

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

**Glenn Gerding
Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210**

1

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.

2

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.

3

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.

4

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.

5

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.

6

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
 - 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.

7

Error Preservation – Jury Selection

- Batson (race) and J.E.B. (gender) claims
 - A complete recordation is imperative for preserving
 - Our Supreme Court has revived Batson
- 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 voir dire folder

8

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:

9

Error Preservation – Jury Selection

Jury Selection: Challenges for Cause
(7-11-10)

Basic for Challenge for Cause: 15A-122

(6) The juror has formed or expressed an opinion as to the guilt or innocence of the defendant. (View only NOT as what the opinion is.)

(7) 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.

(8) 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 fair cause challenge:

- 1) Repeat the juror's bias or impaired position.
Use their EXACT words.
"We are not a creative artist... I despite 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 of this juror.
"Tell us about your own'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.
No call it. "Seems like the requirement"
Do NOT argue or be judgmental. Some sympathy but NOT condescending.
Recognize that hearing 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.

10

Error Preservation – Jury Selection

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

JURY SELECTION QUESTIONS
(2017-01)

I. GENERAL PURPOSE OF YOUR REE

"The voir dire examination serves the dual purpose of enabling the court to select an impartial jury and avoiding conceal in exercising peremptory challenges." *WALKER v. Virginia*, 500 U.S. 415, 431 (1991). (The N.C. Supreme Court explained that a similar "dual purpose" was to ascertain, before granting cause for cause challenge and to enable the juror to intelligently exercise their peremptory challenges. *State v. Simpson*, 341 N.C. 316, 462 S.E.2d 71, 252 (1995).

"Where an adversary wishes to exclude a juror because of bias, it is in the adversary's best interest to exercise the court's discretion through questioning that the potential juror lacks impartiality." *W. H. HARRIS v. State*, 409 U.S. 423 (1985).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Thomas*, 294 N.C. 393, 115 (1975).

The purpose of voir dire and the exercise of challenges "is to eliminate extremes of partiality and to secure both... [jurors]... that the jurors chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Cannon*, 50 N.C. 616, 489 S.E.2d 425, 432 (1996).

Jurors, like all of us, have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's personality or beliefs that would make it difficult for that juror to vote the ticket, not in an abstract sense, but in a particular case, dispassionately. *State v. Hildreth*, 66 N.C. App. 399 (1994).

11

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).

12

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

13

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.

14

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 (recording motion)
 - Mitigated with a limiting instruction or mistrial request

15

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.”

16

~~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.

17

Objections – Timeliness

- Motions to suppress and other motions before or during trial
 - 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.

18

Objections – Timeliness

- 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

19

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.

20

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.”

21

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.”

22

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.

23

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

24

Objections – Specificity

WORKSHEET FOR PFD TEST

-p. 2 of 6 - "has always been shy and even resistant to do new things, classroom. 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

25

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

26

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."

27

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.

28

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.

29

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.

30

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

31

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.

32

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?

33

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.
 - "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?"

34

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.

35

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

36

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

37

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.
 - Give notice of appeal of the judgment.

38

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.

39

Resources

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

40

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

**Glenn Gerding
Appellate Defender
123 W. Main St.
Durham, NC 27701
(919) 354-7210**