements, and to its exclusion of the testimony of her surveyor. We address the assignments of error in turn.

### I

Ms. Parr first claims that the trial court's findings of fact 7, 11, and 12 are not supported by substantial evidence. Those findings were that:

> 7. Survey shows that the legal boundary line between the Parr and Hand parcels is approximately two feet from the edge of the garage.
>
> . . . .
>
> 11. Exhibit 2 shows a pathway well established on the [Hand[1]] side of the hedge. Testimony and the exhibits indicate that Plaintiff used the pathway in the same manner and location as his predecessor in interest, Mr. and Mrs. DeClements.
>
> 12. Plaintiff has never excluded Defendant from his side of the hedge. Both parties trimmed the hedge on an annual basis.

CP at 121-22.

We review the trial court's factual findings for substantial evidence. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). When reviewing a finding for substantial evidence, "there [must] be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true." *Id*. When conducting such review, we view the evidence and all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support the findings entered, we do not reweigh the evidence and substitute our judgment even though we might have resolved the factual dispute

[1] The trial court's finding states that the footpath is on the Parr side of the hedge, but this is clearly a scrivener's error in light of the undisputed evidence that the footpath ran between the hedge and Mr. Hand's garage.

differently. *Brown v. Superior Underwriters*, 30 Wn. App. 303, 305-06, 632 P.2d 887 (1980).

Mr. Hand first argues that the well-settled rule that unchallenged findings of fact are verities on appeal required Ms. Parr to challenge the findings not only in this court, but also in the trial court—something she did not do. He is incorrect. RAP 2.5(a)(2) states that a party may argue for the first time on appeal that the prevailing party below "fail[ed] to establish facts upon which relief can be granted." Courts often state that the rule refers to unchallenged findings on appeal. *E.g., Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 402, 693 P.2d 708 (1985) ("The findings are unchallenged on appeal; therefore, we consider them as verities for purposes of the appeal."). It is only on appeal that the findings need be challenged. Ms. Parr has separately assigned error to them as required by RAP 10.3(g).

Turning to the challenged findings, Ms. Parr first challenges finding 7, that the boundary line between the properties is "approximately two feet from the edge of the garage." CP at 121. Ms. Parr points to evidence submitted at trial that the distance between the edge of Mr. Hand's garage and his property line was greater—and so wide, at 2.9 to 4.7 feet, to include *all* of what she contends was his very narrow footpath.[2]

[2] She argues that a survey admitted at trial reflects that the southwest corner of the garage to the property line is 2.9 feet, and the southeast corner to the property line is 4.7 feet. Br. of Appellant at 4. The survey was never admitted, however, and is not a part of the record on appeal. *See* RP (Feb. 7, 2011) at 84-85. Her citation to the record is to a

We first note that the distance between the garage and the property line is inconsequential, given the form of the trial court's findings, conclusions, and judgment. Ms. Parr's counsel recognized as much when he informed the trial court during trial that the "boundary line is not the issue in this case." RP (Feb. 7, 2011) at 81. The critical expanse is what the court determined to have been the eight foot width of the footpath, measured from the garage to the north end of the former hedge. While the judgment might have been more technically correct had it awarded a perpetual easement to "*so much of the real property* beginning at a point eight feet from Plaintiff's garage and extending along the line of a previously existing hedge line as shown on Exhibit 2 . . . *as is owned by Chloe Parr*," or language to that effect, the judgment as entered operates to award an easement to however much of the eight feet—be it two feet or five feet—is property belonging to Ms. Parr. Even if finding 7 were stricken, it would not undercut the findings' support for the trial court's conclusions and judgment.

There is sufficient support in the record for the finding. Ms. Parr offered exhibit 23, a drawing of the footpath area prepared by Mr. Sindt based on the 1971 survey and his own measurements. Mr. Hand did not object to the hearsay character of any information incorporated from the 1971 survey and the exhibit was admitted. Mr. Sindt's

---

drawing prepared by Mr. Sindt that incorporated key measurements from the survey, as discussed hereafter.

drawing depicted the property line as being as close to the garage as 2.9 feet at one end. Mr. Hand testified at trial that the distance between one corner of the garage and the bamboo fence that Mr. Sindt constructed, purportedly on the property line, was 34 inches. The trial court's finding that the boundary line was "*approximately* two feet" from the edge of the garage is supported by the record.

Ms. Parr next contests finding 11, and specifically the trial court's determination that "[p]laintiff used the pathway in the same manner and location as his predecessor in interest, Mr. and Mrs. DeClements." CP at 122. She claims that there was no testimony that the DeClementses continuously utilized the path before Mr. Hand purchased the property.

Mr. Hand's and his real estate agent's testimony established that Mr. DeClements viewed the path to be exclusively on his property. That evidence was not countered by Ms. Parr. Testimony that the side yard setback requirement was five feet and that the water line and drain for the DeClementses' home had been under the hedge since 1955 tended to support Mr. DeClements' belief. Evidence was presented that the path was well established at the time of sale to Mr. Hand; Mr. Hand's real estate agent testified that the footpath was well used, and looked like it had been "there forever." RP (Feb. 7, 2011) at 9. Evidence was also presented that Ms. DeClements necessarily used the footpath to maintain a garden along the garage.

While this circumstantial evidence falls short of the evidence Mr. Hand was able to provide as to his own use, the evidence was sufficient to support the court's finding.

Ms. Parr also challenges finding 12, that "Plaintiff has never excluded Defendant from his side of the hedge. Both parties trimmed the hedge on an annual basis." CP at 122. Ms. Parr does not address this finding anywhere in her briefing beyond assigning error to it. Br. of Appellant at 1. We do not consider assignments of error unsupported by argument. *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005); RAP 10.3(a)(6). Regardless, the finding is clearly supported by the record.

The contested findings of fact are supported by substantial evidence.

II

Ms. Parr next assigns error to the trial court's third conclusion of law, that Mr. Hand "established a permanent Prescriptive Easement over the pathway location and width as shown in Exhibit 2, which is at its farthest point from the garage eight feet from the garage corner." CP at 123. Her assignment of error is that the conclusion is "erroneous for lack of substantial evidence in the record." Br. of Appellant at 1.

Whether the elements of a prescriptive easement are met is a mixed question of law and fact. *Lee v. Lozier*, 88 Wn. App. 176, 181, 945 P.2d 214 (1997). Whether the facts found by the trial court and supported by the record establish a prescriptive easement is reviewed for errors of law. *Id*.

The only legal argument we can glean from Ms. Parr's brief is that it was improper to award an easement where, she contends, the entire footpath was on Mr. Hand's property. Br. of Appellant at 4. She makes this argument for the first time on appeal, and it contradicts the factual position she advocated below. In moving for summary judgment, for example, Ms. Parr represented that "[t]he path in question is partially on plaintiff's property and on defendant's property." CP at 74. Her trial brief represented that she would "testify that she gave the DeClements[es] permission to walk on her portion of the footpath." CP at 111. During closing argument, she represented that the center line of the footpath "may have only been six inches" to the north of the property line. RP (Feb. 8, 2011) at 138. Her factual position on appeal not only ignores the fact that we view the evidence in the light most favorable to Mr. Hand, but ignores her own evidence and argument at trial.

The evidence as to the location of the property line was not well developed at trial. And the critical factual premise to this argument by Ms. Parr—that the footpath was extremely narrow, extending at most 2.9 to 4.7 feet from the garage—was clearly disputed and resolved in favor of Mr. Hand. Most importantly, this argument was not raised by Ms. Parr below. It merits no further consideration. RAP 2.5(a).

III

Ms. Parr next argues that the trial court improperly excluded her testimony as to

conversations she had with Ms. DeClements. The court sustained Mr. Hand's objections on the basis of the dead man's statute. Apparently Ms. Parr would have testified that she granted Ms. DeClements permission to use the footpath. She now argues that the dead man's statute does not preclude her testimony under the circumstances and that Mr. Hand waived his right to object on dead man's statute grounds by offering similar testimony.

We review a trial court's evidentiary rulings for an abuse of discretion. *Hoglund v. Meeks*, 139 Wn. App. 854, 875, 170 P.3d 37 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A discretionary decision rests on untenable grounds or is based on untenable reasons "if the trial court relies on unsupported facts or applies the wrong legal standard." *Id*. Questions of law are reviewed de novo. *In re Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996).

The dead man's statute, RCW 5.60.030, provides in relevant part that

> in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased . . . person.

The purpose of the dead man's statute "is to prevent interested parties from giving

self-serving testimony about conversations or transactions with the deceased." *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 791, 150 P.3d 1163 (2007).

Ms. Parr argues that testimony as to what she told Ms. DeClements about permission to use the footpath was not testimony as to a transaction within the meaning of the statute. Br. of Appellant at 5-6. She does not dispute that she is an interested party within the meaning of the statute or otherwise adequately contest its applicability to the case.[3]

A transaction has been described as the "'doing or performing of some business . . . or the management of any affair . . . [and] include[s] a tort and . . . is much broader than a contract.'" *Thor v. McDearmid*, 63 Wn. App. 193, 199, 817 P.2d 1380 (1991) (alterations in original) (internal quotation marks omitted) (quoting *In re Estate of Shaughnessy*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982)). The test is "'whether the deceased, if living, could contradict the witness of his own knowledge.'" *Id*. (quoting

[3] Without citation to authority, Ms. Parr hints in one sentence of her opening brief that the statute might not apply to this case at all. Br. of Appellant at 6 ("How in this case, would the statute protect the interest [of] the deceased De[C]lements[es]?"). This issue has not been adequately argued to merit consideration. Washington courts have applied the dead man's statute in similar proceedings. *See Fies v. Storey*, 21 Wn. App. 413, 419-20, 585 P.2d 190 (1978) (recognizing the statute's applicability in an adverse possession proceeding where the issue was whether the decedent adversely possessed invalidly-deeded property), *overruled on other grounds by Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984); *Kline v. Stein*, 30 Wash. 189, 191-93, 70 P. 235 (1902) (remanding for a new trial due to testimony being mistakenly admitted under the dead man's statute where adverse possession was alleged by the plaintiff).

*King v. Clodfelter*, 10 Wn. App. 514, 516, 518 P.2d 206 (1974)). When it appears that there was a personal transaction with the deceased and the testimony offered tends to show either what did or did not take place between the parties, it must be excluded so long as it concerns the transaction or justifies an inference as to what it really was. *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001).

Given the broad meaning of "transaction," Ms. Parr's excluded testimony falls within its scope. If available to testify, Ms. DeClements could certainly contradict Ms. Parr's testimony.

Ms. Parr next argues that Mr. Hand waived his right to object to her testimony because he "opened the door" by testifying to his own conversations with Mr. DeClements.

The protections afforded by the dead man's statute may be waived when the protected party introduces evidence concerning a transaction with the deceased. *McGugart v. Brumback*, 77 Wn.2d 441, 450, 463 P.2d 140 (1969); *Lennon*, 108 Wn. App. at 175. Once the protected party has opened the door, the interested party is entitled to rebuttal. *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 59-60, 116 P.2d 272 (1941). "'The logic of the cases is that the party who invokes the protection of the statute must himself respect it.'" *Id.* at 60 (quoting *Robertson v. O'Neill*, 67 Wash. 121, 124, 120 P. 884 (1912)). The statute may be as effectually violated by testimony of a

negative character as by affirmative proof of what actually took place. *Martin v. Shaen*, 26 Wn.2d 346, 352, 173 P.2d 968 (1946). However, a waiver by introduction of testimony about one transaction does not extend to unrelated transactions and conversations. *In re Estate of Malloy*, 57 Wn.2d 565, 568, 358 P.2d 801 (1961); *Lennon*, 108 Wn. App. at 175.

Mr. Hand argues that his testimony concerning his conversations with Mr. DeClements dealt only with the property line, not any issue of permissive use of the footpath, thereby constituting only a narrow waiver that preserved his right to object to Ms. Parr's testimony. If his testimony to his conversation with Mr. DeClements had been relevant only to Mr. Hand's own understanding and conduct following his purchase of the property, we would agree. But Mr. DeClements' statement was also relied upon by Mr. Hand as relevant to the crucial last year of Mr. DeClements' ownership of the home. Part of its relevance was its tendency to prove that Mr. DeClements had not been presented with Ms. Parr's claim of ownership and was not relying on permission to use the footpath given to him or his late wife. This negative implication of the testimony could be enough to open the door. *See Bentzen v. Demmons*, 68 Wn. App. 339, 345, 842 P.2d 1015 (1993) (testimony that decedent never told adverse party of an agreement was testimony, in effect, that no such agreement existed); *cf. Shaen*, 26 Wn.2d at 352 (analyzing the issue by noting that the tendency of the adverse party's testimony to negate

the interested party's position was what made the testimony relevant and admissible in the first place).

Even if we allow that Mr. Hand's testimony might have opened the door to some rebuttal testimony by Ms. Parr, however, her failure to create an adequate record demonstrating error or prejudice causes her argument to fail on appeal. A party whose evidence is being excluded has a duty to make an adequate offer of proof:

> "[I]t is the duty of a party to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. If the party fails to so aid the trial court, then the appellate court will not make assumptions in favor of the rejected offer."

*Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 617, 762 P.2d 1156 (1988) (alteration in original) (quoting *Tomlinson v. Bean*, 26 Wn.2d 354, 361, 173 P.2d 972 (1946)). Beyond that basic obligation, when a party cannot offer legal authority for its position, is invited by the trial court to do so, and then fails to do so, the party's failure to present adequate legal grounds for the court to make an informed decision on the issue even more clearly forecloses its right to argue error on appeal. *State v. Jamison*, 105 Wn. App. 572, 586-87, 20 P.3d 1010 (2001) (claim was not reviewable on appeal where court had agreed to await further briefing that defendant never provided).

Ms. Parr did not make a record adequate to meet her burden on appeal. Too little testimony was presented for us to know whether her testimony would have been

significant or whether Mr. Hand's testimony had opened the door to it. When the topic of Ms. Parr's excluded conversation with Ms. DeClements was first volunteered by Ms. Parr during her direct examination by Mr. Hand's lawyer, only the following was said:

> Q So, you never indicated to [Mr. Hand] that you felt he was using part of your ground, correct?
> A No, I never said anything to [Mr. Hand], but it was Mrs. DeClements one time, we talked. She says—
> [Mr. Hand's lawyer]: I object. There's the Dead Man's Statute.
> THE COURT: Okay.

RP (Feb. 7, 2011) at 78. Following this objection, Mr. Hand's lawyer moved on to other questions. A short time later, during cross-examination of Ms. Parr by her own lawyer, the topic of Ms. Parr's having spoken with Ms. DeClements was approached again, but an objection was again promptly raised:

> Q . . . Now, back when Mr. and Mrs. DeClements lived there, did you ever tell Mrs. DeClements that she could walk across any portion of your part of the property?
> A Yes, we did talk about that, because—
> [Mr. Hand's lawyer]: Objection.
> A —because she was concerned about it. She kept thinking that maybe her plants—
> THE COURT: There's an objection on the record.

*Id.* at 92. The court tentatively sustained the objection, so nothing more was heard from Ms. Parr about the conversation. It was, of course, proper for Mr. Hand to object promptly. The proper course for Ms. Parr to follow, in order to make an adequate record,

was to make an offer of proof. She made none.

The legal basis for objection was also inadequately raised in the trial court. When the objection to Ms. Parr's testimony on dead man's statute grounds was raised the first time, her lawyer did not respond at all; when it was raised the second time, her lawyer protested only, "We have the same problem with Mr. Hand's testimony with regard to representations about the boundary," to which the trial court responded, "But there was no objection made." *Id.* at 93. In sustaining the objection on the basis of the dead man's statute, the trial court said, "I am going to sustain the objection at this point. Tomorrow if you want to bring in some authority otherwise, you can do so." *Id.* Ms. Parr did not provide any further authority for overruling Mr. Hand's objection before closing her case.

From the record available, we cannot determine whether Ms. Parr's conversation with Ms. DeClements, at an unknown time, is sufficiently related to Mr. Hand's conversations with Ms. DeClements' husband, at a later time, to have opened the door for purposes of the dead man's statute. It is doubtful Ms. Parr could demonstrate prejudice from exclusion of her testimony as to her conversation with Ms. DeClements, given the absence of any substantiation or other support for permissive use and the substantial evidence presented by Mr. Hand. In any event, because she failed to make an offer of proof or provide the authority for her position requested by the court, we will not draw assumptions in her favor. She has failed to meet her burden of demonstrating error and

prejudice.

IV

Ms. Parr last argues that the trial court erred by excluding the testimony of the surveyor who prepared her 1971 survey, whom she did not disclose as a witness until the first day of trial. She argues that because her failure to disclose the witness in her answer to Mr. Hand's interrogatories was not willful, the sanction was unwarranted. We review a trial court's discovery rulings for abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

In punishing a discovery violation, "the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997). Although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, "the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." *Mayer*, 156 Wn.2d at 688. A violation of a court order without reasonable excuse is deemed willful. *Burnet*, 131 Wn.2d at 510.

Ms. Parr's failure to disclose her surveyor as a witness was without reasonable excuse and was therefore a willful violation. Although Ms. Parr does not raise the issue,

the trial court failed to consider a lesser sanction on the record before excluding the witness.

Even if the trial court improperly excluded the testimony, any error was harmless. Ms. Parr represented that she sought to call the surveyor solely to have him authenticate a survey showing the boundary line between the properties. Given Mr. Sindt's testimony and the admission of exhibit 23, his drawing incorporating key distances determined from the survey, the survey itself would likely have been cumulative. And as earlier discussed, the location of the property line was inconsequential to the trial court's judgment, which established the scope of the easement without reference to that line.

Finding no reversible error or abuse of discretion by the trial court, the judgment is affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_____
Siddoway, A.C.J.

WE CONCUR:

_____
Brown, J.

_____
Kulik, J.