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:
- $\circ\,\text{preserve}$ objections and arguments,
- oestablish facts in the record, and
- oappeal correctly.

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Pre-trial Preparation

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

Pre-trial Preparation - 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.

Pre-trial Preparation

- 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.

Pre-trial Preparation

- Consider objections the State could make to your cross-examination questions and come prepared to defend the questions.
- Come to court prepared with evidence to support your cross-examination questions.

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Pre-trial motions

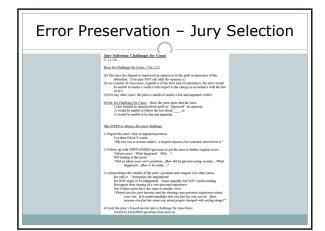
- Request and motion for discovery
- Motion for complete recordation
- Motion for a bill of particulars
- Motion to sever charges or defendants
- Motion to suppress
- $\circ\,$ You MUST attach an affidavit, and you can sign the affidavit
- If the MTS is denied, you MUST object in front of the jury when the evidence is actually offered.

Error Preservation – Jury Selection

- Batson (race) and J.E.B. (gender) claims
- o A complete recordation is imperative for preserving
- o Our Supreme Court has revived Batson
- Manner of juror selection, including fair crosssection of the community.
- Challenges for Cause that are denied can be preserved for appellate review
- o Specific, technical requirements to preserve
- o 15A-1214
- o Have a voir dire folder

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:



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Error Preservation - Jury Selection

 Have case law handy to support your client's right to have you ask certain questions.

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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).

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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.
- o 15A-927(a)(1)-(2)
- Motion must be pretrial, unless "based on grounds not previously known"
- o State v. Yarborough

Move to sever charges & defendants

- Assert constitutional and statutory grounds.
- $\,\circ\,$ 5th Amendment and state constitutional grounds
- o 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.
- <u>Motions must be renewed</u> at close of State's evidence and at the close of ALL evidence to give the judge a chance to determine prejudice.

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Preserving Evidentiary Error

- · Objections must be:
- oTimely
- oIn front of the jury, even if made outside the presence of the jury
- oSpecific (cite rule/statute)
- oInclude 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."

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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

- Motions to suppress and other motions before or during trial
- Object at the moment the evidence is introduced <u>in the presence of the jury</u>, even if voir dire was held immediately before or earlier in case.
- \circ Object if the evidence is mentioned by a later witness.
- Don't open the door if evidence is suppressed.

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Objections – Timeliness

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

Objections – Timeliness

- 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.

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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."

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Objections - Specificity

- 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.

Objections – Specificity

LACK OF BELIABILITY OF OFINION ISSUE - BULE 702

what are your opinions?

-told AGA 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 wad 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?

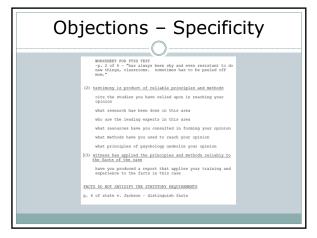
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being in court with John?

have you asked what she thinks about it?

other sources of trauma - medical examinations

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Objections - Specificity

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

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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."

Sufficiency & Variance

- Have a folder for a motion to dismiss.
- Move to dismiss <u>all</u> charges for insufficient evidence <u>and</u> variance.
- o Don't forget to make the motion.
- o 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.

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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.
- o N.C.G.S. 15A-1231
- o Rule 21 General Rules of Practice
- This includes modifications of pattern instructions.
- · Ask the judge for a written copy of instructions.

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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
- o Printed copy is not always adequate
- o 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
 - o Ex parte is different than having something sealed and unavailable to the public.

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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

- Submit a photograph of evidence and make sure it's in the court file.
 Picture of client's tattoo
- Describe what happens in court.
 "A white man with a clean shaven head and a long beard sat 3 feet from the jury and stared at Juror Number 5."
- Describe what a witness does.
- o "Mr. Jones, 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?"

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Making A Complete Record

- Defense wants to cross-examine State's witness about pending charges.
 - \circ Ask to voir dire, and ask the questions.
 - o 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.
- \circ Ask to voir dire, and ask the questions.
- \circ Make sure the answers are in the record.

Properly appealing

 Oral notice of appeal in open court – literally must be immediately after judgment is entered and client sentenced – otherwise, it must be in writing

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Properly appealing

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

Properly appealing

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

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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 <u>all</u> dates.

Resources

- IDS website
 - Training Presentations
 - o http://www.aoc.state.nc.us/www/ids/
- SOG website
- o Defender Manual
- o http://defendermanuals.sog.unc.edu/
- OAD on-call attorneys

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