

How To Make Sure Your Objections Are Heard On Appeal (aka Preserving the Record)



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Bottom Line up Front



- To ensure appellate review on the merits of an issue, the trial attorney must:
 - preserve objections and arguments,
 - establish facts in the record, and
 - appeal correctly.

What's the Big Deal?



- How you preserve an issue, or whether you preserve it at all, controls:
 - (1) whether it can be argued on appeal, and if so,
 - (2) what standard of review the appellate court will apply.

What's the Big Deal?



- Some issues are completely unreviewable on appeal if you do nothing. The issues are waived. Examples:
 - No motion to sever charges or defendants = can't be argued on appeal, at all.
 - No motion to dismiss charges at close of state's evidence = argument waived.
 - No double jeopardy argument = can't be argued on appeal.

What's the Big Deal?



- Some issues can be raised without an objection, but the standard of review is so high, relief is rarely allowed:
 - No objection to admission of evidence = Court will review only for “plain error.”
 - No objection to jury instructions = Court will review only for “plain error.”

What's the Big Deal?



- Plain Error is a high standard:
 - Did a fundamental error occur?
 - Did the error have a “probable impact” on the outcome, meaning that “absent the error, the jury probably would have returned a different verdict”?
 - Was the error an “exceptional case” that warrants plain error review?
 - ✦ Did the error seriously affect the fairness, integrity or public reputation of the judicial proceedings.

What's the Big Deal?



- *But*, if there was an objection to admission of evidence or jury instructions standard of review is:
 - Did the error have a “possible” impact on the result. That’s it. Much simpler and easier to win.

What's the Big Deal?



- And if a constitutional objection is made, the standard is even better:
 - The State must show the error is “harmless beyond a reasonable doubt.”
 - ✦ Burden shifts to the State
 - ✦ Highest standard required in the law

Pre-trial Preparation



- Preservation of issues, objections, and arguments begins during pre-trial preparation.
- Thoughtful and thorough preparation will lead to you properly preserving issues, objections, and arguments.

Discovery



- Preserve discovery issues by filing written discovery requests, specifying what you want, and follow up with a motion to compel. If the motion to compel is allowed, get a written order from the judge.
- Keep a running list of items you need to ask the State to produce.
- Cite constitutional and statutory grounds for your entitlement to the discovery.

Review Discovery to Plan Objections



- In reviewing discovery, you should ask yourself, “how will the State introduce this evidence? What objections will I make to this evidence?”
 - Will I need a limiting instruction? Come prepared.
- When you prepare questions for each of the State’s witnesses, highlight in bold the expected testimony of the witness that is objectionable. Write down the basis for your objections.

Anticipate the State's Objections



- Consider objections the State could make to your cross-examination questions and come prepared to defend the questions.
- Evidence of third-party guilt.
- Evidence of alleged victim's violent past.
- Come to court prepared with evidence to support the evidence you seek to admit.

Pre-trial motions



- **Motion for complete recordation**
- “Request and Motion for Discovery”
 - Seek orders to compel to preserve requests.
- Motion for a bill of particulars
- Motion to sever charges or defendants
- Motion to suppress
 - You MUST attach an affidavit, and you can sign the affidavit
 - If the MTS is denied, you MUST object in front of the jury when the evidence is actually offered.

Error Preservation – Jury Selection



- Batson (race) and J.E.B. (gender) claims
 - A complete recordation is imperative for preserving.
 - Our Supreme Court revived Batson, but changes in the court composition mean no relief in state court.
 - Preserve for federal litigation.
- Manner of juror selection, including fair cross-section of the community.
- Challenges for Cause that are denied can be preserved for appellate review.
 - Specific, technical requirements to preserve
 - 15A-1214
 - Have a folder with voir dire materials

Error Preservation – Jury Selection



- Spend time preparing your voir dire and considering if there are facts about your case that could lead to a challenge for cause.
- Have a script to help you develop and preserve a challenge for cause:

Error Preservation – Jury Selection



Jury Selection: Challenges for Cause

(7-11-10)

Basis for Challenge for Cause. 15A-1212

- (6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (You may NOT ask what the opinion is.)
- (8) As a matter of conscience, regardless of the facts and circumstances, the juror would be unable to render a verdict with respect to the charge in accordance with the law of N.C.
- (9) For any other cause, the juror is unable to render a fair and impartial verdict.

GOAL for Challenge for Cause...Have the juror agree that the juror:

- 1) has formed an opinion about guilt (or “expressed” an opinion),
- 2) would be unable to follow the law about _____, or
- 3) would be unable to be fair and impartial.

The STEPS to obtain a for cause challenge

- 1) Repeat the juror’s bias or impaired position.
Use their EXACT words
“My son was a cocaine addict...I despise anyone ever remotely involved in it.”
- 2) Follow up with OPEN-ENDED questions to get the juror to further explain views.
Tell me more...What happened...Why...?
NO leading at this point
“Tell us about your son’s problem...How did he get into using cocaine...What happened...How is he today...?”
- 3) Acknowledge the validity of the juror’s position and compare it to other jurors
Ira calls it...“Normalize the impairment”
Do NOT argue or be judgmental...Some empathy but NOT condescending
Recognize their sharing of a very personal experience
See if other jurors have the same or similar views
“Thank you for your honesty and for sharing your personal experience about your son. It is understandable that you feel the way you do. Does anyone else feel the same way about people charged with selling drugs?”
- 4) Lock the juror’s biased answer into a challenge for cause basis
Switch to LEADING questions from here on

Error Preservation – Jury Selection



- A prospective juror who is unable to accept a particular defense...recognized by law is prejudiced to such an extent that he can no longer be considered competent. Such jurors should be removed from the jury when challenged for cause. *State v Leonard*, 295 N.C. 58, 62-63 (1978).
- Defense counsel is free to inquire into the potential jurors' attitudes concerning the specific defenses of accident or self-defense. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989).

Error Preservation – voir dire



- 15A-1214(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

Error Preservation – voir dire



- 15A-1214(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:
 - (1) Had peremptorily challenged the juror; or
 - (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

Joinder of Charges



- 15A-926(a): Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both,
- are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

Joinder of Defendants



- 15A-926(b): Charges against two or more defendants may be joined for trial:
- When each of the defendants is charged with accountability for each offense; or

Move to sever charges & defendants



- Objection to the State's motion to join charges is not sufficient to preserve for appellate review.
- A motion to sever preserves.
 - 15A-927(a)(1)-(2)
 - Motion must be pretrial, unless "based on grounds not previously known"
 - State v. Yarborough

Move to sever charges & defendants



- Assert constitutional and statutory grounds.
 - 5th Amendment and state constitutional grounds
 - 15A-926 (same transaction, single plan)
 - 15A-927 (“necessary to achieve a fair determination of the defendant’s guilt or innocence”)
- Assert how the defendant will be prejudiced.
- **Motions must be renewed** at close of State’s evidence and at the close of ALL evidence to give the judge a chance to determine prejudice.

Preserving Evidentiary Error



- Objections must be:
 - Timely
 - In front of the jury, even if made outside the presence of the jury
 - Specific (cite rule/statute)
 - Include constitutional grounds
 - On the record (recordation motion)
 - Mitigated with a limiting instruction or mistrial request

Appellate Rule 10



- “In order to preserve an issue for appellate review, a party must have presented to the trial court a **timely** request, objection, or motion,
- “stating the **specific** grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.
- “It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.”

~~Rule 103(a)~~



- Rule 103: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”
- **Held unconstitutional in *State v. Oglesby*, 361 N.C. 550 (2007).**
- Even if a judge says an objection is preserved, that doesn’t make it preserved.

Objections – Timeliness



- To preserve an issue or objection, there must be an objection that is made at the right time.
- Make it too soon or too late, and it is the same as if you didn't make the objection at all.
- There can be a cure for an objection that is too late, which is a motion to strike the answer, but it must be immediately after the inadmissible answer is stated.

Objections – Timeliness



- Motions to suppress and other motions before or during trial are not sufficient alone to preserve your motions.
 - Object at the moment the evidence is introduced in the presence of the jury, even if voir dire was held immediately before or earlier in case.
 - Object if the evidence is mentioned by a later witness.
 - Don't open the door if evidence is suppressed.

Objections – Timeliness



- State v. Joyner, COA 2015
 - Before defendant testified, judge ruled he could be impeached with old convictions.
 - When defendant was cross-examined about the old convictions, defense attorney did not object.
- “As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal.”

Objections – Timeliness



- “For us to assess defendant’s challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial.”
- “Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review.”

Objections – Timeliness



- State v. Monk, COA 24-446
 - Motion to suppress statements denied

Defendant argues he preserved this issue by renewing his objection when the State began eliciting evidence of his statements at trial. Defendant correctly points out he objected during the testimony of Detective Moots:

THE STATE: Okay. Were you there about – during the conversation about the safe keys?

DETECTIVE MOOTS: Yes, I was.

THE STATE: Tell us about that.

DETECTIVE MOOTS: Once we located the drugs, Detective Pittman had made some conversation with him, he discussed about –

DEFENDANT'S COUNSEL: Objection.

Objections – Timeliness



Defendant did not object during the introduction of the same evidence during the direct testimony of Detective Pittman:

DETECTIVE PITTMAN: I spoke with [D]efendant, advised him that we were – we were going to go do a search of his Compass Landing apartment where he resided. I said, [i]s there anything illegal in there? And I said, [p]eople that reside there with you could be charged.

And he then directed [Howard] to get his keys off the – to his safe off the Jeep keyring and go with them and open his safe.

Objections – Timeliness



- “Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.”
- “Defendant failed to object after Detective Pittman testified to the same information contained in his Motion in Limine and his prior preserved objection during the testimony of Detective Moots.”
- “Defendant failed to preserve this issue for appellate review.”

How to Be on Time!



- When you prepare your cross-examination questions for each witness, highlight/bold/circle the evidence and questions that you must object to.
 - List the constitutional grounds and evidence rules

How to Be on Time!



- Ask for a voir dire hearing to address witness testimony and exhibits.
 - A single document might contain various pieces of evidence that are inadmissible for different reasons.
 - During pre-trial preparation you should go through the documents sentence by sentence and note objections.
- But you must still object during the witness's testimony to the admission of the testimony and the exhibit.

Objections – Timeliness



- To preserve an issue or objection, you have to be very specific in what you say:
 - Evidence Rule Number, or
 - Evidence topic, ie. hearsay, relevance, authenticity
 - Constitutional provision, or
 - Constitutional topic, ie. due process, confrontation clause, right to present a defense
 - Specifically how is the instruction legally or factually incorrect? What's wrong with it?

Objections – Specificity



- State v. Mosley, COA 2010
 - home invasion with testifying co-defendant
 - co-defendant had unrelated pending charges
 - defendant sought to cross-examine about pending charges
 - asserted Rule 608(b) as only basis

Objections – Specificity



- “As it does not affirmatively appear from the record that the issue of Defendant’s constitutional right to cross-examine Crain about the pending criminal charge was raised and passed upon in the trial court
- or that Defendant timely objected to the trial court’s ruling allowing the State’s motion *in limine* to prohibit such questioning, this issue is not properly before us for appellate review. The assignment of error upon which Defendant’s argument is based is dismissed.”

How to be Specific!



- Organize and label your questions to match up with the evidence rule that you are going to argue.
- Don't rely on your memory in court. Write it down.
- Be prepared in advance to say the correct rule and constitutional provision.

Objections – Specificity



LACK OF RELIABILITY OF OPINION ISSUE – RULE 702

what are your opinions?

-told ADA on 3/9/12 that having to testify with John in the room would affect Sally's ability to testify and effectively communicate all due to his presence in the room as well as other people being present talking about what happened

-thinks Sally will clam up at the sight of John in the courtroom
- not sure whether that was due to fear or some other emotion
but she said his presence would definitely hinder her ability to give truthful testimony



(1) testimony must be based on sufficient facts or data

have you talked with Sally about a trial?

a courtroom?

a jury?

being in court with John?

have you asked what she thinks about it?

other sources of trauma – medical examinations

Objections – Specificity



WORKSHEET FOR PTSD TEST

-p. 2 of 6 - "has always been shy and even resistant to do new things, classrooms. sometimes has to be peeled off mom."



(2) testimony is product of reliable principles and methods

cite the studies you have relied upon in reaching your opinion

what research has been done in this area

who are the leading experts in this area

what resources have you consulted in forming your opinion

what methods have you used to reach your opinion

what principles of psychology underlie your opinion



(3) witness has applied the principles and methods reliably to the facts of the case

have you produced a report that applies your training and experience to the facts in this case

FACTS DO NOT SATISFY THE STATUTORY REQUIREMENTS

p. 4 of state v. Jackson - distinguish facts

Sufficiency & Variance



- Have a folder for a motion to dismiss.
- Move to dismiss **all** charges for **insufficient evidence and variance**.
 - Don't forget to make the motion.
 - If defense puts on evidence, the motion must be renewed or it is waived.
 - Make a motion to dismiss for insufficient evidence and variance after guilty verdict BEFORE judgment.

Sufficiency & Variance

- Don't limit your motion to dismiss.
- It's OK to only argue some charges.
- But don't say anything that suggests you're limiting your motion.
- Best practice is at the end of your arguments to repeat that you are moving to dismiss **all** charges.

20 MOTION TO DISMISS:
21 MR. [REDACTED] Yes. At this time, I'd make a motion
22 to dismiss. Even in the light most favorable to the State,
23 I don't believe they have reached their burden.
24 That would be with respect to possession of
25 cocaine, 20 CR 05357, and possession with intent to sell,

Charge Conference

Page 155

1 manufacture or deliver a Schedule 2 controlled substance, 20
2 CR 50356, and within a thousand feet of a park.
3 THE COURT: All right. Motions -- all right, the
4 motion to dismiss is denied.
5 MR. [REDACTED] Thank you.

Instructions



- Print pattern instructions for all offenses.
- Review pattern instructions – you might be surprised what's in there.
 - Read the footnotes and annotations.
 - Footnotes are not required unless requested!
 - Consider terms/phrases in brackets
- Limiting instructions are not required unless requested, so request it, and then remember to make sure it is actually given!
- Think outside the box and construct proposed instructions based on cases.

Instructions



- Requests for non-pattern instructions must be in writing to be preserved.
 - N.C.G.S. 15A-1231
 - Rule 21 General Rules of Practice
- This includes modifications of pattern instructions.
- Ask the judge for a written copy of instructions.

Instructions – Never Agree



- Never ever agree that the instructions are correct. This is especially true if you have objected to the instructions, or have proposed instructions that were not given.
- State v. Jenkins, 24-889, August 6, 2025
 - Judge Murry
- Where a defendant fails to object to the jury instructions and instead expressly agrees with them, he waives any “right to all appellate review concerning the invited error, including plain-error review.”

Instructions – Never Agree



- Defendant did not object to the self-defense instruction, despite having at least three opportunities to do so.
- Defendant confirmed his satisfaction “with the way the instructions are to be read to the jury” and had “nothing to add [or]take away, or [any] concern[s] with the jury charge.”
- Because his counsel repeatedly affirmed the jury instructions, Defendant waives the right to appellate review on this issue.

Objections – Closing Arguments



- Objections during argument are more important to protecting the defendant's rights on appeal than the attorney not appearing rude.
- Improper arguments are not preserved without objection.

Objections – Closing Arguments



- Burden shifting
- Name calling
- Arguing facts not in evidence
- Personal opinions
- Misrepresenting the law or the instructions
- Inflammatory arguments

Making A Complete Record



- Move for a complete recordation
- Basis for objection on the record
 - Even if stated at the bench or in chambers, put it on the record
- An oral proffer as to expected testimony is ineffective
 - The witness must testify
 - The exhibit/document must be given to the judge and be placed in the record

Making A Complete Record



- PowerPoints – get in the record
 - Printed copy is not always adequate
 - Compare DA's PowerPoint slides to the actual exhibits – object to manipulation
- Digital evidence – get in the record and keep copies
- Ex parte materials – clearly labeled and sealed and not served on the State
 - Ex parte is different than having something sealed and unavailable to the public.

Making A Complete Record



Courtroom conditions:

What can the jury see?

Law enforcement presence

Victim's rights advocates

Covid restrictions

Signs on the courtroom
door restricting access

How big is the screen that
shows gruesome pictures
and where is it located?

Making A Complete Record



- Please object to the State submitting disks or thumb drives containing digital files that are not shown to the jury.
- Cellebrite phone extractions
- Interrogation, surveillance, bodycam videos
- Causes problems for clerks, appellate attorneys, appellate courts, and could be a problem if the jury wants to see an exhibit.

Making A Complete Record



- Submit a photograph of evidence and make sure it's in the court file.
 - Picture of client's tattoo
- Describe what happens in court.
 - "Three men came into the courtroom wearing shirts that said "Justice for Meghan."
- Describe what a witness does.
 - "Mr. Smith, I see that when you described the shooting, you raised your right hand in the air and moved your finger as if pulling the trigger of a gun two times. Is that correct?"

Making A Complete Record



- Defense wants to cross-examine State's witness about pending charges.
 - Ask to voir dire, and ask the questions.
 - Submit copies of indictments.
- Defendant wants to testify that he knows the alleged victim tried to kill someone five years ago. Judge won't let him.
 - Ask to voir dire, and ask the questions.
 - Make sure the answers are in the record.

Properly appealing



- Oral notice of appeal in open court – must be after judgment is entered and before court session is closed sine die.
 - Don't give notice of appeal before judgment is entered.
 - Do it after the judge finishes saying all of the sentence.

Properly appealing



- Written notice of appeal - 14 days
 - specify party appealing
 - designate judgment (not the ruling)
 - designate Court of Appeals
 - case number
 - signed
 - filed
 - Served on DA – not in DA's mailbox in clerk's office – You must attach a certificate of service

Properly appealing



- Do not say you're giving notice of appeal from "the denial of the suppression motion," or any other specific ruling. Notice of appeal is from the judgment.
- Our website has a sample written notice of appeal that includes a request for appointment of counsel.

Properly appealing



- If you litigated a MTS and lost, and defendant pleaded guilty, you must give prior notice to the court and DA that your client will appeal.
 - Put it in the transcript and state it on the record.
 - Give notice of appeal of the judgment.

Preventing Delay



- There are a number of steps in the process that can result in cases getting delayed or lost in a clerk's file cabinet.
- Trial attorneys should ensure continuity between trial and appellate counsel.
- Follow up after giving notice of appeal to ensure clerk has prepared Appellate Entries and that Office of the Appellate Defender is appointed.
- Make sure clerk knows dates of pretrial hearings and that the Appellate Entries shows all dates.

Resources



- OAD website:
 - <https://ncappellatedefender.org/>
- IDS website
 - <http://www.aoc.state.nc.us/www/ids/>
- SOG website
 - Defender Manual
 - <http://defendermanuals.sog.unc.edu/>
- OAD on-call attorneys

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