ISSUE PRESERVATION AND PRESENTATION
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I. GENERAL OVERVIEW – WHY THIS STUFF IS IMPORTANT

Issues which are properly preserved and presented get better review on appeal. Issues which were not properly preserved at trial get reviewed under a much harder prejudice standard, if they get reviewed at all. Many or most issues which were not properly preserved at trial will not get merits review.

When presenting an issue on appeal which was not properly preserved at trial, the appellate lawyer will need to explain in the brief both HOW and WHY the appellate court should address the merits of the issue.

N.C.R.App.P. Rule 10(b) provides the basic rules governing issue preservation. The most basic rule is that in order to preserve an issue for appeal, “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 trial court to make if the specific grounds were not apparent from the context.” N.C.R.App.P. Rule 10(b)(1) (emphasis added)

II. MOTIONS AND OBJECTIONS AT TRIAL – THE CORE OF ISSUE PRESERVATION

A. Motions and motions in limine A timely pretrial motion seeking specific relief other than on evidentiary issues, such as a motion for change of venue, or a motion to dismiss based on double jeopardy or speedy trial violations, will generally be sufficient to preserve the issue raised therein for appeal on the specific grounds argued in the motion. HOWEVER, a pretrial motion seeking a pretrial ruling on the admissibility of evidence – including a motion to suppress evidence on constitutional grounds – will not preserve the issue for appeal unless there was also an objection during the trial when the evidence was admitted.

B. General objections Basically speaking, general objections are worthless. General objections might possibly sufficient to preserve an issue for appeal in two situations. First, if the basis of the objection is obvious from the context. Obviousness is an elusive concept in this regard. You cannot ever count on appellate court agreeing that the grounds for objection are obvious from the context, but do not hesitate to rely on this provision if it is the only way your issue might be preserved. If the trial judge’s ruling shows that the trial judge understood the basis for the objection, that will be helpful. Second, a general objection is sufficient if the evidence in question is rendered incompetent by statute and is not admissible for any legitimate purpose. Another elusive concept. This exception is based on old case law and has been the subject of much criticism.

C. Specific objections A specific objection preserves only the specific basis asserted. Thus, an objection on hearsay grounds will not preserve an issue based on the confrontation clause. Similarly, an objection based on relevance will not support a hearsay argument or an argument that there was a discovery violation regarding the item of evidence.
D. Timeliness and the requirement of continuing to object — “losing the benefit” of an objection by failing to continue to object. An objection is timely only if it is made at the first opportunity. When a question clearly calls for inadmissible evidence, the objection should be made when the question is asked. If the question was OK but the answer unexpectedly contains inadmissible evidence, the objection should be made when the answer is given. Once inadmissible evidence has come in once without objection, a subsequent objection to more of the same evidence will be untimely.

Moreover, it is not enough for a trial lawyer to enter a timely and specific objection. If the same evidence is subsequently admitted without objection, the appellant loses the benefit of the objection. The only exceptions to this are (1) there is case law saying that a single objection is sufficient to preserve the issue for a single line of questions (i.e. consecutive questions about the same topic without anything intervening) and (2) if the objecting party brings the issue back up in order to explain or refute the previously objected-to inadmissible evidence.

E. Constitutional issues. Constitutional issues are not automatically preserved for appellate review. Case law from the North Carolina Supreme Court says that constitutional issues not raised at trial will not be addressed for the first time on appeal. The Court of Appeals regularly enforces this rule.

F. Do not count on N.C. Gen. Stat. §15A-1446(d) 15A-1446(d) lists broad categories of issues which are deemed preserved for review even without objection. Unfortunately, our Supreme Court has ruled in a number of cases that where this statute conflicts with Rule 10(b) of the Appellate Rules, the Appellate Rules control and the statute is unconstitutional. If you ever have an issue which falls under any of the categories listed in 15A-1446(d) check the annotations. At least 5 subsections have expressly been ruled unconstitutional.

III. EXCEPTIONS TO THE GENERAL RULE—ISSUED DEEMED PRESERVED FOR REVIEW AS A MATTER OF LAW, EVEN WITHOUT OBJECTION

Notwithstanding the general rule requiring a contemporaneous objection, there are a few categories of issues which are deemed preserved as a matter of law even without an objection. Some of these categories, including subject matter jurisdiction are not even subject to the invited error rule.

A. Subject matter jurisdiction. Any appellate argument that the trial court lacked subject matter jurisdiction is deemed preserved as a matter of law. In criminal cases, these issues usually pertain to defective indictments, or indictments which don’t support the conviction offense. Another way this comes up in criminal cases is when rulings on pretrial motions are issued after the session of court in which the hearing took place has expired. In 7B cases, there are a variety of ways subject matter jurisdiction issues come up, including such things as fatally defective petitions, lack of a proper (and properly served) summons, jurisdiction lying in another state in interstate custody disputes, etc.
B. Violations of non-waivable state constitutional rights -- the right to an unanimous verdict of twelve jurors, the right to a valid indictment, the right to be present during all critical stages of a capital trial

North Carolina Supreme Court case law says these issues are not waivable and are preserved for appellate review notwithstanding the lack of objection.

C. Violations of statutory mandates At least in criminal cases, when a statute mandates that the trial judge take a certain action, any issue arising out of the trail judge’s failure to follow the statutory mandate is deemed preserved for review even without objection. Examples in criminal cases include failing to appoint the statutorily required second counsel for an indigent defendant in a capital trial, failure to bring the entire jury back into the courtroom to respond to a question from the jury, expressions of opinion by the judge, and failing to impanel the jury. In 7B cases, a trial court’s failure to follow statutory timelines, failure to appoint a guardian ad litem when one is required by statute.

D. Sentencing issues and issues related to the pronouncement of judgment In criminal cases, issues arising during sentencing are preserved as a matter of law. This will include such things as calculation of the defendant’s prior record level, whether the sentence imposed was unlawful, whether two offenses should have “merged” for judgment purposes, whether a resentencing is more severe than the original sentence. Back when judges determined aggravating factors, it applied to sufficiency of evidence to support an aggravating factor. This exception will not include an argument that a sentence constitutes cruel and unusual punishment. Although there is not yet case law on point, the sentencing exception to Rule 10(b) most likely will not apply to issues pertain to jury trials on aggravating factors.

In civil cases, when the trial court enters a written order the appellant can assign error to and argue issues pertaining to the validity of the findings of fact and conclusions of law without objecting. Likewise, a defendant may argue issues pertaining to the findings in a written order denying a motion to suppress, so long as there was a contemporaneous objection when the evidence was admitted at trial.

In cases where the trial judge sits as finder of fact and the facts must be found by a higher standard than the preponderance standard (eg. beyond a reasonable doubt for delinquency and criminal contempt cases and clear, cogent and convincing in some 7B situations), the failure of the order to reflect application of the higher burden of proof will be preserved w/out objection.

E. Other miscellaneous issues Questions propounded to a witness by the court, or the court’s calling of a witness (N.C.R.Evid. Rule 614); orders entered out of session and out of term.

There is case law saying that defects in the indictment, verdict or judgment appearing on the face of the record proper subject a judgment to a motion in arrest of judgment and may be raised for the first time on appeal. These types of defects generally overlap with categories A and B above, but include a few other quirky issues such as the verdict sheet failing to provide an option for the jury to vote “not guilty.”
IV. WHAT TO DO IF AN ISSUE WAS NOT PRESERVED FOR REVIEW AT TRIAL

If you have a case which presents a potentially meritorious issue, but nothing was done at trial to preserve the issue for appellate review, what do you do? The first thing to do is to try to figure out whether there is any way to fit the issue into a category of error which is deemed automatically preserved as a matter of law. If there is no viable way to do this, there are several recognized methods of presenting truly unpreserved errors on appeal. For each of these methods, you must show both (1) why there was error at trial and (2) why the appellate court should address that error even though it was not properly preserved for appellate review.

A. **Plain error**  Plain error review is available only in criminal cases. See, N.C.R.App.P. Rule 10(c)(4). Loosely speaking, plain error is error which (1) affects a fundamental right and/or (2) resulted in a manifest injustice and/or (3) was so prejudicial that the result at trial probably would have been different but for the error.

Although there are a few older cases finding plain error on other types of issues, recent case law has held that plain error is strictly limited to issues regarding the admissibility of evidence, and issues related to jury instructions. Generally, there is no point in trying to argue plain error in other types of situations.

In order to argue plain error in the brief, you must “specifically and distinctly” allege plain error. In the brief, your argument should explain, as specifically as possible, why the error you are addressing meets the test for plain error.

B. **Arguing that the judge should have intervened Ex Mero Motu** This is related to, but technically distinct from plain error. When a prosecutor’s closing argument is grossly improper, a trial court has the duty to intervene even without an objection. Likewise, if a prosecutor’s question to a witness is grossly improper (meaning the impropriety is contained within the question itself, not that the question improperly calls for a plainly improper answer) the trial judge should intervene without objection. Examples include abusive closing arguments, arguments or questions which improperly go beyond the record or interject the prosecutor’s personal knowledge or opinion, arguments or questions which contend that a witness is a liar, etc.

Unlike plain error, *ex mero motu* review of grossly improper arguments or questions is not limited to criminal cases. However, because the prejudice in these situations is generally based on the improper effect on the jury, this category is probably of very limited use in 7B cases.

C. **Ineffectiveness of trial counsel in failing to object or take some other action** In criminal and delinquency cases, there is a constitutional right to effective assistance of counsel. In 7B parents cases, the case law recognizes a comparable right to effective assistance of counsel under state law. If faced with an unpreserved issue which does not fit under either plain error review or *ex mero motu* review, you may argue that counsel was ineffective for failing to properly raise and preserve the issue.

The test for ineffective assistance of counsel requires the appellant to show (1) that counsel’s performance was objectively deficient – that is, fell below the minimum acceptable standard for counsel undertaking that type of representation, and (2) that the client was prejudiced by counsel’s deficient performance. There is a strong presumption that counsel’s trial
decisions were the result of reasonable trial strategy. The necessary showing for IAC is almost impossible to meet in a direct appeal. Essentially, you must convince the court that (1) the issue would have been a winner if it had been raised, (2) winning the issue would have changed the ultimate outcome, and (3) on the appellate record, there was no conceivable valid strategic reason for counsel to fail to raise and preserve the issue.

D. The issue should be reviewed under Rule 2 of the Rules of Appellate Procedure

Appellate Rule 2 provides the ultimate last-ditch fall-back position. In the recent case of Dogwood Development and Management Co., Inc. v. White Oak Transportation Co., Inc. 362 N.C. 191, 657 S.E.2d 361 (2008) the North Carolina Supreme Court explained that “Rule 2 permits the appellate courts to excuse a party's [trial court] default in both civil and criminal appeals when necessary to ‘prevent manifest injustice to a party’ or to ‘expedite decision in the public interest.’ The Court goes on to caution that Rule 2 will only be applied under exceptional circumstances.

If you have a viable but unpreserved issue, and no other way to get review, argue that the error meets this test. But don’t just say it. You need to explain (hopefully in a convincing fashion) why your case is exceptional and why failure to address an issue will result in manifest injustice or why the public interest requires that the issue be addressed.

V. WHAT TO DO IF IT IS UNCLEAR WHETHER AN ISSUE IS PRESERVED

Sometimes you might face a situation where it is unclear whether an issue is preserved for appellate review. Maybe there was a general objection and you think the basis was obvious in context but you cannot count on the court agreeing with you. Maybe the judge violated a statute which you think creates a mandate, but there is no case law on point. What do you do? The answer is simple – argue both alternatives. Make your best argument why the issue falls within a category that is preserved for review, then explain why, even if the court disagrees with you, the issue should be reviewed under one of the grounds for reviewing unpreserved error.