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**COURT OF APPEALS, DIVISION II OF THE
STATE OF WASHINGTON**

NO. 40966-6-II

In Re the Guardianship of:
THOMAS ROBINSON

Appellant,

v.

Department of Social and Health
Services, Adult Protective Services,
STATE OF WASHINGTON

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JOHN R. HICKMAN

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ARGUMENT OF THE CASE	
A.	<i>Temporary Financial Manager</i>	1
	1. Objection to Testimony Not Waived	1-5
	2. Manifest Constitutional Error Not Required	6-10
	3. If Constitutional Error, Error Not Harmless	10-11
B.	<i>Detained and Evaluated at Western State Hospital</i>	11
	1. Objection to Improper References Preserved	11-13
	2. Reference to Western State Not Invited Error	13-14
3	<i>Inadequate Medical Report and Testimony</i>	15-16
II.	CONCLUSION	16-17

TABLE OF AUTHORITIES

CASES

<i>In re Detention of Audett., 158 Wn.2d 712, 147 P.3d (2006)</i>	2-3
<i>In Re The Guardianship of Stamm, 121 Wash App. 830, 837, 91 P.3d 126 (2004)</i>	15-16
<i>Jones v. Stebbins, 122 Wn.2d 471, 860 P.2d 1009 (1993)</i>	7-10
<i>State v. Guloy, 104 Wn.2d 412, 705 P.2d, 1182 (1985)</i>	10-11
<i>State v. Olson, 126 Wn.2d 315, 893 P.2d 629</i>	4-5

REFERENCE MATERIAL

RCW 11.88... .. 11, 15, 16
RCW 71.05 12, 17

WASHINGTON STATUTES

RCW 11.88.010 11
RCW 11.88.045 (4)15, 16, 17
RCW 71.05.390 12, 17

REGULATIONS AND RULES

RAP 1.2(a) 1, 5, 10, 13, 16
RAP 2.5(a) 1, 6, 9
RAP 10.3(a)(3) 4
RAP 18.8(b) 2

I. ARGUMENT OF THE CASE

A. Appellant's Assignment of Error concerning the admission of testimony by the temporary financial manager is properly before this Court.

- 1. Mr. Robinson did not waive his objection to testimony concerning Mr. Messerschmidt's role as temporary financial manager.**

In its brief the State cites to RAP 2.5(a) to suggest that Appellant is barred from asserting on appeal that testimony from the court-appointed temporary financial manager was admitted in error. (RB, pg. 11, lines 1-2.) The State contends that the issue was waived when trial counsel failed to object. (RB, pg. 10, line 22.) Appellant agrees that, ideally, trial counsel should have objected.

However, the rules of appellate procedure do not require attorneys to be perfect. RAP 2.5(a) merely says that the appellate court may refuse to review a claim of error which was not raised in the trial court. The appellate court is in no sense precluded from considering Appellant's assignment of error. RAP 1.2(a) sets forth the standard which guides our appellate courts. It is reproduced as follows:

RULE 1.2. Interpretation and waiver of rules by court.

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance

with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8 (b).

None of the restrictions enumerated in Rule 18.8 (b) apply in our case. Appellant seeks only to assign error concerning the admission of testimony by the temporary financial manager; and, Appellant is not even requesting an extension of time to do so.

In its brief the State expresses concern about having to face newly asserted errors or new theories for the first time on appeal. (RB, pg. 11, line 8-10.) But, the State has always known of Appellant's concern about the role of the temporary financial manager in his life. Appellant objected to the appointment of the temporary financial manager. (CP 31). Appellant also assigned error to the Order Appointing Temporary Manager in Appellant's Motion for New Trial (CP 94).

Appellant agrees that trial counsel should have objected to the testimony of the temporary financial manager. However, it was Judge Hickman who approved the appointment in the first place. (CP 32). It seems unlikely that Judge Hickman would have stricken the testimony of a temporary financial manager whose appointment he approved, even if trial counsel had interposed an objection.

The State also cites the case of *In re Detention of Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006). (RB, pg. 11, lines 16-21). Defendant Audett

had undergone a CR 35 mental examination conducted by Dr. Rawlings. Audett did not object to the admission of evidence derived from the examination at trial, and he was not allowed to raise the issue for the first time on appeal. The State reasons that, therefore, Appellant Robinson should not be able to raise the issue of the temporary financial manager's testimony for the first time on appeal, either. (RB, pg. 11, line 20-21).

The State fails to apprehend how Audett is different from our case. In Audett, the prosecution was seeking to have defendant Audett undergo a second examination by a Dr. Thomas. Audett objected that such an examination would be unfairly cumulative and duplicative of the examination conducted by Dr. Rawlings. Audett did not merely fail to object to the testimony of Dr. Rawlings; rather, Audett relied upon the examination of Dr. Rawlings to serve his trial strategy of preventing a second examination.

On appeal Audett, a repeat sex offender, cynically sought to object to the testimony of Dr. Rawlings after having relied on it at trial. In contrast, Appellant herein is a lifelong, law-abiding citizen who never sought to rely on the testimony of the temporary financial manager to serve any purpose of his own. The failure of trial counsel to object to the testimony of the temporary financial manager was a mere mistake, not a trial strategy. Appellant should not be penalized on that account.

The analogous case to the case of Appellant herein is *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629. Defendant Olson was charged with possession of a controlled substance with intent to manufacture after police, executing a search warrant, discovered a marijuana growing operation at his residence. Olson at 317. Olson moved to suppress the evidence. The trial court granted the motion and suppressed the evidence, and a dismissal followed. The State appealed. Ibid.

In its opening brief the State argued that the suppression order should be vacated, the order of dismissal reversed, and the case remanded for trial on the merits. Olsen at 318. Olson filed a motion to dismiss along with his respondent's brief. The motion to dismiss was based on the grounds that the state failed to assign error to the dismissal order in its opening brief. In its reply brief the State assigned error to the dismissal order. Ibid. The Court of Appeals reached the merits of the case, reversed the trial court, and remanded for trial. Olson appealed the denial of his motion to dismiss to the Supreme Court. Ibid.

Our Supreme Court noted that the State had not strictly complied with RAP 10.3(a)(3) because the State initially failed to assign error to the order of dismissal. Olson at 319. However, the Court declined to adopt a rigid rule that technical violations of the rules of appellate procedure should preempt an issue from being raised on appeal.

After analyzing several cases the Court said, in pertinent part, the following: “. . . Under these circumstances, it cannot be said that the Court of Appeals abused its discretion under RAP 1.2(a) in deciding to consider the merits of the case, promoting substance over form” Olson at page 323. The Court went on to say that there was no compelling reason why the case should not be decided on the merits. Ibid. *See State V. Olson*, 126 Wn.2d 315, 323 - 324, 893 P.2d 629;

“There is no compelling reason why this case should not be decided on its merits. The Court of Appeals properly exercised its discretion in this case and we therefore affirm...”

In Appellant’s case, as in the case of Olson, we are dealing with technical violations of the rules of appellate procedure. In Olsen, the State failed to assign error to a dismissal order; in Appellant’s case, trial counsel failed to object to testimony from the temporary financial manager. In neither case was the opposing party unduly burdened.

Indeed, in our case, the State always knew of the Appellant’s concern about the temporary financial manager. Appellant acted promptly by assigning error in his opening brief. Appellant respectfully suggests that this Court should be guided by the spirit of RAP 1.2(a). Appellant asks this Court to promote substance over form, and to consider the impact of the testimony of the temporary financial manager on its merits.

2. Appellant does not have to demonstrate manifest constitutional error to raise an issue on appeal.

Next, the State asserts that Appellant should be barred from raising this issue on appeal absent a showing of manifest constitutional error. (RB, pg. 12, line 13-14.) Appellant believes that the State has misconstrued RAP 2.5(a) in formulating this opinion. RAP 2.5(a) contains the following language:

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for the first time on review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

The State is relying on RAP 2.5(a)(3). (RB, ppg. 12, line 15-16).

However, Appellant reads the rule to say that questions of jurisdiction, failure to establish grounds for relief, and manifest constitutional error are issues that appellate courts MUST consider. Appellant does not read the rule to say that the Court cannot consider other issues.

In pages 12 and 13 of its brief, the State cites a string of cases in arguing that Appellant must demonstrate manifest error of constitutional magnitude. Every case involves appeals raised by criminal defendants. Appellant is a civil litigant. He calls the Court's attention to the matter of *Jones v. Stebbins*, 122 Wn.2d, 471, 860 P.2d 1009 (1993).

On April 18, 1986, Jones was injured by the allegedly tortious conduct of Stebbins. Jones filed a complaint on March 21, 1989, in King County Superior Court. Jones at 473. On May 26, 1989, Jones hired a process server to perform personal service on Stebbins. The process server believed that he served Stebbins on June 15, 1989, though he failed to inform Jones' attorney of the service. Ibid.

On June 19, 1989, not having been notified of successful personal service, Jones obtained an ex parte order allowing him to serve Stebbins by certified mail. Jones mailed copies of the summons and complaint that day. Jones at 474. Stebbins filed his Notice of Appearance on July 11, 1989. Ibid.

On November 27, 1990 Stebbins filed his answer in which he raised the affirmative defense that the action was barred by the statute of limitations. Stebbins claimed he had not been served the complaint and summons until June 22, 1989—more than three years after the alleged

tortious act and more than 90 days since the filing of the summons and complaint on March 21, 1989. Jones at 474.

On April 15, 1991, Stebbins filed a motion to dismiss on the basis that the service by mail was not completed within the time allowed by the statute of limitations. Jones challenged the motion to dismiss on the ground that Stebbins had been personally served on June 15, 1989. Jones at 474. The trial court entered an order of dismissal. On June 26, 1991, Jones filed a Notice of Appeal to the Court of Appeals. Ibid.

The Court of Appeals found no evidence that Stebbins had been personally served on June 15, 1989. During oral argument, however, Jones asserted for the first time that service by mail was valid. Jones at 474. The Court of Appeals reversed the trial court's dismissal and remanded the case for further proceedings. *JONES v. STEBBINS*, 67 Wash. App. 896, 841 P.2d 791 (1992). Jones at 474. Stebbins filed a petition for review which was granted. Ibid.

Stebbins, citing RAP 2.5(a), argued to the Supreme Court that Jones should not have been allowed to raise the issue of service by mail at the appellate level, because Jones failed to raise the issue before the trial court. Jones at 479. Our Supreme Court disagreed, saying in pertinent part as follows:

“However, this rule does not apply when the question raised affects the right to maintain the action. New Meadows Holding Co. v. Washington Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984).”

“At the outset, we note that RAP 2.5(a) is permissive in nature and does not automatically preclude the introduction of an issue at the appellate level. Likewise, under RAP 12.1(b), an appellate court may consider an issue not set forth in the briefs. Thus, the Court of Appeals had authority to consider Jones’ contentions concerning the applicability of CR 4(d)4 and whether “Citizens” controlled that issue.”

“If Jones had not raised the issue of the applicability of CR 4(d)(4), the Court of Appeals would have affirmed the trial court’s dismissal, since the court rejected Jones’ other contentions. Therefore, since Jones’ argument was essential to maintain the action, the exception from New Meadows applies. We hold that the Court of Appeals in this case properly allowed Jones to raise an issue for the first time on appeal.” ‘ ‘ ‘ Jones at 479, 480.

Appellant’s situation is analogous to Jones. In his opening brief Appellant assigned three points of error: (1) Our issue under discussion here, the admission of testimony from the temporary financial manager; (2) Improper references to Western State Hospital; (3) The inadequacy of the medical report. Appellant believes all three assignments of error to be meritorious.

However, Appellant cannot presume how much weight this Court will give any of his assignments of error. Appellant therefore contends that consideration of the financial manager's testimony is essential to maintain this action. The Court should act in the spirit of RAP 1.2(a) and promote substance over form. The Court should consider the issue of the testimony of the temporary financial manager on its merits.

3. If this Court Determines there was Manifest Constitutional Error, The Error Cannot Be Assumed To Be Harmless

Appellant has argued that he does not have to demonstrate manifest constitutional error. However, in section A3 of its brief the State invites the Court to assume (for that argument only) that manifest constitutional error occurred. (RB, ppg.15, lines 1-4). The State then contends the error was harmless. (RB ppg. 15, line 5).

The case of *State v. Guloy*, 104 Wn.2d 412, 705 P.2d, 1182 (1985) defines harmless error: "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Guloy* at 425. "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *Guloy* at 425 (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)).

The State argues that, based on all of the evidence presented to the jury, a reasonable juror would have found appellant incapacitated as to both his person and his estate. (RB, ppg. 16, lines 2-6). The State fails to understand that all the evidence presented to the jury is not the standard our Supreme Court uses in its harmless error analysis. Rather, our highest Court applies the “overwhelming untainted evidence” test. Guloy at 426.

Under the “overwhelming untainted evidence” test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to the conclusion which the jury reached. Ibid. This Court has yet to determine what evidence in this proceeding is tainted or untainted.

Upon making that determination, This Court can apply the “overwhelming untainted evidence” test. Until that test is performed, there can be no assumption that the admission of testimony from the temporary financial manager was harmless error. We must remember that the standard of proof in guardianship proceedings is clear, cogent, and convincing evidence. RCW 11.88.010.

B. The trial court improperly allowed references to Western State Hospital, and it was the State’s witness who first intimated that Appellant Robinson was detained there.

- 1. The trial court's order on Appellant's motion in limine did not sufficiently restrict references to Western State Hospital, and Appellant's trial counsel properly preserved the issue for appeal.**

The State asserts that if a trial court applies the correct legal standard, there has not been an abuse of discretion. (RB, pg. 16, line 25). Unfortunately, the correct legal standard was not applied here. RCW 71.05.390 clearly states that no reference to Appellant's being at Western State was permissible unless (1) Appellant executed a release, or (2) the disclosure of Appellant's detention fell within one of nineteen enumerated exceptions. The disclosure did not fall under any of the exceptions.

The State's acknowledges the statutory violation in its own words: "The trial court did permit Dr. Parmenter to testify that she was employed at Western State Hospital". (RB, pg. 17, lines 8-10). The State's brief goes on to say this: "Specifically, the jury heard testimony from Dr. Parmenter that she was employed at Western State hospital, saw patients there, and met with Mr. Robinson for purposes of a neuropsychological examination of Mr. Robinson." (RB, pg. 17. lines 16-19).

The jurors hearing this testimony could only conclude that Appellant was detained at Western State. There is no other reasonable inference. A trial court rightly has discretion to do many things, but

disregarding a statute is not within a trial court's discretion. Permitting any reference to Appellant's detention at Western State was error.

The State then argues that trial counsel failed to object to Dr. Parmenter's testimony. In fact, trial counsel brought a motion in limine to exclude any references to Appellant being at Western State. (CP 42). The trial court ruled that Dr. Parmenter could testify to being employed at Western State. (CP 42).

Had trial counsel objected to Dr. Parmenter's testimony regarding her place of employment, the trial court surely would have overruled him anyway. Trial counsel properly assigned error to testimony concerning Appellant's detention at Western State in his Motion for New Trial (CP 94). As noted supra, RAP 1.2a promotes substance over form so that this Court can decide issues on their merits.

2. Reference to Mr. Robinson's Status As A Patient at Western State Hospital Was Not Invited Error.

The State attempts to blame Appellant's trial counsel for allowing the jury to infer that Appellant was detained at Western State. Trial counsel supposedly committed this error by eliciting testimony from Dr. Parmenter that Appellant was hospitalized when she conducted her assessment of him. (RB, Pg. 18, lines 19-21).

In fact, the State's assertion reverses the chronology of events at trial. Dr. Parmenter was sworn in as the State's witness on April 20, 2010. RP2, 126. She testified that she was employed at Western State Hospital. RP2, 127. Dr. Parmenter further testified that she saw patients at Western State, and that she met with Appellant to conduct a neuropsychological examination. RP2, 128. Said testimony intimated that Appellant was at Western State Hospital.

By contrast, trial counsel did not commence cross-examination until April 21st, 2010. RP2, 162. On direct examination Dr. Parmenter made several references to Appellant presenting an unkempt appearance. RP2, 149-162. Trial counsel was eliciting testimony to show that Appellant could not take charge of his appearance, or anything else, because he was involuntarily detained.

The State wants to have it both ways. The State introduced testimony about Appellant's appearance to buttress its contention that he was incapacitated. Trial counsel had a duty to show that Appellant was not in control of affairs. In any event, the testimony in question consisted of only one or two lines. RP2, 166. The doctrine of invited error does not apply here.

C. The Two Written Medical Reports And Supplemental Testimony From The Guardian Ad Litem Did Not Comply With The Requirements Of RCW 11.88.045(4), Because The First Medical Report Was Hearsay.

In his opening brief Appellant demonstrated that the medical report of Dr. Brett Parmenter did not meet the requirements of the statute. Specifically, her report did not identify what medications Appellant was taking nor the effect of the medications upon him. (AB, pg. 15, lines 4-12). In its brief the State does not deny the shortcomings in Dr. Parmenter's report.

Instead, the State argues that the initial medical report, completed by Dr. Karanam on July 14, 2009, satisfied the requirements of the statute. (RB, pg. 21, lines 9-12). Appellant agrees that Dr. Karanam's report, filed October 1, 2009, would satisfy the statute if this guardianship were uncontested.

But, this guardianship went to trial. In a trial setting Dr. Karanam's report was hearsay. Appellant acknowledges that guardianship proceedings permit some use of hearsay. A guardian ad litem may be permitted to testify to her opinions and state the basis for those opinions, including through the use of hearsay testimony. *In re Guardianship of Stamm*, 121 Wn. App. 830, 837, 91 p.3d 126 (2004).

However, a guardian ad litem's testimony must not be used as a vehicle to present otherwise inadmissible hearsay. *Stamm at 838*. That is what happened in this case. Julie Wiegand, the guardian ad litem, testified to the contents of Dr. Karanam's report. RP, pg. 246, 247. Since Ms. Weigand did not prepare the report, it does not fit a business records exception.

The State could have called Dr. Karanam to testify about his report. It did not. Appellant was denied his right to cross-examine a witness. We are left with two inadequate medical reports. Dr. Karanam's report is hearsay; and, Dr. Parmenter's report fails to identify Appellant's medications. Under these facts the requirements of RCW 11.88.045(4) have not been satisfied.

II. CONCLUSION

Appellant's assignment of error concerning the admission of testimony from the temporary financial manager is properly before this Court. RAP 1.2(a) calls for a liberal construction of the rules to elevate substance over form and allow cases to be decided on their merits. Consideration of the issue is necessary to maintain Appellant's action, and the admission of the temporary financial manager's testimony cannot be assumed to be harmless error.

The trial court did not properly limit references to Appellant's detention at Western State. None of the exceptions specified in RCW 71.05.390 applied, and Appellant never signed a release. Objection to the references was preserved by Appellant's Motion in Limine to exclude the references. Disclosure of Appellant's detention at Western State Hospital was not invited error on the part of Appellant's trial counsel.

The two medical reports relied on by the State do not satisfy the requirements of the statute. Dr. Karanam's report was hearsay, and the guardian ad litem's testimony about his report was hearsay. Appellant was denied the opportunity to cross-examine Dr. Karanam. Dr. Parmenter's report failed to identify Appellant's medications and the affect the medications had on him.

RESPECTFULLY SUBMITTED THIS 3 DAY OF JUNE, 2011

BONNER LAW OFFICE



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COURT OF APPEALS
DIVISION II
JUN 14 2011
STATE OF WASHINGTON
BY cm

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that on this date I filed with the Court of Appeals, Division II, and served via U.S. mail, postage prepaid, a copy of the foregoing Appellant Reply Brief, on the following parties of record:

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