

PRESERVING THE RECORD ON APPEAL

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I. INTRODUCTION:

- ❖ Our appellate courts are increasingly using “waiver” to avoid reaching the merits of issues in appellate cases.
- ❖ While appellate attorneys can and do fail to preserve appellate issues, “waiver” most often begins at the trial level

II. BASIC PRESERVATION PRINCIPLES:

- ❖ Express disagreement with what the trial court did (or did not do) and the complete grounds for that disagreement by objection, exception, motion, request, or otherwise.
- ❖ Assert your position in a timely fashion.
- ❖ Assert your position in the form required by the applicable rule or statute.
- ❖ Constitutionalize your position whenever possible by explicitly asserting both Federal and State constitutional grounds.
- ❖ Re-assert your position every time the same or a substantially similar issue arises.
- ❖ Make an offer of proof if your evidence is wrongly excluded.
- ❖ Recent Case Note: In *State v. Canaday*, 355 N.C. 242, 559 S.E.2d 762 (2002), the trial attorneys preserved a number of statutory and constitutional errors. While the individual errors may not have warranted a new trial, the Supreme Court held that, when “taken as a whole,” the cumulative preserved errors “deprived defendant of his due process right to a fair trial.” *Id.* at 254, 559 S.E.2d at 768. The Court’s opinion in *Canaday* demonstrates the benefit of lodging timely, specific, and frequent objections.

III. RECORDATION

- ❖ Make sure the hearing is being recorded. See N.C. Gen. Stat. § 122C-267(g), -268(i), -268.1(h).
- ❖ If anything occurs off the record, ask the trial judge to reproduce it for the record and ensure that all of your objections are in the record.

IV. EVIDENTIARY RULINGS:

A. Objecting to the State's Evidence:

- ❖ Make timely objections. *See* N.C. R. App. Proc. 10(b)(1). If the prosecutor asks a question that you think is improper or may elicit improper testimony, enter a quick *general* objection. If the trial court invites you to argue the objection or rules against you, you should follow up by stating the *basis* for your objection.
 - ✓ A defendant's general objection to the State's evidence is ineffective unless there is *no* proper purpose for which the evidence is admissible. *See State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994) (burden on defendant to show no proper purpose).
 - ✓ If evidence is objectionable on more than one ground, *every* ground must be asserted at the trial level. Failure to assert a specific ground waives that ground on appeal. *See State v. Moore*, 316 N.C. 328, 334, 341 S.E.2d 733, 737 (1986); N.C. R. App. P. 10(b)(1).
- ❖ If evidence is admissible for a limited purpose, object to its use for all other improper purposes. *See State v. Stager*, 329 N.C. 278, 309-10, 406 S.E.2d 876, 894 (1991); N.C. R. Evid. 105.
- ❖ When appropriate, constitutionalize your objections. If a defendant wishes to claim error on appeal under the Federal Constitution as well as state law, the defendant must have raised the constitutional claim when the error occurred at trial. *See State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 222 (1994); *State v. Skipper*, 337 N.C. 1, 56, 446 S.E.2d 252, 283 (1994).
 - ✓ *e.g.*: If the trial court excludes your proffered evidence, do not object solely on state law relevance grounds. You should also cite your client's constitutional due process right to present evidence in his defense.
 - ✓ *e.g.*: Due process issues at involuntary commitment hearings. *See Vitek v. Jones*, 445 U.S. 480, 491-92, 63 L.Ed.2d 552, 564 (1980) (commitment to mental hospital produces massive curtailment of liberty requiring due process protections):
 - ✓ Notice and an Opportunity to be Heard. *Vitek v. Jones*, 445 U.S. 480, 63 L.Ed.2d 552 (1980) (transfer of prisoner to mental hospital without notice and opportunity to be heard violates due process)
 - ✓ Confrontation of Adverse Witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 270, 25 L.Ed.2d 287, 300 (1970) (right to confront witnesses at hearing on termination of AFDC benefits; "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and examine witnesses."); *Willner v. Committee on Character*, 373 U.S. 96, 103, 10 L.Ed.2d 224, 229 (1963) (admission to practice of law; "procedural due process often

requires confrontation and cross-examination of those whose word deprives a person of his livelihood”).

- ✓ Right to Counsel. *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27, 68 L.Ed.2d 640, 649 (1981) (presumption that indigent litigant has right to appointed counsel when, if he loses, he may be deprived of his physical liberty); *Vitek v. Jones*, 445 U.S. 480, 494-96, 63 L.Ed.2d 552, 566-67 (1980) (plurality opinion) (indigent prisoner entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital); *In re Gault*, 387 U.S. 1, 41, 18 L.Ed.2d 527, 554 (1967) (appointed counsel required for delinquency proceeding that might result in commitment to institution)
- ✓ Sufficiency of Evidence. When the State seeks to deprive a person of liberty, it must produce sufficient evidence to justify the deprivation. *Jackson v. Virginia*, 443 U.S. 307, 314-16, 61 L.Ed.2d 560, 570-71 (1979). See *Addington v. Texas*, 441 U.S. 418, 60 L.Ed.2d 323 (1979) (State must produce evidence sufficient to convince reasonable finder of fact by clear, cogent and convincing evidence that respondent dangerous and mentally ill); *O'Connor v. Donaldson*, 422 U.S. 563, 45 L.Ed.2d 396 (1975) (violation of due process to continue to confine harmless but mentally ill person); *Fouch v. Louisiana*, 504 U.S. 71, 118 L.Ed.2d 437 (1992) (violation of due process to continue where respondent dangerous but no longer mentally ill); *In re Doty*, 38 N.C. App. 233, 247 S.E.2d 628 (1978) (insufficient evidence respondent was a danger to herself or others); see also *In re Ingram*, 74 N.C. App. 579, 328 S.E.2d 588 (1985) (petition not duly sworn and failed to state claim upon which relief could be granted).

B. Moving to Strike the State's Evidence:

- ❖ If the prosecutor's question was not objectionable (or your objection to the question was overruled), but the witness' answer was improper in form or substance, you must make a timely motion to strike that answer. See *State v. Marine*, 135 N.C. App. 279, 285, 520 S.E.2d 65, 68 (1999).
- ❖ Similarly, if the trial judge sustains your objection but the witness answers anyway, you must make a timely motion to strike the answer. See *State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994); *State v. McAbee*, 120 N.C. App. 674, 685, 463 S.E.2d 281, 286 (1995).

C. Waiving Prior Objections:

- ❖ If you initially object but then allow the same or similar evidence to be admitted without objection, the defendant will have waived his right to challenge admission of the evidence on appeal. See *State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992).
- ❖ One way to deal with this problem is to enter a standing line objection to the evidence when it is offered at trial. See N.C. Gen. Stat. § 15A-1446(d)(9) & (10).

- ✓ To preserve a line objection, you must ask the trial court’s permission to have a standing objection to a particular line of questions. In addition, you should clearly state your grounds for the standing objection. If the court denies your request, object to every question that is asked.
- ✓ If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.
 - *e.g.*: If you have a standing line objection based on relevance and a specific question in that line calls for hearsay, you need to interpose an additional hearsay objection.

D. Making an Offer of Proof:

- ❖ Evidence Rule 103(a)(2) provides that “[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.”
- ❖ Thus, if the trial court sustains the prosecutor’s objection and precludes you from presenting evidence, making an argument, or asking a question, you must make an offer of proof.
- ❖ You should make your offer of proof by actually eliciting testimony from the witness. It is not enough to rely on the context surrounding the question. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002). Summarizing what the witness would have said also may not be sufficient. *See State v. Long*, 113 N.C. App. 765, 768-69, 440 S.E.2d 576, 578 (1994).
- ❖ If the court tells you that an offer is not necessary, state: “Defendant wants the record to reflect that we have tried to make an offer of proof.”
- ❖ If the court tells you to make your offer “later,” the burden is on you to remember and make sure the offer is made.

V. MOTIONS TO DISMISS:

- ❖ Always move to dismiss at the close of the State’s evidence and renew your motion to dismiss at the close of all the evidence (even if you only introduce exhibits).