UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2023 Robert O. Dawson Conference on Criminal Appeals

May 10-12, 2023,
Capital, Austin Texas

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PRESERVATION OF ERROR

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Carmen Roe is a criminal defense attorney who established her own law firm in Downtown Houston, specializing in criminal trials, criminal appeals, and post-conviction writs, in both state and federal court. Ms. Roe is Board Certified in Criminal Appeals by the Texas Board of Legal Specialization and served as a Board of Director for the State Bar of Texas. She is a member of the Texas Bar College and a Texas Bar Fellow.

Ms. Roe currently serves on the Board of Directors for the Texas Criminal Defense Lawyers Association and National Association of Criminal Defense Lawyers. She has been selected as a Texas Super Lawyer, Best Lawyers in America as well as Best Law Firms in America. Ms. Roe is a legal analyst for KHOU in Houston and a frequent guest legal analyst for CourtTV.

BRIAN W. WICE

Brian W. Wice is recognized as one of Texas' top criminal appellate and postconviction lawyers, having handled over 400 appellate matters, including 13 death penalty cases before 18 state and federal appellate courts. He is an attorney *pro tem* in the prosecution of Texas Attorney General Ken Paxton, prosecuted former Harris County District Attorney investigator Dustin Deutsch, defending the conviction on appeal, and successfully defended the capital murder conviction and death sentence of multiple-capital murderer Dexter Johnson in state habeas corpus proceedings.

A 1976 *magna cum laude* graduate of the University of Houston and 1979 graduate of the University of Houston Law Center where he served on the Houston Law Review, Brian has been a frequent lecturer at continuing legal education events for the State Bar of Texas, serving as Course Director for the 2008 Advanced Criminal Law Course, as well as for the TCDLA, HCCLA, and HBA for the past 30 years.

Brian was honored as the "Attorney of the Year" by the Texas Criminal Defense Lawyers' Association in 2016, and by the Harris County Criminal Lawyers Association and the Houston Press in 2010, by the *Houston Press* as the "Best Legal Analyst" and "Best Appellate Lawyer, by Texas Monthly as a Texas Super Lawyer in 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, by "H Texas" Magazine as one of Houston's Top Lawyers in 2006, 2007, 2008, and 2009, and by Martindale Hubbell as an AVPreeminent Lawyer in 2009-2013.

Brian is a legal analyst for KPRC-TV, Channel 2, in Houston, and MSNBC, and has appeared on *the Today Show, Dateline-NBC, 48 Hours, 20-20, Good Morning America, CNN's New Day, Anderson Cooper 360, and the O'Reilly Factor,* and virtually every criminal justice show on network and cable television.

Brian's high-profile successes include the reversal and dismissal of all charges on appeal for former House Majority Leader Tom DeLay, a new punishment hearing in the nationally-acclaimed Susan Wright murder case in 2010, a new punishment hearing from the Fifth Circuit in 2009 for Gaylon Walbey, Galveston County's only death row inmate at the time, and the Fourth Circuit's reversal of the Rev. Jim Bakker's 45-year prison term in 1991. He was also part of the defense team for Adrian Peterson, the Minnesota Vikings' All-Pro and two-time MVP running back.

Brian was a visiting county criminal court at law judge in Harris County and is a Special Master for the Harris County District Courts in post-conviction writs, and was an associate municipal court judge for the City of Houston from 1995 to 2005. He was as a law clerk to Court of Criminal Appeals Judge Sam Houston Clinton.

Brian's articles and op-ed pieces on the criminal justice system have appeared in a variety of publications.

ACKNOWLEDGMENTS

Brian Wice wishes to thank the late Judge Sam Houston Clinton, who served on the Court of Criminal Appeals with distinction from 1978 until his retirement in 1996, and for whom he had the privilege of serving as a briefing attorney in 1979 and 1980. Judge Clinton was a giant of a jurist and a mentor as long as he lived.

Brian also wishes to express his sincere appreciation to the late Judge Cathy Cochran, former Justices Murry Cohen and Terry Jennings, John Messinger, Scott Durfee, David Botsford, Randy Schaffer, Rick Wetzel, Kevin Dubose, Chris Downey, and Carmen Roe for their continuing advice and counsel over the years.

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PROLOGUE

"[T]here are no technical considerations or form of words to be used [to preserve trial error]. Straightforward communication in plain English will always suffice.

"The standards of procedural default, therefore, are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it ... [Appellate courts] should reach the merits of those complaints without requiring that the parties read some special script to make their wishes known."

Lankston v. State, 827 S.W.2d 907, 909
(Tex.Crim.App. 1992) (emphasis added)

"Preservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion."

Haley v. State, 173 S.W.3d 510, 515 (Tex.Crim.App. 2005)

PRESERVATION OF ERROR

I. SCOPE OF ARTICLE

The past 40 years that I have spent as an appellate lawyer reviewing almost 400 appellate records in all kinds of criminal cases has convinced me that most criminal defense attorneys are either unwilling or unable to preserve error for appellate review. This malady is by no means confined to young or inexperienced lawyers. I have only recently read trial records where attorneys whose trial skills are thought to be unmatched by the public have failed to preserve otherwise meritorious appellate issues for review. What then could possibly be the problem?

Some trial lawyers simply get caught up in the urgency of the proceedings and forget to take the steps to preserve a claim. Others who are more candid confess that they simply don't know what to do. This article will serve to remedy both of these responses: first, it will tell you what you need to know to preserve error, it should be the first thing that you put in your trial notebook before you announce ready for trial.

This article is not the last word on error preservation. Any criminal trial necessarily entails a myriad of situations requiring a timely and specific objection to
ensure that error has ben preserved for appellate review.

II. PRESERVATION OF APPELLATE COMPLAINTS: AN OVERVIEW

A. TEX.R.APP.P. 33.1

Rule 33.1 provides that in order to preserve a complaint for appellate review, a party must have presented to the trial court and obtained a ruling upon his timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. *Long v. State*, 800 S.W.2d 545 (Tex.Crim.App. 1990). Because an objection, instruction to disregard, and request for mistrial "seek judicial remedies of decreasing desirability for events of decreasing frequency, the traditional and preferred procedure for a party to voice its complaint has been to ask for them in sequence [but] this sequence is not essential to preserve complaints for appellate review. The essential requirement is a timely, specific request that the trial court refuses." *Young v. State*, 137 S.W.3d 65 (Tex.Crim.App. 2004). The trial court may not prohibit counsel from preserving error by threatening him with contempt. *Ruiz-Angeles v. State*, 351 S.W.3d 489 (Tex.App.– Houston [14th Dist.] 2011, pet. ref'd).

In cases where the State is the appealing party, such as where the trial court granted a motion to suppress, claims not raised or argued by the State at trial are waived and cannot be raised for the first time on appeal. *State v. Ballman*, 157 S.W.3d 65 (Tex.App.–Fort Worth 2004, pet. ref'd). This rule does not apply where the State has prevailed in the trial court and is the appellee on appeal. *Alford v. State*, 400 S.W.3d 924 (Tex.Crim.App. 2013). Even when the State stipulates as part of a plea agreement that a claim has been preserved for review, an appellate court must itself consider whether error has been preserved. *Laurent v. State*, 454 S.W.3d 650 (Tex.App.– Houston [1st Dist.] 2014, no pet.).

If the State does not object to the sufficiency of the trial court's findings of fact and conclusions of law in the trial court, it cannot raise this issue for the first time on appeal. *State v. Froid*, 301 S.W.3d 449 (Tex.App.– Fort Worth 2009, no pet.). Where the State is the losing party with respect to the district court's granting of a motion to quash based on juvenile court's decision to certify defendant as an adult, it cannot raise for the first time on appeal the issue that the district court lacked jurisdiction to review evidence underlying certification. *State v. Rhinehart*, 333 S.W.3d 154 (Tex.Crim.App. 2011).

Error preservation requirements apply to Sixth Amendment claims that the defendant has been denied her right to a speedy trial. *Henson v. State*, 407 S.W.3d 764 (Tex.Crim.App. 2013).

The defendant does not waive his right to be sentenced by a judge who considers the entire range of punishment by failing to object. *Grado v. State*, 445 S.W.3d 736 (Tex.Crim.App. 2014).

No objection is necessary to preserve for review the claim that the trial court erred in not declaring a mistrial where the defendant is found to be incompetent after the onset of the trial on the merits. *Laster v. State*, 202 S.W.3d 774 (Tex.App.–San Antonio 2006, no pet.). But a timely objection is required to preserve for review the trial court's improper intrusion into the plea bargaining process. *Moore v. State*, 295 S.W.3d 329 (Tex.Crim.App. 2009).

The defendant did not forfeit her right to complain about the unauthorized cost for the appointment of an attorney pro tem by not objecting when she was never given the opportunity to object and was not required to file a motion for new trial to preserve this claim. *Landers v. State*, 402 S.W.3d 253 (Tex.Crim.App. 2013).

The defendant waived her right to complain about the restitution requirement assessed as a term of community supervision by not objecting. *Gutierrez-Rodriguez v. State*, 444 S.W.3d 21 (Tex.Crim.App. 2014).

The defendant did not waive his claim of inability to pay his probation fees even though he pled true to this allegation because the requirement that the State prove that a probationer's inability to pay is intentional because this issue is one that cannot be forfeited. *Rusk v. State*, 440 S.W.3d 694 (Tex.App.– Texarkana 2013, no pet.).

B. SPECIFICITY

"Rather than focus on the presence of magic language, a court should examine the record to determine whether the trial court understood the basis of a defendant's [objection]." *State v. Rousseau*, 396 S.W.3d 550 (Tex.Crim.App. 2013). The generally acknowledged policy of requiring a specific objection is two-fold. First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. *Martinez v. State*, 22 S.W.3d 504 (Tex.Crim.App. 2000). Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or to supply other testimony. *Zillender v. State*, 557 S.W.2d 515 (Tex.Crim.App. 1977).

A general objection is the functional equivalent of no objection and will not ordinarily preserve error. *Meek v. State,* 628 S.W.2d 543 (Tex.App.--Fort Worth 1982, no pet.). It is not

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First appeared as part of the conference materials for the
2023 Robert O. Dawson Conference on Criminal Appeals session
"Preservation of Error for the Appellate Practitioner "