IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
February 8, 2023 Session

IN RE THE CONSERVATORSHIP OF KIMELAH M.

Appeal from the Probate Court for Shelby County
No. PR-19375 Karen D. Webster, Judge

No. W2022-00292-COA-R3-CV

Appellant appeals the decision of the probate court to name other parties as the conservators of her daughter on the basis that the trial court improperly placed time limitations on the presentation of proof at the final hearing. Because Appellant has failed to show any reversible error in the trial court's decision, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN, and KENNY ARMSTRONG, JJ., joined.

Jocelyn V. Henderson, Memphis, Tennessee, for the appellant, Dezi G.

Gerald S. Green, Memphis, Tennessee, for the appellees, Delores C. and James C.

OPINION

I.

On May 11, 2021, Petitioner/Appellant Dezi G.[1] ("Appellant") filed a petition for an independent medical examination and for the appointment of a conservator over the person of Respondent Kimelah M. ("Respondent").[2] Therein, Appellant alleged that she was the parent of Respondent and that Respondent was not competent to manage herself or her personal or medical affairs. Appellant further alleged that her own mother was misusing Respondent's social security benefits, and that Appellant's brother, an alleged drug addict, was residing in the home with Respondent.

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[1] To protect the identities of the parties involved, we refer to the parties by the first names and last initials.

[2] Appellant's counsel on appeal did not represent her in the trial court proceedings.

On May 12, 2021, the Shelby County Probate Court ("the trial court") appointed a guardian ad litem for Respondent and set two hearing dates in May and July 2021. Due to the COVID-19 Pandemic, the trial court ruled that the hearings would be conducted telephonically. Following a May 26, 2021 hearing, the parties entered into a consent order on June 2, 2021, for an independent medical examination of Respondent. On July 12, 2021, the physician who performed the exam submitted his report and opinion that Respondent was in need of a conservator "to look after her affairs and her person" due to an intellectual disability.

On July 15, 2021, Appellees James C. and Dolores C. ("Appellees"), Respondent's maternal grandparents, filed a response to the petition for a conservatorship. Therein, they denied that they were taking advantage of Respondent and also denied Appellant's allegation that Respondent was in need of a conservator. Moreover, Appellees alleged that Appellant had abandoned Respondent as an infant and did not provide any support for her. But Appellees also filed their own intervening petition in which they alleged that Respondent was "unable to make decisions regarding her medical care and treatment and financial affairs" and asked that they be named conservators for Respondent.

Also on July 15, 2021, the guardian ad litem filed a detailed report describing her investigation into this case. Ultimately, the guardian ad litem agreed that Respondent was in need of a conservator of her person and recommended that an attorney ad litem be appointed for her. The guardian ad litem further recommended that Respondent stay with Appellees, in the home where she has always resided. On July 19, 2021, the trial court appointed an attorney ad litem for Respondent and set a full hearing for October 7, 2021. On October 4, 2021, the guardian ad litem filed a supplemental answer and report. Due to changes in circumstance, the guardian ad litem no longer recommended that Respondent remain in the home of Appellees due to her own violent outbursts or that Appellees be named her conservators. But the guardian ad litem still recommended the appointment of a conservator of Respondent's person, along with an additional evaluation due to the "continued physical threat to herself or others." Rather than Appellees, the guardian ad litem named Appellant as the person who should be appointed conservator over Respondent's person.

On November 5, 2021, the trial court entered an order continuing the final hearing and appointing Appellees as temporary conservators over Respondent's person. On January 10, 2022, Respondent, through her attorney ad litem, filed an answer to the pending petitions for the appointment of a conservator. Therein, Respondent averred that she desired to remain in the care and custody of Appellees, acknowledged that she needed assistance in managing her affairs, and requested that Appellees be allowed to assist her with her affairs. Finally, Respondent stated that she had no desire to have any contact with Appellant.

A final hearing occurred on January 20, 2022. The trial court entered a detailed final order on February 9, 2022. Therein, the trial court recounted that it heard testimony from Appellant, Appellees, Respondent, and three other witnesses "in open court[.]"[3] The trial court further found that the parties did not dispute that Respondent was in need of a conservator. The trial court essentially rejected Appellant's claim that an incident from seventeen to twenty years prior should disqualify Appellees from being conservators.[4] The trial court further found that based on the testimony, it was in Respondent's best interest for Appellees to be appointed as co-conservators over Respondent's person only. The trial court further awarded fees to the attorney ad litem and Appellees' attorney. Costs were assessed to Appellant. Appellant thereafter filed a timely appeal.

II.

Appellant raises the following issues, which are taken from her brief:

> 1. Whether the trial court abused its discretion by setting time limits on the rights of the parties to present their cases?
>
> 2. Whether the trial court properly applied the best interest standard by limiting the time in which the parties had to present their cases?

III.

Although Appellant raises two issues in this appeal, her appeal stems from one central argument: that the trial court abused its discretion in setting time limits on the parties' presentation of proof, which prevented the trial court from hearing all of the evidence concerning Respondent's best interest. There are a number of problems with Appellant's argument, the first of which is that there is nothing in the appellate record to demonstrate that such time limits were ordered by the trial court.

Specifically, in her appellate brief, Appellant states as follows:

> Here, it is uncontroverted that the parties were given strict time limits by the judge. One of these rules was that each party had 10 minutes per witness. For direct examination, a party had 10 minutes to present its case, then the opposing party had 10 minutes to conduct cross-examination.

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[3] At oral argument, counsel for Appellant at times characterized this hearing as being over a conference call. The trial court's order suggests otherwise. In addition, while the statement of the evidence prepared by Appellant specifically characterizes several earlier hearings as telephonic, it does not describe the January 2022 hearing as telephonic.

[4] Based on the issues presented in this appeal, it is unnecessary to recount the exact nature of the allegations in this Opinion.

Appellant's assertion is not accompanied by any reference to the appellate record where this ruling is contained. In general, it is the appellant's duty to provide record citations for the facts it relies upon, and it is not this Court's duty to search the record for support for the appellant's assertion in the absence of such citations. *See* Tenn. R. App. P. 27(a); ***Com. Union Bank, Brentwood, Tennessee v. Bush***, 512 S.W.3d 217, 224 (Tenn. Ct. App. 2016) ("It is not the duty of this court to verify unsupported allegations or search the record for facts in support of an appellant's poorly-argued issues." (citing ***Bean v. Bean***, 40 S.W.3d 52, 56 (Tenn. Ct. App. 2000))).

Even after conducting an independent search of the record, however, we can find no evidence of the trial court's ruling. Here, the only evidence of what transpired at the final hearing comes to us in a statement of the evidence and the trial court's final order. Neither recounts that the trial court placed limitations on the parties' witness examinations.[5]

In an effort to correct this error, on the day before oral argument in this cause, Appellant filed a motion with this Court seeking to supplement the record on appeal with an affidavit from Appellant's trial counsel.[6] In the affidavit, counsel states that the trial court placed time limitations on the presentation of the proof and opined that "not enough time was allotted during trial to completely and adequately present my case[.]"[7]

In an appeal to this Court, "[t]he appellate record provides the boundaries of an appellate court's review. ***State v. Smotherman***, 201 S.W.3d 657, 660 (Tenn. 2006) (citing ***State v. Bobadilla***, 181 S.W.3d 641, 643 (Tenn. 2005)). As such, "[a]n appellate court may consider only evidence contained in the appellate record." ***Id.*** The Tennessee Rules of Appellate Procedure, however, do allow supplementation of the record under some

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[5] The statement of the evidence contains very little discussion of the proof presented at the final hearing, instead focusing on the procedural history of the case, the bulk of which was already reflected in the technical record.

[6] At oral argument, counsel for Appellees asked for an opportunity to respond to Appellant's motion. This Court entered an order on February 2, 2023, allowing Appellees ten days to respond. No response was ever filed.

[7] Specifically, the affidavit states as follows:

> 1. That I represented [Appellant] on her Petition to be appointed as Conservator of her daughter, [Respondent], in the Probate Court of Shelby County, Tennessee.
>
> 2. It is my position that not enough time was allotted during trial to completely and adequately present my case.
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> 3. For the entire hearing, all parties, including three to four attorneys were allowed 3 hours to present the entire case.
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> 4. For direct examination of each witness, counsel was only allowed 10 minutes to present the case in chief.
>
> 5. For cross-examination all counsel collectively were allowed between 10-15 minutes to question.

circumstances:

> If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive. If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted.

Tenn. R. App. P. 24(e). Thus, Rule 24(e) allows the record on appeal to be corrected to include omitted materials. What Rule 24(e) does not permit, however, is for a party to supplement the record with documents that were never presented to the trial court. *See* ***State v. Johnson***, 854 S.W.2d 897, 902 (Tenn. Crim. App. 1993) ("Rule 24(e) of the Tennessee Rules of Appellate Procedure, permitting a correction of the record, was inapplicable; the panel concluded there was no authority for this court to enlarge the record by adding evidence not introduced at the hearing." (citing ***State v. Swanson***, No. C.C.A. 143, 1989 WL 63882, at *1 (Tenn. Crim. App. June 14, 1989) ("The trial judge is without the authority to enlarge the record by adding evidence that was not introduced at the hearing.")))). Here, the appropriate time for Appellant to make a record of the trial court's time limitations was when the statement of the evidence was created. Appellant's belated effort to supplement the record with an affidavit of trial counsel is simply not contemplated by our rules.[8]

We note, however, that while Appellees take issue with Appellant's failure to provide proof of the time limitations allegedly imposed by the trial court, they do not deny that such time limitations were ordered. But even if we consider the late-filed affidavit as sufficient proof that time limitations were imposed, Appellant's argument suffers from a number of other infirmities.

As an initial matter, we note that "[c]ourts have the inherent power to supervise and control their own proceedings and to sanction attorneys for conducting themselves in a reckless manner." ***Wright v. Quillen***, 909 S.W.2d 804, 814 (Tenn. Ct. App. 1995) (citing ***Andrews v. Bible***, 812 S.W.2d 284 (Tenn. 1991)). "It is the longstanding principle that the 'propriety, scope, manner and control of examination of witnesses is within the trial court's discretion.'" ***State v. Reid***, 164 S.W.3d 286, 348 (Tenn. 2005) (quoting ***State v. Harris***, 839 S.W.2d 54, 72 (Tenn. 1992), *reh'g denied and opinion modified* (Sept. 8, 1992)). Appellant cites no Tennessee law that imposes any bright-line rule prohibiting time

[8] Indeed, although Appellant cites Rule 24(e) as the only legal authority in her motion, she herself admits that she is not attempting to supplement the record with documents that were submitted to the trial court but inadvertently excluded from the record on appeal.

limitations on the parties' presentation of proof. In the context of argument in a criminal proceeding, the Tennessee Supreme Court has explained as follows:

> No trial court can fix and specify any set rule whereby a definite time is fixed in which to argue any and all cases. Of necessity the time to be used must be left to the discretion of the trial judge who takes various things into consideration in fixing time for argument. The discretion to be exercised is not an arbitrary or willful discretion, but a discretion with regard to what is right and equitable under the circumstances and law, and directed by reason and conscience to a just result.

Brooks v. State, 187 Tenn. 67, 78, 213 S.W.2d 7, 11–12 (Tenn. 1948). Thus, like other decisions regarding the admission or exclusion of evidence or the manner of examination of witnesses, the trial court's decision to impose time limitations in a particular case is discretionary. As this Court has explained regarding those decisions:

> Discretionary decisions require conscientious judgment. They must take the applicable law into account and must also be consistent with the facts before the court. Appellate courts will set aside a discretionary decision only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence. Thus, a trial court's discretionary decision should be reviewed to determine: (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives. Appellate courts should permit a discretionary decision to stand if reasonable judicial minds can differ concerning its soundness.

White v. Vanderbilt Univ., 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999) (citations omitted). As a result, "[a] party seeking to have a lower court's holding overturned on the basis of abuse of discretion undertakes a heavy burden." ***State ex rel. Jones v. Looper***, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000).

Moreover, in the context of evidentiary issues, the appellant's burden is two-fold: "Concluding that a trial court improperly excluded otherwise admissible evidence does not end the inquiry. The erroneous exclusion of evidence will not require reversal of the judgment if the evidence would not have affected the outcome of the trial even if it had been admitted." ***White***, 21 S.W.3d at 223; *see also* Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."). To this end, parties challenging the exclusion of evidence are required to make an offer of proof

so that the appellate court can discern whether the exclusion of the evidence at issue would have affected the outcome of the trial:

> The applicable evidentiary rule requires appellants who challenge rulings that exclude evidence to make an offer of proof unless the substance of the evidence is otherwise apparent. On appeal, an appellate court may not find that the exclusion of evidence was error unless a party's substantial right was affected and an offer of proof is contained in the record. Tenn. R. Evid. 103(a)(2). An appellate court may find error where no offer was made if the substance of the evidence and the specific evidentiary basis for admission are apparent from the record. ***Id.***

Alley v. State, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994). Thus, the exclusion of evidence will only require reversal if the exclusion was "harmful[.]" *See* ***In re Estate of Smallman***, 398 S.W.3d 134, 152 (Tenn. 2013). The erroneous exclusion of evidence is harmful "when considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." ***Id.*** (internal quotation marks omitted) (quoting ***State v. Gomez,*** 367 S.W.3d 237, 249 (Tenn. 2012)). Whether the exclusion of evidence "is sufficiently prejudicial to require reversal depends on the substance of the evidence, its relation to the other evidence, and the peculiar facts and circumstances of the case." ***Keith v. Murfreesboro Livestock Mkt., Inc.***, 780 S.W.2d 751, 758 (Tenn. Ct. App. 1989) (citing ***Wheeler v. State,*** 539 S.W.2d 812, 814 (Tenn. Crim. App. 1976)).

Considering this framework, we now turn to the issues presented on appeal. As an initial matter, Appellant's counsel conceded at oral argument that no objection was made to the trial court's time limitations by any party at trial. But the Tennessee Supreme Court has held that a party waives an argument regarding the procedures utilized by the trial court by failing to make a contemporaneous objection. *See* ***State v. Walls***, 537 S.W.3d 892, 899 (Tenn. 2017) ("[T]his Court has further recognized the importance of a contemporaneous objection to *procedures* utilized by the trial court in addition to evidentiary issues." (citing ***State v. Estes***, 655 S.W.2d 179, 186 (Tenn. Crim. App. 1983) ("Objections to improper procedure must be voiced contemporaneously to give the trial judge the opportunity to correct the error on the spot. In the absence of a contemporaneous objection, any error was waived."))). Thus, in the absence of an objection to the procedure utilized by the trial court, Appellant cannot now claim error in that procedure.

In addition, nothing in the record suggests that Appellant attempted to make an offer of proof as to what evidence was not presented due to the trial court's time limitations. And even if the offer of proof procedure is not strictly applicable in this situation given that the purported exclusion was based on time limitations rather than admissibility, without some indication of what proof was excluded, we simply cannot find prejudice to Appellant in its exclusion. *See* ***State v. Galmore,*** 994 S.W.2d 120, 125 (Tenn. 1999) (noting that although

an offer of proof was unnecessary under the specific circumstances of the case, "an offer of proof may be the only way to demonstrate prejudice"). Here, the trial court's final order contains several pages detailing the testimony of the multitude of witnesses who testified at trial. Nothing in the trial court's order, the statement of the evidence, or otherwise in the record on appeal indicates that any necessary testimony was unable to be produced due to the trial court's purported time limitations. Even the affidavit filed by Appellant following oral argument does not reveal the substance of the evidence that would have been introduced had the trial court not imposed the time limitations. And without some indication of what proof was excluded for time purposes, we simply cannot say that such evidence was likely to have any effect on the trial court's ruling or had any effect whatsoever on the judicial process. ***In re Estate of Smallman,*** 398 S.W.3d at 152. Under these circumstances, even crediting Appellant's assertion that time limits were imposed by the trial court, we must conclude that Appellant has simply not met her burden to show reversible error in the trial court's decision to impose such limits.[9] Because Appellant's argument as to the trial court's best interest finding is also entirely predicated on the time limits placed by the trial court,[10] that argument also respectfully lacks merit.

IV.

The judgment of the Shelby County Probate Court is affirmed, and this cause is remanded for all further proceedings as may be necessary and consistent with this Opinion. Costs of this appeal are taxed to Appellant, Dezi G., for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE

[9] Based on the foregoing, Appellant's motion to supplement the record with the affidavit of trial counsel is respectfully denied.

[10] Appellant's argument in this regard is as follows: "the best interest of Respondent was not taken into account by the trial court because of the unreasonable time limitations put in place."