

**Pre-Trial Preparation for Criminal Defense Practitioners
How To Make Sure Your Objections Are Heard On Appeal
(aka Preserving the Record)
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Top Tips To Ensure Full Appellate Review:

- Move for a complete recordation.
- Objections must be made in front of the jury to be timely.
- Objections must be specific (cite specific statute, rule of evidence, and constitutional basis)
- Move to dismiss all charges for insufficient evidence and variance.
- Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.
- Never agree that the instructions are correct.
- Give proper notice of appeal and ensure appellate counsel is appointed and that the Office of the Appellate Defender has received the case from the county clerk's office.
- Thoughtful preparation, research, and brainstorming with an eye towards appeal will help you have confidence in objecting and preserving the record. Make it a habit to be forward thinking. Read appellate opinions not just for the legal ruling, but to learn how the issue was (or was not) properly preserved.

- **Move for a complete recordation.** – Make sure everything is in the record. Proffer evidence through witness testimony and documents.

In non-capital criminal cases, the court reporter is not required to record voir dire, opening statements, or closing arguments, except upon motion of any party or the judge's own motion. N.C.G.S. 15A-1241.

Counsel or the trial judge should ask for and ensure a complete recordation. Appellate review of *Batson* claims, in particular, are frustrated by the lack of a transcript of voir dire. In *State v. Campbell*, 846 S.E.2d 804 (N.C. Ct. App. 2020), voir dire was not recorded. Defense made a *Batson* objection and the parties tried to recreate the record. Judge Hampson noted in his concurrence/dissent that:

our existing case law significantly limits a party's ability to preserve the issue absent not only complete recordation but also specific and direct voir dire questioning of prospective jurors (or other evidence) about their race. . . . In light of our case law indicating a trial lawyer cannot recreate the record of an unrecorded jury voir dire to preserve a *Batson* challenge, the obligation to recreate that record, it seems, must fall on the trial judge in conjunction with the parties.

→ **To be timely, objections must be made in front of the jury** to preserve any objections and arguments made in voir dire hearings. This includes preserving a ruling on a motion to suppress. You cannot rely on Rule 103(a) of the N.C. Rules of Evidence. Why not?

Our Supreme Court has held Rule 103(a) unconstitutional in part because only the Supreme Court, not the General Assembly, can create rules for preserving error. *State v. Oglesby*, 361 N.C. 550 (2007).

Rule 10(a) of the N.C. Rules of Appellate Procedure states:

“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...”

Therefore, our Supreme Court interprets Rule 10(a)(1) to require objections to evidence to be made in front of the jury at the time the evidence is introduced, even if the objection has been made and ruled upon previously. *State v. Ray*, 364 N.C. 272 (2010).

In *State v. Ray*, outside the presence of the jury, the defense attorney objected based on Rule 404(b) to the prosecutor's cross-examination of the defendant. Although the voir dire hearing occurred immediately before this line of questioning began in the presence of the jury, defendant's attorney did not object during the actual exchange in front of the jury. The Supreme Court held that the failure to object in front of the jury waived the 404(b) issue for appellate review.

An example of a case applying Rule 10(a)(1) and *State v. Ray* is *State v. Joyner*, 243 N.C. App. 644 (2015).

In *Joyner*, before the defendant testified, his attorney sought to preclude the State from cross-examining him about old convictions under Rule 609. The trial court allowed the defendant to testify during a voir dire hearing, heard arguments of counsel, and ruled that the State could cross-examine the defendant on the old convictions. When the jury was called back in and the defendant testified, the defense attorney failed to object to the State's cross-examination of the defendant about the old convictions. The Court of Appeals held that "the defendant has no right to raise the Rule 609 issue on appeal."

→ **Objections must be specific (cite specific statute, rule of evidence, and constitutional basis):**

Rule 10(a) of the N.C. Rules of Appellate Procedure requires the objecting party to cite the specific grounds for an objection. That means counsel must say the specific rule of evidence and constitutional provision in front of the jury. Examples:

Counsel's failure to cite Rules 403 and 404(b) waived appellate review:

In *State v. Allen*, COA17-973, 2018 N.C. App. LEXIS 554 (June 5, 2018) (unpublished op.), defense counsel sought to exclude evidence under Rules 403 and 404(b). During a hearing outside the presence of the jury the trial judge overruled the objections and ruled the evidence was admissible. Defense counsel acknowledged he would need to object when the State offered the evidence in front of the jury.

However, when the prosecutor questioned the witness in front of the jury defense counsel objected, stating "I apologize. Just for the record, we'd object to the proposed testimony on due process grounds, Federal Constitution, do not wish to be heard." The Court of Appeals held that the objection made in front of the jury was only on constitutional grounds, and not based on a rule of evidence. The issue was waived.

Counsel's failure to cite Sixth Amendment waived appellate review:

In *State v. Mosley*, COA09-1060, 2010 N.C. App. LEXIS 758 (May 4, 2010) (unpublished op.), the trial attorney sought to cross-examine a testifying co-defendant about his pending criminal charges to show bias. The trial attorney argued Rule 608 as the basis for admissibility. The trial court denied the request to allow cross-examination. On appeal, the defendant argued the cross-examination should have been allowed not just under Rule 608, but was required by the Sixth Amendment right to cross-examine and confront a witness. The Court of Appeals held the constitutional issue was waived because the trial attorney failed to assert the Sixth Amendment during trial.

→ **Move to dismiss all charges for insufficient evidence and variance.**

Rule 10(a)(3) of the N.C. Rules of Appellate Procedure states that: "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial."

In *State v. Golder*, 374 N.C. 238 (2020), the Supreme Court made clear that when defense counsel moves to dismiss the charges, even if thereafter they argue only about certain charges or theories, they have preserved the issue of the sufficiency of the evidence for all charges and all theories of liability.

It is not clear after *Golder*, and a following case *State v. Smith*, 375 N.C. 224 (2020), whether a motion to dismiss for insufficient evidence also preserves a variance issue. To be safe, counsel should specifically move to dismiss all charges for variance in addition to insufficiency.

The Court of Appeals has already started to distinguish *Golder*. In *State v. Gettleman*, 2020 N.C. App. LEXIS 895 (Dec. 15, 2020) (published op.), the defense attorney did not move to dismiss "all" charges but moved to dismiss certain charges specifically. The Court of Appeals held that when defense counsel failed to move to dismiss "all"

charges, he did not preserve for appellate review the sufficiency of the evidence as to the charge that he did not move to dismiss.

→ **Submit non-pattern jury instructions, and requests to modify pattern instructions, in writing.**

N.C.G.S. 15A-1231(a) “At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish copies to the other parties at the time he tenders them to the judge.”

Rule 21 General Rules of Practice: “If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.”

→ **Give proper notice of appeal and ensure the Office of the Appellate Defender is appointed and that the Office of the Appellate Defender has received the case from the county clerk’s office.**

Rules 3 and 4 of the N.C. Rules of Appellate Procedure

- Oral notice of appeal at trial (before court adjourns sine die)
- Written notice of appeal within 14 days
 - MUST be served on DA and must have cert. of service
- Appeal is from the “judgment” NOT from the “order denying the motion to suppress”
- Written notice of appeal is necessary to appeal satellite-based monitoring (SBM) orders

If notice of appeal is defective (ie. is not timely, does not include those items listed in Rule 3, fails to include a certificate of service, appeals from the denial of a motion, instead of from the judgment) then the appeal will be dismissed, and the Court will consider issues only by way of a petition for writ of certiorari under Rule 21 of the N.C. Rules of Appellate Procedure. Granting a petition for certiorari is discretionary and the Court of Appeals can decline to review issues, whereas if notice of appeal is proper, the Court is required to review the issues.