

“TRIAL OBJECTIONS AND PRESERVATION OF ERROR”

***Fixing What’s Broke before the Warranty Expires and
Avoiding a Claim of Ineffective Assistance of Counsel***

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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)

“TRIAL OBJECTIONS AND PRESERVATION OF ERROR”

I. SCOPE OF ARTICLE

The past 30-plus years that I have spent as an appellate lawyer reviewing over three hundred 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 been preserved for appellate review.

II. PRESERVATION OF APPELLATE COMPLAINTS: AN OVERVIEW

A. TEX.R.APP.P. 33.1: No Harm--No Foul: What's Good for the Goose....

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). 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). Where the State did 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). Where the State was 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, State could not raise for the first time on appeal issue that district court lacked jurisdiction to review evidence underlying certification. State v. Rhinehart, 333 S.W.3d 154 (Tex.Crim.App. 2011).

Where the State did not raise the good faith exception in Art. 38.23(a) of the Code of Criminal Procedure or the claim that its cooperating individuals whom police relied on to procure a search warrant were acting in the public interest by trespassing on the premises to be searched at the suppression hearing, it could not do so for the first time on appeal as the losing party. State v. Rodriguez, 2011 WL 2087499 (Tex.App.—Tyler 2011)(not designated for publication).

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 beginning of the trial on the merits. Laster v. State, 202 S.W.3d 774 (Tex.App.—San Antonio, 2006). 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 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, ___ S.W.3d ___, 2013 WL 503957 (Tex.App.—Texarkana, 2-13-13).

B. SPECIFICITY: *Knowing What to Say*

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). It is not necessary that an objection refer to a specific statute if the objection is specific enough to put the trial judge on notice as to the basis of counsel's complaint. Lankston v. State, 827 S.W.2d 907 (Tex.Crim.App. 1992). The specificity requirement applies "to goose and gander, State and defendant." State v. Neesley, 196 S.W.3d 356 (Tex.App.—Houston [1st Dist.], 2006)(State waived claim regarding admissibility of blood sample suppressed by trial court by not raising them at suppression hearing). As the party offering the evidence, the defendant is not required to tell the trial court

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