

Preserving Trial Issues for Appeal High Level Felony 2026



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What's the Big Deal?



- ❑ 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.”
 - ❑ Modified instructions not submitted in writing = Court will review only for “plain error.”

What's the Big Deal?



- ❑ Plain Error is a very high standard:
 - ❑ Did 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 a timely and specific objection to admission of evidence or jury instructions, the 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 is Key



- ❑ 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.

Pre-Trial Checklist: Indictments



- ❑ Do the indictments state a crime?
 - ❑ Compare indictment closely with the statute.

- ❑ Technical defects like not including “Inc.” are no longer an issue after *State v. Singleton*.

- ❑ *Singleton* left open what it means for an indictment to not state a crime.

Pre-Trial Checklist: Constitution



- ❑ Do I have any constitutional challenges to the statute or any constitutional defenses?
 - ❑ First Amendment protected speech, or conduct?
 - ❑ Threats – online or in person
 - ❑ Compelled speech – registration of online identifier
 - ❑ Second Amendment?
 - ❑ Possession of firearms
 - ❑ Fifth Amendment?
 - ❑ Due Process – statute is vague
 - ❑ Does the statute give notice of prohibited conduct or what is required? Reporting a missing minor.

Pre-Trial Checklist: Novel Offenses



- ❑ Is this a new offense or has the offense been amended recently?
 - ❑ The General Assembly routinely creates new crimes that are not always clear as to the elements or as to the conduct that is prohibited.

- ❑ Is this an offense that is rarely charged?
 - ❑ Continuing criminal enterprise.

- ❑ Is this an enhancement that is rarely used?

Pre-Trial Checklist: Discovery



- ❑ Do I have all discovery? Motions and Orders.
- ❑ 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.
 - ❑ Inflammatory text messages involving the client, or pictures found on client’s social media. – Plan to object.
- ❑ Move for sanctions, including alternative sanctions, if a violation is uncovered in trial.

Pre-Trial Checklist: Motions to Suppress



- ❑ Does my motion to suppress comply with statutory requirements?
 - ❑ You MUST attach an affidavit, and you can sign the affidavit – doesn't have to be client who signs it.
- ❑ If the MTS is denied, you MUST object in front of the jury when the evidence is actually offered, and any time it is mentioned again by the same or different witness, and if it is offered in a different form (like in a report).

Pre-Trial Checklist: Joinder/Severance



- ❑ Does the state intend to join charges, or co-defendants for trial? If so, am I ok with that or do I want them separated?
- ❑ Objecting to the State's motion to join is not sufficient to preserve for appellate review.
- ❑ A motion to sever preserves.
 - ❑ Motion must be pretrial, unless "based on grounds not previously known."
- ❑ 15A-927(a)(1)-(2) sets standards for joinder.

Pre-Trial Checklist: Move to Sever



- ❑ 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.
- ❑ Renew motion to sever (not objection) at close of State’s evidence and at the close of ALL evidence to give the judge a chance to determine prejudice.

Pre-Trial Checklist: Expert Witness



- ❑ Does the state have an “expert” witness?
- ❑ Did I receive a CV? Are there issues with the proposed witness’s experience?
- ❑ Did I receive a written report? 15A-903(a)(2)
 - ❑ Scrutinize for ALL opinions and the absence of any opinions in the report.
 - ❑ Object if expert provides an opinion not in the report.
- ❑ Are the “expertise” and “opinion” subject to scientific challenge and impeachment?
 - ❑ Contact IDS Forensics Counsel

Pre-Trial Checklist: Instructions



- ☐ Which pattern instructions do I anticipate?
- ☐ Do I want to propose modifications to patterns, or non-patterns?
 - ☐ Must be in writing and provided to Judge and DA.
- ☐ Defensive Force
 - ☐ Self
 - ☐ Others
 - ☐ Home, curtilage
 - ☐ Workplace
 - ☐ Vehicle

Pre-Trial Checklist: Prior Record Level



- ☐ Prior Record Level – Don't assume anything!
- ☐ Is the Math correct?
- ☐ Notice of additional points filed by State?
- ☐ Convictions not double counted for Habitual Felon status?
- ☐ Are these my client's convictions?
- ☐ Convictions correctly classified?
- ☐ Convictions that might be on same day or week double counted?
- ☐ Out of state convictions – what will state be required to prove?

Pre-Trial Checklist: Anticipate Objections



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

Trial Checklist: Complete Recordation



- ❑ Often filed in writing pre-trial, but can be made orally at trial. Regardless, the judge must hear the motion and order complete recordation.
 - ❑ Voir dire
 - ❑ Opening statements
 - ❑ Closing arguments

Trial Checklist: Voir Dire



- ❑ Challenges for Cause that are denied can be preserved for appellate review.
 - ❑ Specific, technical requirements to preserve
 - ❑ 15A-1214
 - ❑ Have a trial folder with voir dire materials.
- ❑ Batson (race) and JEB (gender)
- ❑ Objections cannot be reviewed if you didn't request complete recodation of voir dire.

Trial Checklist: Digital Evidence



- ❑ Object to the State submitting disks or thumb drives containing digital files that are not shown to the jury. Files not shown are not relevant. Cite Rules 402, 403, and 404(b) (could be others).
 - ❑ Cellebrite phone extractions
 - ❑ Interrogation, surveillance, bodycam videos

- ❑ Admission of digital files into evidence beyond those published to the jury causes problems for clerks, appellate attorneys, appellate courts, and could be a problem if the jury wants to see an exhibit.

- ❑ Note the time stamps for digital evidence when played for the jury.

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

Objections – Timeliness And Specificity



- ❑ To preserve an issue or objection, there must be an objection that is made at the right time, and the right words must be said.
- ❑ Make it too soon or too late, or say the wrong words, 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.

Trial Checklist: Timely Objections



- ❑ Object in front of the jury.
- ❑ Object whenever the evidence is brought up, even with later witnesses or in other kinds of evidence (reports, maps, pictures).
- ❑ “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.”

Trial Checklist: Specific Objections



- ❑ Rule of Evidence must be cited by number or evidentiary topic.
- ❑ Consider the evidence could violate multiple rules and constitutional provisions and all must be stated.
 - ❑ Example: Rules 402, 403, 404 – cite ALL of them.
 - ❑ Example: Rule 402, 403, 702 (hearsay), 6th Amend.
- ❑ Some Evidence Rules have subparts which should be mentioned with specificity:
 - ❑ Rule 702, expert witnesses

Trial Checklist: Specific Objections



- ❑ Constitutional provisions or concepts must be cited in addition to Rules of Evidence.
 - ❑ Fourth Amendment (suppression motion denied)
 - ❑ Fifth Amendment, or right to remain silent
 - ❑ Fifth Amendment, or Due Process, or right to a fair trial.
 - ❑ Fifth Amendment, right to present a defense
 - ❑ Sixth Amendment, or Confrontation Clause, or right to confront the witness (should be said along with objection, hearsay)

Trial Checklist: Limiting Evidence



- ❑ If you don't ask for evidence to come in for a limited purpose, it will be admitted for all purposes, meaning the jury can use it to convict and an appellate court can use it to find the evidence was sufficient.
- ❑ Limiting instructions
 - ❑ Limit the use of hearsay as only corroboration
- ❑ Redactions

Trial Checklist: Move to Dismiss



- ❑ Move to dismiss ALL charges for insufficient evidence AND variance at close of state's evidence. Do not move to dismiss only specific charges.
- ❑ If you introduce evidence, you must move to dismiss AGAIN at the close of evidence.

Trial Checklist: Present Evidence



- ❑ If the judge prevents you from asking certain questions of a witness, whether your witness on direct or the state's witness on cross, you must present the evidence through the witness's testimony.
 - ❑ An oral proffer from you is NOT sufficient.
- ❑ Same goes for documents you want to introduce. It must be given to the judge and in the record (e-file it).

Trial Checklist: 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 (and understand) 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.

Trial Checklist: 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.
- ❑ File proposed instructions in Odyssey.

Trial Checklist: Instructions



- ❑ 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.”

Trial Checklist: Instructions



- ❑ 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.

Trial Checklist: 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.
- ❑ 15A-1230(a) sets parameters of closing arguments, in addition to constitutional protections against certain arguments.

Trial Checklist: Closing Arguments



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

Trial Checklist: Courtroom Conditions



Unfair courtroom conditions:

What can the jury see?

Law enforcement presence

Victim's rights advocates

Restrictions on media

Signs on the courtroom door restricting access

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

Trial Checklist: File Everything



- ❑ Documents used during pretrial motions hearings or during trial in voir dire hearings should be e-filed.
 - ❑ Ensure that a working copy of digital evidence is given by the DA to the clerk as an exhibit that will be available if there is an appeal.
- ❑ Proposed instructions – e-file.
- ❑ Powerpoints – if the DA uses a Powerpoint, ask that the Court require the DA to provide an electronic copy to the clerk for the file.

Trial Checklist: Notice of Appeal



- ☐ Give oral notice of appeal correctly.
- ☐ “Your Honor, my client gives notice of appeal.”
- ☐ Must be AFTER entry of judgment (ie. after sentence).
- ☐ Must be no later than end of the session (when the court adjourns sine die).

Post-Trial Checklist: Preventing Delay



- ❑ There are a number of steps in the process that can result in cases getting delayed or lost on a clerk's desk.
- ❑ Trial attorneys should ensure continuity between trial and appellate counsel.
- ❑ Notify Office of the Appellate Defender that you appealed.
- ❑ 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 the clerk knows dates of pretrial hearings and that the Appellate Entries shows all dates.

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