

PRESENTED AT

**2021 Robert O. Dawson Conference
on Criminal Appeals**

May 13-14, 2021
Austin, Texas

**Preservation of Error
Pretrial, During Trial, and Post-Trial**

Michael C. Gross

Michael C. Gross
Gross & Esparza, PLLC
San Antonio, Texas 78215

lawofcmg@gmail.com
(210) 354-1919

**PRESERVATION OF ERROR
PRETRIAL, DURING TRIAL, AND POST-TRIAL**

Michael C. Gross
Gross & Esparza, P.L.L.C.
1524 North Alamo Street
San Antonio, Texas 78215
www.txmilitarylaw.com
(210) 354-1919
(210) 354-1920 Fax
lawofcmg@gmail.com

**2021 Robert O. Dawson Conference on Criminal Appeals
Austin, Texas
May 13-14, 2021**

GROSS & ESPARZA, P.L.L.C.
1524 North Alamo Street
San Antonio, Texas 78215
lawofcmg@gmail.com
www.txmilitarylaw.com
(210) 354-1919

MICHAEL C. GROSS
CURRICULUM VITAE

EDUCATION

B.A., Trinity University, San Antonio, Texas, 1984
J.D., St. Mary's University, San Antonio, Texas, 1987

PROFESSIONAL ACTIVITIES AND RECOGNITIONS

Judge Advocate, U.S. Marine Corps, 1988-1992
Associate, Zimmermann & Lavine, P.C., Houston, Texas, 1992 - 1996
Law Office of Michael C. Gross, P.C., San Antonio, Texas, 1996 - 2012
Gross & Esparza, P.L.L.C., San Antonio, Texas, 2012 - Present
Board Certified, Criminal Trial Advocacy, National Board of Trial Advocacy, 1997
Board Certified, Criminal Law, Texas Board of Legal Specialization, 1995
Board Certified, Criminal Appellate Law, Texas Board of Legal Specialization, 2011
President-Elect, Texas Criminal Defense Lawyers Association, 2021
President, San Antonio Criminal Defense Lawyers Association, 2011
Defender of the Year, San Antonio Criminal Defense Lawyers Association, 2008
Defender of the Year, San Antonio Criminal Defense Lawyers Association, 2009
Named in Best Lawyers in America, 2005 - 2021
Named Best Lawyers San Antonio Non-White-Collar Lawyer of the Year - 2015, 2017
Named in Texas Super Lawyers in Texas Monthly Magazine, 2004 - 2021
Named Top 50 Texas Super Lawyers in Central and West Texas Region, 2010 - 2012, 2014
Named in Best Lawyers in San Antonio by Scene in San Antonio Magazine, 2004 - 2021
Named Top 10 Criminal Defense Attorneys in San Antonio by Scene Magazine - 2013
AV rated by Martindale Hubble

COURT ADMISSIONS

Supreme Court of the United States, 1991
Supreme Court of the State of Texas, 1987
United States Court of Appeals for the Armed Forces, 1990
United States Court of Appeals for the Fifth Circuit, 1990
United States Court of Appeals for the Tenth Circuit, 1998
United States District Court for the Northern District of Texas, 1990
United States District Court for the Southern District of Texas, 1991
United States District Court for the Eastern District of Texas, 1991
United States District Court for the Western District of Texas, 1992

TABLE OF CONTENTS

I.	Key rules to know regarding error preservation	1
A.	Timely, specific objection is required - TRAP 33.1(a)(1)	1
B.	Constitutionalized objection has best standard of review - TRAP 44.2(a).	1
C.	Trial objection must comport with appellate point of error	2
1.	State procedural default	2
2.	Failure by state or defense to preserve error.	2
D.	Offer of proof - TRE 103(c)	3
E.	Obtain an adverse ruling on objection - TRAP 33.1(a)(2)	3
F.	Renew objection if necessary	4
G.	Evidence conditionally admitted and motion to strike	4
H.	Excluded evidence offered by you	4
II.	Preservation of error pretrial.	4
A.	MMA letter - TCCP 39.14	4
B.	Preserving a claim of error pretrial or outside jury presence - TRE 103(b)	5
C.	Motions in limine and preliminary questions - TRE 104	5
D.	Pretrial motions and trial briefs and court awareness of each.	5
III.	Preservation of error during trial.	5
A.	Coded objections and motions in limine.	5
B.	Limiting instructions - TRE 105.	6
C.	Voir dire of expert outside presence of jury - TRE 705(b).	6
D.	Bench conferences and court reporter.	9
E.	Indictment/information/complaint	9
F.	Multiple defendants at trial	10
G.	Jury selection.	10
H.	Running objections	10
I.	Objections to exhibits	10
J.	TRE 404(b) evidence	10
1.	Follow <i>Montgomery</i>	11
a.	Propensity evidence	11
b.	Prerequisites under 404(b)	11
c.	Rule 403 standard	11
d.	Steps to follow	12
e.	Request Notice	12
i.	Rebuttal evidence	12
ii.	Open file	12
iii.	Timely request.	12
iv.	Form of request.	13
v.	Sufficiency of notice.	13
K.	Jury instructions	14
L.	Client confesses during punishment	14

IV.	Preservation of error post-trial	14
A.	Motion for new trial - TRAP 21	14
1.	Definition	14
2.	When Motion for New Trial Required	15
3.	Grounds.	15
4.	Time to File and Amend Motion	17
5.	State May Controvert; Effect	17
6.	Time to Present.	17
7.	The hearing on the Motion	18
8.	Court's Ruling.	18
9.	Effect of Granting.	19
B.	Formal bills of exception - TRAP 33.2.	20
C.	Arrest of judgment - TRAP 22	20

I. Key rules to know regarding error preservation

A. Timely, specific objection is required - TRAP 33.1(a)(1)

Rule 33.1 of the TRAP states that, in order to present a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that: (1) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; (2) complied with the requirements of the Texas Rules of Evidence or the TRAP; and (3) the trial court ruled on the request, objection, or motion, either expressly or implicitly, or the trial court refused to rule and the complaining party objected to the refusal.

The record must reflect a specific objection in order to preserve error for appeal. For example, a generic reference to the federal and state constitutions is not a specific objection and fails to preserve error. *Burks v. State*, 876 S.W.2d 877, 903 (Tex. Crim. App. 1994). An objection as to hearsay fails to preserve error where the claim on appeal was the evidence was not a prior consistent statement pursuant to Rule of Evidence 801(e)(1)(B). *Meyers v. State*, 865 S.W.2d 523, 524-525 (Tex. App. - Houston [14th Dist.] 1993, pet. ref'd).

"[A]ll 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." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim.

App. 1992). An appellate court should apply waiver only if the nature of the defendant's complaint was unclear. *Id.* A general objection will preserve error if its grounds are apparent to the trial judge. *Id.* at 908.

Error called to the court's attention will lead to reversal if there was some harm to the appellant, but unobjected-to error calls for reversal only if it was so egregious as to deprive the appellant of a fair and impartial trial. *Flores v. State*, 224 S.W.3d 212 (Tex. Crim. App. 2007).

Texas Rule of Evidence 103(d) authorizes an appellate court to take notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court. *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000). Some rights, such as the presumption of innocence, are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. *Id.* A principal characteristic of these rights is that they cannot be forfeited. *Id.* Such rights are not extinguished by inaction alone. *Id.* Instead, if a defendant wants to relinquish one or more of them, he must do so expressly. *Id.* A violation of a fundamental constitutional right, such as when a judge's comments to the jury violates an appellant's presumption of innocence, is not subject to the requirements of Rule 33.1 and requires no objection. *Id.* It is possible, however, to waive a constitutional error by failing to object and comply with Rule 33.1. *See Briggs v. State*, 789 S.W.2d 918, 924 (Tex. Crim. App. 1990).

B. Constitutionalized objection has best standard of review - TRAP 44.2(a)

TRAP 44.2(a) states that, "If the appellate record in a criminal case reveals

constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.” TRAP 44.2(b) states that, “Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”

A reviewing court reviews the harm resulting from the denial of a suppression motion regarding evidence obtained in violation of the Fourth Amendment under the constitutional harmless-error standard of TRAP 44.2(a). *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001). Under Rule 44.2(a), a reviewing court must reverse the conviction unless it concludes “beyond a reasonable doubt that the error did not contribute to the conviction or punishment.” Under this standard, a reviewing court presumes reversal is required, and the burden is on the State to show the error is harmless. *See Morris v. State*, 554 S.W.3d 98, 124 (Tex. App. - El Paso 2018, pet. ref’d).

C. Trial objection must comport with appellate point of error

For a complaint to be preserved for appellate review, the trial objection must comport with the complaint on appeal. *See Lovill v. State*, 319 S.W.3d 687, 691-92 (Tex. Crim. App. 2009); *see also Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016) (noting that, “[i]f a trial objection does not comport with arguments on appeal, error has not been preserved”); *Bekendam v. State*, 441 S.W.3d 295, 300 (“We are not hyper-technical in examination of whether error was preserved, but the point of error on appeal must comport with the objection made at trial.”); *Wilson v. State*, 71 S.W.3d 346, 349

(Tex. Crim. App. 2002); *Coffey v. State*, 796 S.W.2d 175, 180 (Tex. Crim. App. 1990).

1. State procedural default

If the State is the appellant, State procedurally defaults point at issue if that point was not argued at trial. *State v. Mercado*, 972 S.W.2d 75 (Tex. Crim. App. 1998). There is no such duty to preserve error on an appellee. *Najar v. State*, No. PD-1049-19 (Tex. Crim. App., March 3, 2021). An appellant must object and preserve error, but not an appellee. *Id. citing Darcy v. State*, 488 S.W.3d 325, 329 (Tex. Crim. App. 2016) (“Ordinarily, the appealing party must have raised a particular complaint at trial before he can raise it on appeal.”); *Bonilla v. State*, 452 S.W.3d 811, 813 (Tex. Crim. App. 2014) (party complaining about trial court’s ruling bears burden of preserving error for review). Preservation rules are “judge-protecting” rules. *Martinez v. State*, 91 S.W.3d 331, 335 (Tex. Crim. App. 2002). That means that “appellate courts may uphold a trial court’s ruling on any legal theory or basis applicable to the case, but usually may not reverse a trial court’s ruling on any theory or basis that might have been applicable to the case, but was not raised.” *Id.* at 336. It does not matter whether the trial court relied on the alternative theory or whether the prevailing party raised it. *State v. Castanedanieto*, 607 S.W.3d 315, 327 (Tex. Crim. App. 2020). A legal theory is applicable as long as the appellant had “an adequate opportunity to develop a complete factual record with respect to the theory.” *Id.*

2. Failure by state or defense to preserve error

Rule 33.1(a) of the TRAP states that preservation of an issue for appellate review ordinarily requires an appellant to have first raised the issue in the trial court. *Burt v. State*,

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Preservation of Error

Also available as part of the eCourse

[Practical Guidance in Criminal Appeals Practice: PDRs, Findings of Fact, Preservation of Error, and More](#)

First appeared as part of the conference materials for the
2021 Robert O. Dawson Conference on Criminal Appeals session
"Preservation of Error"