

PRESERVING APPELLATE ISSUES

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I. INTRODUCTION

A. WHY PRESERVE ERRORS FOR APPEAL?

1. So your client can appeal
2. Vindication – maybe an appellate court will think you’re right
3. In criminal cases, so the appellate attorney doesn’t have to argue under the plain error standard

II. ASSERT ALL BASES FOR THE MOTION, ESPECIALLY CONSTITUTIONAL ONES -- ANY BASIS FOR THE MOTION NOT ASSERTED AT TRIAL CANNOT BE ARGUED ON APPEAL.

A. EXAMPLES:

1. “Defendant contends that the trial court erred by inquiring into the jury split and denying defendant’s motion for mistrial when the jury was deadlocked. Defendant asserts violation of his right to a jury trial under both the United States and the North Carolina Constitutions. By failure to raise the federal constitutional issue at trial, defendant has, however, waived that argument on appeal.” *State v. Patterson*, 103 N.C. App. 195, 405 S.E.2d 200 (1991), *aff’d*, 332 N.C. 409, 420 S.E.2d 98 (1992).

2. “Defendant argues that his constitutional and statutory rights were violated by the denial of his motion to require the state to disclose the name of the confidential informant. We take note that defendant did not present this motion to the trial court on constitutional grounds, the motion was not argued on constitutional grounds, and the trial court did not determine it on constitutional grounds. . . . This Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court. . . . Because [defendant] failed to ask the trial court to pass upon the constitutional issue, we decline to do so now.” *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985).

III. IF YOUR MOTION IN LIMINE OR PRETRIAL SUPPRESSION MOTION IS DENIED, OBJECT WHEN THE EVIDENCE IS OFFERED AT TRIAL.

A. IF YOU DO NOT OBJECT AT TRIAL WHEN THE EVIDENCE IS OFFERED, THE ISSUE IS NOT PRESERVED FOR APPEAL. *State v. Hayes*, 350 N.C. 79, 511 S.E.2d 302 (1999).

1. Examples:

(a) “Although defendant filed and the trial court ruled on the motion in limine, defendant failed to object at trial to the admission of Johnson’s testimony. The rule is that a motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the movant fails to further object to that evidence at the time it is offered at trial.” *City of Wilson v. Hawley*, 156 N.C. App. 609, 577 S.E.2d 161 (2003).

(b) “The dispositive issue is whether the trial court erred in allowing evidence to be admitted at trial that resulted from Deputy Aleem's search of defendant. Defendant contends the evidence obtained from Deputy Aleem's search of his pocket should have been suppressed because no probable cause and exigent circumstances justified the warrantless search. . . . We first note that "[a] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." . . . Moreover, "[r]ulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial[,] and thus an objection to an order granting or denying the motion `is insufficient to preserve for appeal the question of the admissibility of evidence.'" . . . Because defendant failed to object at trial to the evidence he sought to suppress through the motion in limine, he has not preserved the issue for appeal.” *State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004).

B. IF A STATUTE OR RULE OF EVIDENCE SAYS THE DENIAL OF THE MOTION IS PRESERVED ANYWAY, DON’T BELIEVE IT.

1. The General Statutes v. the Appellate Rules – If the general statutes say an issue is preserved, but the appellate rules or N.C. Supreme Court case law says it is not, the appellate rules and N.C. Supreme Court win, i.e., the issue is not preserved.

2. Examples – preservation statutes deemed unconstitutional by Supreme Court:

(a) N.C. Gen. Stat. 15A-1446(d)(6) (don't need to object to assert unconstitutionality of statute on appeal). *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981).

(b) N.C. Gen. Stat. § 15A-1446(d)(5) (don't need to move to dismiss to argue insufficiency of evidence on appeal). *State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987).

(c) N.C. Gen. Stat. § 15A-1446(d)(13) (don't need to object to assert errors in jury charge on appeal). *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983).

3. **Not yet ruled unconstitutional, but probably will be:** - N.C. Gen. Stat. § 8C-1, Rule 103(b) - once the trial court makes a definitive ruling admitting or excluding evidence, either at or before trial, there is no need to later renew the objection.

C. IF A JUDGE SAYS YOU DON'T HAVE TO OBJECT, DON'T BELIEVE IT.

1. Assurances of the trial court that pretrial objections would remain in effect at trial are insufficient to preserve the issue of admissibility of the evidence. *State v. Goodman*, 149 N.C. App. 57, 560 S.E.2d 196 (2002), *rev'd in part on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003).

D. LINE OBJECTIONS

1. **General rule - If you initially object but then allow the same or similar evidence to be admitted without objection, you will have waived your right to challenge admission of the evidence on appeal.** *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *death sentence vacated*, 488 U.S. 807, 102 L.Ed.2d 18 (1988). *But see* N.C. Gen. Stat. § 1A-1, Rule 46(a)(1) and *Department of Transp. v. Fleming*, 112 N.C. App. 580, 436 S.E.2d 407 (1993), for civil cases.

2. How to Preserve a Line Objection

(a) 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.

(b) If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.

(1) Example - 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.

(c) You cannot make a line objection at the time you lose your motion to suppress or your motion in limine; you must object to the evidence at the time it is offered. *State v. Gray*, 137 N.C. App. 345, 528 S.E.2d 46 (2000).

IV. WHEN THE STATE’S MOTION IS GRANTED AND YOUR EVIDENCE IS EXCLUDED, MAKE AN OFFER OF PROOF

A. GENERAL RULE - “ERROR 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.” N.C. Gen. Stat. § 8C-1, Rule 103(a)(2). *See also* N.C. Gen. Stat. § 15A-1446(a) (“when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence.”)

B. HOW TO MAKE AN OFFER OF PROOF

1. You should make your offer of proof by actually eliciting testimony from the witness outside the presence of the jury.

(a) It is not enough to rely on the context surrounding the question. *State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002), *cert. denied*, 537 U.S. 1125, 154 L.Ed.2d 808 (2003). What you think is apparent may not be to an appellate court.

(b) Summarizing what the witness would have said is probably not sufficient. *State v. Long*, 113 N.C. App. 765, 440 S.E.2d 576, *disc. rev. denied*, 336 N.C. 318, 445 S.E.2d 399 (1994).

(c) If the evidence sought to be admitted is an exhibit, be sure to try to introduce it at trial. *State v. McCall*, 162 N.C. App. 64, 589 S.E.2d 896 (2004).

2. If the court does not allow you to make an offer of proof, make sure your request and the trial court’s denial is on the record. In a criminal case, also state that the trial court’s failure to allow you to do so violates the defendant’s right to confrontation, to present a defense, and, if applicable, to compulsory process. It is error for the court to prohibit you from making an offer of proof. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981).