

NO. 40966-6

COPIED TO FILE  
11/11/11 - 3:01 PM '11  
BY: 

---

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

---

In re the Guardianship of:  
Thomas Robinson, An Incapacitated Person,  
Appellant.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

Margaret M. Kennedy  
Assistant Attorney General  
WSBA #27558  
PO Box 40124  
Olympia, WA 98504  
(360) 586-6481

ORIGINAL

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT.....	10
	A. The Trial Court Properly Allowed Mr. Messerschmidt’s Testimony When Mr. Robinson Did Not Object, Did Not Point To Any Manifest Constitutional Error, And Any Resulting Error Was Harmless.....	10
	1. Mr. Robinson Waived His Objection To Testimony Concerning Mr. Messerschmidt’s Role As Temporary Financial Manager.....	10
	2. Assuming For Purposes Of Argument That This Issue Was Properly Before This Court, There Was No Manifest Constitutional Error.....	12
	3. If This Court Determines That There Was Manifest Constitutional Error, The Error Was Harmless.....	15
	B. The Trial Court Properly Allowed Limited References To Western State Hospital, And The Only Arguable Reference To Mr. Robinson’s Status As A Patient At Western State Hospital Was Provided In Response To A Question Asked By Mr. Robinson’s Counsel.....	16
	1. The trial court’s order on Mr. Robinson’s motion in limine properly restricted references to Mr. Robinson’s status at Western State Hospital, the witnesses fully complied with the court order limiting such references, and Mr. Robinson’s counsel failed to object to the testimony he now claims was in error.....	16

2.	Reference To Mr. Robinson’s Status As A Patient At Western State Hospital Was Invited Error .....	18
C.	The Trial Court Properly Found That The Two Written Medical Reports And Supplemental Testimony From The Guardian Ad Litem Complied With The Requirements Of RCW 11.88.045(4) When The Initial Medical Report Submitted By The Guardian Ad Litem Fully Complied With The Statutory Requirements .....	20
V.	CONCLUSION .....	25

## TABLE OF AUTHORITIES

### Cases

<i>City of Seattle v. McCoy</i> , 101 Wn. App. 815, 4 P.3d 159 (2000).....	11
<i>Falconer v. Stevenson</i> , 184 Wash. 438, 51 P.2d 618 (1935) .....	22
<i>Fisher Bros. Corp. v. Des Moines Sewer Dist.</i> , 97 Wn.2d 227, 643 P.2d 436 (1982).....	23
<i>In re Detention of Audett</i> , 158 Wn.2d 712, 147 P.3d 982 (2006).....	11, 12
<i>In re Guardianship of Healey</i> , 140 Wn. App. 1020, 2007 WL 2411688 (Wash. Ct. App., Aug. 27, 2007) .....	23, 24
<i>In re Guardianship of McGill</i> , 33 Wn. App. 265, 654 P.2d 705 (1983).....	22
<i>In re Guardianship of Stamm</i> , 121 Wn. App. 830, 91 P.3d 126 (2004) .....	21
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	16, 17
<i>In re Teeters</i> , 173 Wash. 138, 21 P.2d 1032 (1933) .....	22
<i>In re the Application of Santore</i> , 28 Wn. App. 319, 623 P.2d 702 (1981).....	22, 23
<i>Rasmussen v. Bendotti</i> , 107 Wn. App. 947, 29 P.3d 56 (2001).....	22
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	11

<i>State v. Henderson,</i> 114 Wn.2d 867, 792 P.2d 514 (1990).....	19
<i>State v. Kirkman,</i> 159 Wn.2d 918, 155 P.3d 125 (2007).....	13
<i>State v. Korum,</i> 157 Wn.2d 614, 141 P.3d 13 (2006).....	19
<i>State v. Mares,</i> ___ Wn. App. ___, 248 P.3d 140 (2011).....	15
<i>State v. Markle,</i> 118 Wn.2d 424, 823 P.2d 1101 (1992).....	16
<i>State v. McFarland,</i> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	11, 13
<i>State v. O’Hara,</i> 167 Wn.2d 91, 217 P.3d 756 (2009).....	14
<i>State v. Scott,</i> 110 Wn.2d 682, 757 P.2d 492 (1988).....	12, 13, 14
<i>State v. Tolia,</i> 135 Wn.2d 133, 954 P.2d 907 (1998).....	11
<i>State v. Wakefield,</i> 130 Wn.2d 464, 925 P.2d 183 (1996).....	19
<i>State v. WWJ Corp.,</i> 138 Wn.2d 595, 980 P.2d 1257 (1999).....	12, 13

**Statutes**

RCW 11.88 .....	14
RCW 11.88.045(4).....	8, 9, 20, 21¶
RCW 11.88.045(4)(g) .....	24

RCW 71.05.090 ..... 17, 18  
RCW 74.34.067(5)..... 2  
RCW 74.34.067(6)..... 2

**Rules and Regulations**

GR 14.1(a)..... 23  
RAP 2.5(a) ..... 11, 12  
RAP 2.5(a)(3)..... 12  
WAC 388-71-0110..... 2

## I. INTRODUCTION

In March 2009, The Department of Social and Health Services Adult Protective Services (APS) received a referral alleging that Thomas Robinson, a 73-year-old man, was neglecting himself after he left a skilled nursing facility against medical advice and returned home. It was alleged that Mr. Robinson was unable to independently provide for his health, safety, finances, and well-being. Mr. Robinson was adamant that he did not need assistance and, after multiple attempts to secure less restrictive alternatives, the Department filed a petition for the appointment of a guardian of the person and estate for Mr. Robinson. A trial was held in which a jury found that Mr. Robinson was incapacitated with respect to both his person and his estate.

Mr. Robinson argues that the trial court erred by allowing testimony that a temporary financial manager had been appointed for Mr. Robinson prior to the commencement of the jury trial. He also argues that the trial court erred when it permitted limited references to Western State Hospital during the jury trial. Finally, he asserts that the statutorily required medical report filed with the court by the guardian ad litem was insufficient in that it did not contain a list of Mr. Robinson's medications and any potential effect those medications would have on his ability to understand the proceedings. However, Mr. Robinson is incorrect in these

assertions. He waived his objection to the testimony of the temporary financial manager by failing to object at trial, the court did not abuse its discretion in permitting limited references to Western State Hospital, and the first medical report filed in this proceeding met the statutory requirements for a medical report in a guardianship matter.

## **II. STATEMENT OF THE ISSUES**

1. Did the trial court properly allow testimony that a temporary financial manager had been appointed to handle Mr. Robinson's financial matters during the pendency of the guardianship petition when counsel waived any objection at the time of trial?
2. Did the trial court properly allow limited testimony that Mr. Robinson was evaluated by a neuropsychiatrist at Western State Hospital, and did Mr. Robinson waive any objection to testimony revealing his status as a patient at Western State Hospital when his counsel opened the door to the testimony?
3. Did the trial court properly find that the medical reports filed with the court satisfied the statutory requirements of RCW 11.88.045(4)?

## **III. STATEMENT OF THE CASE**

APS provides protective services to vulnerable adults who have been the victims of abandonment, abuse, neglect, or financial exploitation. RCW 74.34.067(6); WAC 388-71-0110. If a victimized vulnerable adult is incapacitated and, therefore, unable to consent or decline protective services, APS may petition for the appointment of a guardian. RCW 74.34.067(5).

APS staff had been involved with Thomas Robinson several times between 2007 and 2009, and was aware that he had been repeatedly hospitalized for issues related to his alcoholism. CP at 62-63. He had been diagnosed with alcoholism, diabetes, dementia, congestive heart failure, and Korsakoff's disease. *Id.* RP3<sup>1</sup> at 152, 155, 160, 243-44. Korsakoff's disease, a condition related to nutritional deficiency as a result of alcoholism, results in profound memory problems. RP3 at 160.

Mr. Robinson had a pattern of frequent hospitalizations because he was unable to adequately conduct many of his activities of daily living, such as handling his complex medication regimen and personal care issues. RP3 at 245-47; CP at 23-24. He often became dehydrated and suffered from other medical problems related to his consumption of alcohol. RP3 at 251-53, 62-63. During each hospitalization, the hospital would work with Mr. Robinson to ensure that he was taking his medications properly. RP2 at 62-63. Frequently, Mr. Robinson would leave the hospital against medical advice, often without filling his necessary prescription medications, and almost always without any caregiving assistance. RP2 at 62-63, 67-68. Once home, Mr. Robinson would begin drinking again and his situation would deteriorate to the point

---

<sup>1</sup> RP3 refers to the report of proceedings from April 20, 2010.

that he would again need to be hospitalized. RP2 at 62-63, 67-68; RP3 at 251-55.

In February 2009, during one of his hospitalizations, Mr. Robinson was assessed by an occupational therapist to determine whether he could live independently, without caregiving or home health services. RP3 103-04. The occupational therapist concluded that Mr. Robinson was not safe to live independently and that he needed assistance with many of his activities of daily living, including medical decision-making, money management, transportation, and using the telephone. RP2 at 103-04; Ex. 1. Other similar assessments conducted during the same time period were consistent with the occupational therapist's assessment; Mr. Robinson was in need of 24-hour care and supervision. RP2 at 108.

In February 2009, Mr. Robinson was discharged from the hospital to Roo-Lan Healthcare Center, an assisted living and skilled nursing facility. RP2 at 69-70, 73. On March 19, 2009, Mr. Robinson left Roo-Lan against medical advice and again refused any caregiving assistance. RP2 at 69-70.

Roo-Lan contacted APS on March 19, 2009, to report that Mr. Robinson had left the facility against medical advice without his prescribed medications and without any caregiving services in place. RP2 at 68-69. The referent further indicated that Mr. Robinson had failed an

independent living assessment, and that he needed to have in-home caregiving services if he were going to reside in the community. CP at 1-7. Lisa Gilman, an APS social worker, was assigned to investigate the allegations. RP2 at 68.

Ms. Gilman met with Mr. Robinson at his apartment on March 23, 2009. RP2 at 70. At this visit, she found Mr. Robinson's apartment in disarray. RP2 at 70. The floors and sparse furniture were badly stained, there were beer bottles throughout the apartment, and clothes were strewn all over the bedroom. RP2 at 70. Mr. Robinson did not appear to be taking his medications as prescribed, and he was only aware of needing one medication, although, he actually requires a total of approximately 17 different prescriptions to treat his medical conditions. RP2 at 72; RP3 at 243.

Ms. Gilman returned to Mr. Robinson's apartment on April 13, 2009. RP2 at 77. Mr. Robinson was wearing the same clothes that he had been wearing at her last visit, three weeks earlier, and they were significantly stained. RP2 at 78-79. The apartment smelled of rotten food, and his personal hygiene was not good. RP2 at 79. There were still visible stains on the floors, and there were significantly more bottles of hard liquor in the apartment than at Ms. Gilman's last visit. RP2 at 78.

On May 8, 2009, Ms. Gilman returned to Mr. Robinson's apartment for a third time. RP2 at 82, 89-90. Mr. Robinson was not home, but because of strong odors emanating from the apartment, the apartment manager unlocked the apartment so they could ensure that Mr. Robinson was not in any danger. RP2 at 82; Ex. 10. The apartment had declined since her last visit. *Id.* There were more empty alcohol bottles, more empty food cartons littered throughout the apartment, and more garbage and stains on the floor. *Id.*

Mr. Robinson was hospitalized again on or about May 14, 2009. RP2 at 90-91. He agreed to return to Roo-Lan Healthcare Center on June 12, 2009, only to again leave the facility against medical advice in October 2009. RP2 at 93.

On June 25, 2009, APS petitioned for the appointment of a guardian of the person and estate of Mr. Robinson. CP at 1-7. Mr. Robinson opposed the guardianship petition and requested a jury trial. RP1, 2, 3, and 4. Julie Weigand was appointed guardian ad litem for Mr. Robinson, and on February 12, 2010, Clif Messerschmidt was appointed his temporary financial manager. CP at 8-13, 71-72.

Upon Mr. Robinson's departure from Roo-Lan in October 2009, he again returned home to live independently. RP2 at 111. Between October 2009 and December 2009, he was hospitalized three or four more times

for issues related to his drinking. *Id.* On January 7, 2010, Ms. Weigand visited Mr. Robinson's apartment and was let in by the apartment manager. RP3 at 259. She discovered that his apartment was filthy, with feces on the floor, rotting food left out, garbage cluttering the apartment, and a rancid odor emanating from the interior of the apartment. RP3 at 259-60. Eventually, Mr. Robinson was involuntarily detained at Western State Hospital, where he remained at the time of the jury trial for the guardianship petition. CP at 47-50.

A twelve-person jury trial was held April 19 through April 22, 2010. RP1, 2, 3, and 4. At trial, Mr. Messerschmidt, who was also the proposed guardian, testified that he had been appointed by the Superior Court to address the management of Mr. Robinson's finances, obtain and handle his mail, determine whether it was appropriate to terminate his lease, remove Mr. Robinson's belongings from his apartment, clean his apartment, and pay for the storage of Mr. Robinson's personal property. RP3 at 185-86. Although counsel had objected to Mr. Messerschmidt's appointment as temporary financial manager, CP at 63-68, he did not object to or seek to limit the scope of Mr. Messerschmidt's testimony. RP3 at 185-86. In addition, Mr. Robinson's counsel did not object to the testimony of Ms. Weigand concerning these same facts. RP3 at 255-56.

Just prior to trial, Mr. Robinson's counsel made a motion in limine to exclude any reference to Western State Hospital and the fact that Mr. Robinson was currently involuntarily detained there. RP1 at 16-18; CP at 104-05. The trial court partially granted the motion, ruling that, "...you can certainly indicate that he was there at Western State Hospital, but not to disclose under what court order or for how long." RP1 at 27.

During the trial, the State's witnesses did not testify that Mr. Robinson was a patient at Western State Hospital. The sole reference that arguably confirmed Mr. Robinson's status as a patient at Western State Hospital came in response to a question Mr. Robinson's counsel asked Dr. Parmenter. RP3 at 166. Although Dr. Parmenter testified that she was employed by Western State Hospital and had conducted the examination there, she did not mention Mr. Robinson's status as a patient there. RP3 at 126-27, 138. In cross-examination, Mr. Robinson's counsel asked, "...he 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." RP3 at 166 (emphasis added). After the answer was given, Mr. Robinson's counsel did not move to strike the answer or request a limiting instruction based upon the court's order. *Id.*

Ms. Weigand submitted two separate medical reports to the court for purposes of complying with RCW 11.88.045(4). CP at 35-41, 106-25;

RP3 at 245. The first medical report was completed by Mr. Robinson's primary care physician, Dr. Karanam, in July 2009. CP at 35-41. This report addressed all of the requirements of RCW 11.88.045(4), including an opinion by the physician that Mr. Robinson's prescribed medications would only minimally impact his ability to understand the proceedings. CP at 38. Because the guardianship petition was pending for such a lengthy period of time before trial, Ms. Weigand obtained a second, more current, medical report from Dr. Brett Parmenter, a neuropsychiatrist at Western State Hospital. RP3 at 257. Ms. Weigand testified that, although the more recent medical report went into more detail than the first report, there were not significant differences in the findings of the two doctors. *Id.* Mr. Robinson's counsel moved to dismiss the guardianship petition based on what he argued were the insufficient medical reports. RP4 at 319-23. The court denied the motion on the basis that Mr. Robinson had refused to complete the assessment conducted by Dr. Parmenter, such that he could not complain of error that he had created, and that the medical reports and testimony substantially complied with the requirements of the guardianship statute. RP4 at 323.

At the conclusion of the trial, the jury found that Mr. Robinson was incapacitated with respect to both his person and his estate. RP4 at 356-57; CP at 198-99, 200-01. The jury also found that a limited guardianship

of the person and estate was sufficient to protect Mr. Robinson, and an Order Appointing a Limited Guardian of the Person and Estate was entered on May 12, 2010. RP5<sup>2</sup> at 202-13; CP at 202-13. On June 25, 2010, Mr. Robinson filed a CR 59 motion for a new trial. CP at 229-34. He argued that the trial court had improperly permitted mention of Western State Hospital during the trial, that the trial court had erroneously denied Mr. Robinson's motion to dismiss the petition based on the insufficiency of the medical report, and that the court had erred by authorizing the appointment of a temporary financial manager. CP at 229-34. The motion was denied, and Mr. Robinson timely appealed. CP at 272-74, CP at 247-67.

#### IV. ARGUMENT

**A. The Trial Court Properly Allowed Mr. Messerschmidt's Testimony When Mr. Robinson Did Not Object, Did Not Point To Any Manifest Constitutional Error, And Any Resulting Error Was Harmless**

**1. Mr. Robinson Waived His Objection To Testimony Concerning Mr. Messerschmidt's Role As Temporary Financial Manager**

Mr. Robinson is barred from asserting for the first time on appeal that testimony from the court-appointed temporary financial manager was admitted in error. Mr. Robinson waived this issue by not objecting at trial.

---

<sup>2</sup> RP5 refers to the report of proceedings from the May 12, 2010, hearing on the presentation of the order appointing a guardian for Mr. Robinson.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a); *State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). In order to properly preserve an issue for appeal, the evidence must be objected to at trial. RAP. 2.5(a); *see City of Seattle v. McCoy*, 101 Wn. App. 815, 844, 4 P.3d 159 (2000) (citing *State v. Brush*, 32 Wn. App. 445, 456, 648 P.2d 897 (1982)), *review denied*, 98 Wn.2d 1017 (1983). Parties should have an opportunity at trial to respond to allegations of error “rather than facing newly asserted errors or new theories and issues for the first time on appeal.” *In re Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006). The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (citing *Estate of Ryder v. Kelly-Springfield Tire Co.*, 91 Wn.2d 111, 114, 587 P.2d 160 (1978)).

In *In re Detention of Audett*, the Supreme Court held that, because Audett did not object to the admission of evidence derived from a mental examination during trial, the Court of Appeals erred in reversing Audett’s commitment as a sexually violent predator. *In re Detention of Audett*, 158 Wn.2d 712 at 714. Audett had waived his objection and was thus barred from raising the issue on appeal. *Id.*

In this case, as in *Audett*, Mr. Robinson did not object to testimony addressing Mr. Messerschmidt's role as temporary financial manager during the trial. Rather, he argues for the first time on appeal that the mere fact that Mr. Messerschmidt was permitted to testify created a presumption that Mr. Robinson was impaired. *Brief of Appellant*, at 6. Mr. Robinson's failure to object at trial deprived the trial court of the opportunity to prevent or cure any error caused by the admission of the Mr. Messerschmidt's testimony. As such, his objection was waived and the argument should not be permitted on appeal.

**2. Assuming For Purposes Of Argument That This Issue Was Properly Before This Court, There Was No Manifest Constitutional Error**

Appellate courts will not consider issues raised for the first time on appeal unless there is a manifest error of constitutional magnitude. RAP 2.5(a)(3); *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). The Washington State Supreme Court has held that the exceptions to RAP 2.5(a) must be construed narrowly. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Assuming, for purposes of this argument only, that the trial court erred in allowing Mr. Messerschmidt's testimony concerning his role as temporary financial manager, Mr. Robinson has not established manifest error of constitutional magnitude.

In order to demonstrate a manifest error of constitutional magnitude, “The defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)); *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Error is manifest if it results in actual prejudice to the defendant. *McFarland*, 127 Wn.2d at 333. “Appellate courts will not approve a party’s failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction).” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Furthermore, Washington case law provides that “an alleged error is manifest only if it results in a concrete detriment to the claimant’s constitutional rights, *and* the claimed error rests upon a plausible argument that is supported by the record.” *State v. WWJ Corp.*, 138 Wn.2d 595 at 603 (citing *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

In the instant case, Mr. Robinson fails to allege that the testimony violated his constitutional rights *or* that the testimony led to actual prejudice. *State v. McFarland*, 127 Wn.2d at 333. Instead, Mr. Robinson suggests that the brief examination of Mr. Messerschmidt would cause a juror to conclude that Mr. Robinson was impaired. *Brief of Appellant* at 5.

He asserts that if the jury had come to this conclusion, it might have violated Mr. Robinson's rights pursuant to RCW 11.88, but he does not address how the testimony would have constituted constitutional error.

However, even if this Court determined that there had been a violation of Mr. Robinson's constitutional rights, Mr. Robinson fails to address how this error was manifest and resulted in actual prejudice. Washington courts have held that actual prejudice focuses on "whether the error is so obvious on the record that the error warrants appellate review." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The appellate court "does not assume that an error is of constitutional magnitude." *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Mr. Robinson has failed to demonstrate any actual prejudice during the proceedings below. Notably, Mr. Robinson's counsel at trial objected to the appointment of a temporary financial manager. CP at 63-68. However, the order appointing Mr. Messerschmidt the temporary financial manager is not before this Court. Instead, Mr. Robinson argues that Mr. Messerschmidt's testimony that he had been appointed the temporary financial manager for Mr. Robinson infringed upon Mr. Robinson's statutory right to be presumed to have capacity. Mr. Robinson fails to demonstrate that he was actually prejudiced by Mr. Messerschmidt's testimony.

**3. If This Court Determines That There Was Manifest Constitutional Error, The Error Was Harmless**

Assuming for purposes of this argument only that there was, in fact, manifest constitutional error during the trial proceedings, any such error was harmless. “A constitutional error is harmless if the appellate court is convinced that any reasonable jury would have reached the same result in the absence of the error.” *State v. Mares*, \_\_\_ Wn. App. \_\_\_, 248 P.3d 140, 142 (2011) (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

The testimony at trial concerning Mr. Messerschmidt’s status as Mr. Robinson’s temporary financial manager was a small portion of the testimony presented to the jury. The jury heard from multiple witnesses about Mr. Robinson’s inability to adequately provide for his health, housing, safety, nutrition, and finances. There were two medical reports that concluded that Mr. Robinson was unable to make independent decisions about his finances, medical care and treatment, and personal care. CP at 35-41, 106-25. There were multiple witnesses who testified to his inability to live safely in the community and his unwillingness to consider having appropriate caregiving or other assistance, including testimony from Ms. Gilman, Ms. Weigand, Dr. Parmenter, and Mr. Robinson himself. There was also testimony and documentary

evidence that less restrictive alternatives to guardianship had not worked. CP at 21-31; RP2 at 54-116; RP3 at 233-74. Based on all of the evidence presented to the jury, a reasonable juror would have reached the same conclusion; that Mr. Robinson was incapacitated with respect to both his person and his estate.

**B. The Trial Court Properly Allowed Limited References To Western State Hospital, And The Only Arguable Reference To Mr. Robinson's Status As A Patient At Western State Hospital Was Provided In Response To A Question Asked By Mr. Robinson's Counsel**

- 1. The trial court's order on Mr. Robinson's motion in limine properly restricted references to Mr. Robinson's status at Western State Hospital, the witnesses fully complied with the court order limiting such references, and Mr. Robinson's counsel failed to object to the testimony he now claims was in error**

Washington state courts provide that "admissibility of evidence lies within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion." *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). A trial court abuses its discretion only if its decision is manifestly unreasonable and not within the range of acceptable choices. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citing *In re Marriage of Kovacks*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993)). If the facts are supported by the record and the trial court applies the correct legal standard, there has not been an abuse of

discretion. *Littlefield*, 133 Wn.2d at 47 (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

RCW 71.05.090 provides for confidentiality of information related to a patient's status at Western State Hospital. The trial court properly ordered that there were to be no references to Mr. Robinson's involuntary commitment proceedings at Western State Hospital, to any findings and rulings related to the commitment proceedings, to the length of Mr. Robinson's stay at Western State Hospital, or to any other procedural matters involving Mr. Robinson's status as a patient at Western State Hospital. RP2 at 123-24, 153-54. The trial court did permit Dr. Parmenter to testify that she was employed by Western State Hospital. RP2 at 123-24, 126, 127.

Mr. Robinson asserts on appeal that testimony from Dr. Parmenter violates the confidentiality provisions of the mental health statutes. *Brief of Appellant* at 6. Specifically, the jury heard testimony from Dr. Parmenter that she was employed by Western State Hospital, saw patients there, and met with Mr. Robinson for purposes of a neuropsychological examination of Mr. Robinson. RP2 at 128. However, Mr. Robinson's counsel did not object to this portion of Dr. Parmenter's testimony as outside the parameters of the court's order limiting references to Western State Hospital, and any error was waived. As discussed above,

a party who fails to timely object at the time to objectionable testimony waives that party's right to review on the issue.

The trial court's ruling was not an abuse of discretion. Rather, the court reviewed the appropriate statutes concerning disclosure of information for patients at Western State Hospital and determined that Dr. Parmenter's limited testimony concerning where she was employed at the time she conducted her assessment did not conflict with the parameters of RCW 71.05.090. RP2 at 123-24. The court indicated that it would be willing to give the jury a limiting instruction, but Mr. Robinson's counsel did not request such an instruction. RP1 at 26; CP at 179-97.

The trial court did not abuse its discretion by permitting limited reference to Western State Hospital. The witnesses complied with the court's order instructing the witnesses not to disclose Mr. Robinson's status as an involuntarily committed patient at Western State Hospital. Mr. Robinson's counsel did not object to the testimony in question and is now barred from seeking review.

**2. Reference To Mr. Robinson's Status As A Patient At Western State Hospital Was Invited Error**

During the trial, Mr. Robinson's attorney elicited testimony from Dr. Parmenter that Mr. Robinson had been hospitalized at the time she conducted her assessment of him. RP3 at 166. Because Dr. Parmenter

had previously testified that she had conducted her assessment at Western State Hospital, this testimony arguably confirmed that Mr. Robinson was, in fact, a patient at Western State Hospital. Mr. Robinson's counsel failed to move to strike this testimony or to request a limiting instruction. This testimony was invited error and should not be reviewed on appeal.

Under the doctrine of invited error, Mr. Robinson is "prohibit[ed] from setting up an error at trial and then complaining of it on appeal." *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) (citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)); see also *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (under the invited error doctrine, a court should decline to review a claimed error if the appealing party induced the court to err).

*State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006), involved a defendant charged with crimes related to a series of home invasions. At trial, the defense counsel opened the door to otherwise inadmissible evidence by eliciting testimony on cross-examination that Korum had "always" denied his involvement in the crimes. The court applied the invited error doctrine and held that because Korum opened the door to this testimony, he was barred from complaining of the error on appeal. *Id.* at 646-47. Similarly, Mr. Robinson's counsel opened the door to the testimony that arguably pertained to Mr. Robinson's status as a patient at

Western State Hospital during his cross-examination of Dr. Parmenter by asking if Mr. Robinson had been hospitalized at the time she evaluated him. Therefore, the invited error doctrine bars Mr. Robinson from complaining of any error on appeal.

**C. The Trial Court Properly Found That The Two Written Medical Reports And Supplemental Testimony From The Guardian Ad Litem Complied With The Requirements Of RCW 11.88.045(4) When The Initial Medical Report Submitted By The Guardian Ad Litem Fully Complied With The Statutory Requirements**

Mr. Robinson claims that the medical reports submitted during trial did not comply with the guardianship requirements. In proceedings to appoint a guardian, the guardian ad litem must file a medical report that contains the following:

- 1) the name and address of the physician;
- 2) the education and experience of the physician;
- 3) the dates of examination and experience of the physician;
- 4) a summary of the relevant medical, functional, neurological, or mental health history known to the physician;
- 5) the findings of the physician as to the alleged incapacitated person's condition;
- 6) current medications;
- 7) the effect of the current medications on the alleged incapacitated person's ability to understand or participate in the proceedings;
- 8) opinions on the specific assistance the alleged incapacitated person needs; and
- 9) identification of persons the physician has met with regarding the alleged incapacitated person.

RCW 11.88.045(4).

The statute also allows the guardian ad litem to obtain a supplemental examination. RCW 11.88.045(4). Furthermore, the 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).

Mr. Robinson asserts that the medical reports filed by Ms. Weigand did not comply with the requirements of RCW 11.88.045(4). This is not accurate. Contrary to Mr. Robinson's assertions, the initial medical report completed by Dr. Karanam on July 14, 2009, was filed with the court on October 1, 2009. CP at 36-41. This report meets the requirements of RCW 11.88.045(4). Dr. Parmenter's report provided supplemental and current information to the jury. CP at 36-41; RP3 at 125-82.

Assuming, for purposes of argument only, that Dr. Karanam's medical report did not fully comply with RCW 11.88.045(4), the combination of Dr. Karanam's report, Dr. Parmenter's report, and testimony from Ms. Gilman and Ms. Weigand about those reports substantially complied with the statutory requirements for a medical report.

An appellate court reviews questions of law de novo. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (2001). Guardianship proceedings are governed by chapter 11.88 RCW, which requires “substantial compliance” with its terms before a legal guardian may be appointed for an alleged incapacitated person. *In re Guardianship of McGill*, 33 Wn. App. 265, 268, 654 P.2d 705 (1983) (“The [guardianship] proceeding is statutory, and a substantial compliance with the statute is necessary to the appointment of a legally constituted guardian.”); *see also In re Teeters*, 173 Wash. 138, 142, 21 P.2d 1032 (1933). If the requirements of the statute have been met, the court has jurisdiction to enter an order appointing a guardian of the person and estate for the alleged incapacitated person. *Id.*; *Falconer v. Stevenson*, 184 Wash. 438, 439, 51 P.2d 618 (1935).

*In re the Application of Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981) (citing *Stasher v. Harger-Haldeman*, 22 Cal. Rptr. 657, 660, 372 P.2d 649 (1974)) defines substantial compliance as “actual compliance in respect to the substance essential to every reasonable objective of the statute.” The court goes on to state that “It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.” *Id.* (citing *In re Estate of Rudd*, 140 Mont. 170, 369 P.2d 526, 530 (1962)). The

determining consideration of a case is whether the purpose of the statutory requirement has been fulfilled. If it has, then strict compliance is unnecessary. *Fisher Bros. Corp. v. Des Moines Sewer Dist.*, 97 Wn.2d 227, 230-31, 643 P.2d 436 (1982).

In *Santore*, two parents submitted a petition for writ of habeas corpus to regain their son from an adoptive couple. The Court of Appeals held that there was substantial compliance with the statute, despite the fact the parties had not strictly complied with the statutory requirements found in the adoption statutes. *Application of Santore*, 28 Wn. App. 319, 623 P.2d 702 (1981). The court held that, “In matters of formal procedure, even though it be in proceedings so highly important as the process by which a party is brought into court, this court has never exacted anything more than a substantial compliance with the statute.” *Id.* at 328. The *Santore* court concludes “there need not be strict compliance with each and every provision of the adoption statutes, even though such provision may be couched in mandatory language.” *Id.* at 327.

Mr. Robinson argues that *In re Guardianship of Healey*, 140 Wn. App. 1020, 2007 WL 2411688 (Wash. Ct. App., Aug. 27, 2007), requires strict compliance with RCW 11.88.045(4)(g). However, *Healey* is an unpublished opinion and cannot be cited as an authority. GR 14.1(a). Mr. Robinson, in addition to citing to an opinion that has no precedential

value, has also misinterpreted the opinion. In *Healey*,<sup>3</sup> the Mrs. Healey's son appealed an order denying the motion for revision of the order appointing a guardian for Mrs. Healey. *Healey*, 2007 WL 2411688. He asserted, in part, that the medical report considered by the judge did not demonstrate Mrs. Healey's incapacity. *Id.* Mr. Healey argued that the medical report was insufficient because it did not adequately address the effect that Mrs. Healey's medications may have had on her ability to understand or to participate in the proceedings pursuant to RCW 11.88.045(4)(g). As Mr. Robinson notes, the court rejected this argument. *Brief of Appellant* at 15. The *Healey* court went on to say that "the record before the commissioner, consisting not only of the medical report but also of other evidence, including the GAL report, presented ample evidence of such 'management insufficiencies over time in the area of person or estate' and that 'this evidence, taken in tandem with the medical report, supports a finding by clear, cogent, and convincing evidence on the question of Ms. Healey's incapacity.'" *Id.* at 8. In contrast to Mr. Robinson's assertion, *Healey* gives a broad reading of the statutory requirements rather than requiring strict construction. The court looked to the entire record to determine whether or not an individual is

---

<sup>3</sup> The Department is addressing this case only in order to clarify Mr. Robinson's misinterpretation of the court's opinion.

incapacitated rather than focusing in on the requirements of the medical report.

In the case at hand, as discussed above, Dr. Karaman's report is sufficient to establish strict compliance with the statute. However, even if it were not, Dr. Parmenter's medical report is appropriately read in tandem with the testimony of the guardian ad litem regarding the medical reports, Ms. Gilman's testimony about Dr. Karanam's medical report, as well as with Dr. Karanam's medical report. Dr. Parmenter's report, combined with the supplemental testimony from Ms. Gilman and Ms. Weigand pertaining to the earlier report of Dr. Karanam, adequately establishes Mr. Robinson's medications and their effects on his ability to understand the guardianship proceedings. RP3 at 245-47, 257-58.

## V. CONCLUSION

Mr. Robinson raises three issues on appeal, none of which constitute reversible error. The trial court properly admitted testimony about the temporary financial manager who had appointed to assist Mr. Robinson with financial issues while the guardianship petition was pending. The testimony was not objected to at trial and does not constitute a manifest error of constitutional magnitude. The trial court also properly limited references to Mr. Robinson's status as an involuntarily detained patient at Western State Hospital, and the witnesses properly complied

with the court's order on this issue. Finally, although two separate medical reports were filed in the guardianship proceeding, the initial report filed by the guardian ad litem satisfied the statutory requirements.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2011.

ROBERT M. MCKENNA  
Attorney General

*Angela Coats McCarthy* <sup>WSBA#35547</sup> *for*  
MARGARET M. KENNEDY, WSBA#27558  
Assistant Attorney General  
Attorneys for Dept of Social & Health Services

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Stanley D. Bonner 1702 Sixth Avenue, Ste. One Tacoma, WA 98504-3310 253-593-41900 <u>Stanbonner01@yahoo.com</u>	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> UPS/Fed Ex Overnight Mail <input checked="" type="checkbox"/> PDF via E-Mail <input type="checkbox"/> Hand delivered by
Steven Lust #22798 Attorney at Law 1901 S I Street Tacoma WA 98405-3801 <u>sel@balsamlaw.com</u>	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> UPS/Fed Ex Overnight Mail <input checked="" type="checkbox"/> PDF via E-Mail <input type="checkbox"/> Hand delivered by
Laura K Sealey #13467 200 S 333rd ST Ste 243 Federal Way WA 98003 <u>lsealey@pacifier.com</u>	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> UPS/Fed Ex Overnight Mail <input checked="" type="checkbox"/> PDF via E-Mail <input type="checkbox"/> Hand delivered by

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of May, 2011, at Tumwater, WA.

  
 \_\_\_\_\_  
 JODY REDDING, Legal Assistant