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PRESERVATION OF ERROR

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BRIAN W. WICE

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A 1976 *magna cum laude* graduate of the University of Houston and 1979 graduate of the University of Houston Law Center where he served on the Houston Law Review, Brian has been a frequent lecturer at continuing legal education events for the State Bar of Texas, serving as Course Director for the 2008 Advanced Criminal Law Course, as well as for the TCDLA, HCCLA, and HBA for the past 30 years.

Brian was honored as the "Attorney of the Year" by the Texas Criminal Defense Lawyers' Association in 2016, and by the Harris County Criminal Lawyers Association and the Houston Press in 2010, by the *Houston Press* as the "Best Legal Analyst" and "Best Appellate Lawyer, by Texas Monthly as a Texas Super Lawyer in 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, by "H Texas" Magazine as one of Houston's Top Lawyers in 2006, 2007, 2008, and 2009, and by Martindale Hubbell as an AVPreeminent Lawyer in 2009-2013.

Brian is a legal analyst for KPRC-TV, Channel 2, in Houston, and MSNBC, and has appeared on *the Today Show*, *Dateline-NBC*, *48 Hours*, *20-20*, *Good Morning America*, *CNN's New Day*, *Anderson Cooper 360*, and *the O'Reilly Factor*, and virtually every criminal justice show on network and cable television.

Brian's high-profile successes include the reversal and dismissal of all charges on appeal for former House Majority Leader Tom DeLay, a new punishment hearing in the nationally-acclaimed Susan Wright murder case in 2010, a new punishment hearing from the Fifth Circuit in 2009 for Gaylon Walbey, Galveston County's only death row inmate at the time, and the Fourth Circuit's reversal of the Rev. Jim Bakker's 45-year prison term in 1991. He was also part of the defense team for Adrian Peterson, the Minnesota Vikings' All-Pro and two-time MVP running back.

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TABLE OF CONTENTS

	PAGE
ABOUT THE AUTHOR	i
AUTHOR' S NOTE	ii
PROLOGUE	vi
I. SCOPE OF ARTICLE	1
II. PRESERVATION OF APPELLATE COMPLAINTS: AN OVERVIEW	1
A. TEX.R.APP.P. 33.1	1
B. SPECIFICITY	3
C. TIMELINESS	6
D. OBTAINING AN ADVERSE RULING	7
III. FIVE VALUABLE TOOLS IN PRESERVING ERROR	7
A. RUNNING OBJECTIONS	7
B. MOTIONS IN LIMINE	8
C. OFFERS OF PROOF	8
D. MOTIONS TO STRIKE	9
E. AVOIDING CURATIVE ADMISSIBILITY	9
F. PRE TRIAL JEOPARDY CHALLENGES/PROS. MISCONDUCT	9
G. MOTIONS TO SUPPRESS: FINDINGS OF FACT	10
IV. GUILTY PLEAS, PRE-TRIAL MOTIONS & NOTICES OF APPEAL	10
A. THE DEMISE OF THE HELMS RULE	10
B. TEX.R.APP.P. 25.2(b)	10
C. PRESERVING ERROR IF PLEA AGREEMENT IS BREACHED	11

- D. THE NOTICE OF APPEAL MUST BE IN WRITING 11
 - E. PRESERVING PRE-TRIAL ERROR DURING TRIAL 11
 - F. THE CERTIFICATION OF APPEAL REQUIREMENT 12
 - G. THE STATE’S RIGHT OF APPEAL 12
- V. VOIR DIRE 13
- A. THE VOIR DIRE MUST BE RECORDED 14
 - B. COMMENTS MADE IN THE PRESENCE OF THE PANEL 14
 - C. VOIR DIRE TIME LIMITS 14
 - D. LIMITATION ON ASKING A GIVEN QUESTION 15
 - E. COMMITMENT QUESTIONS 15
 - F. DENIAL OF A CHALLENGE FOR CAUSE 16
 - G. GRANTING OF THE STATE’S CHALLENGE FOR CAUSE 16
 - H. SUA SPONTE EXCUSAL OF A JUROR 17
 - I. BATSON CLAIMS 17
 - J. THE UNTRUTHFUL OR DISSEMBLING JUROR 18
 - K. STRIKE MISTAKES 18
 - L. DISABLED JURORS 18
- VI. EXCLUSION OF TESTIMONY 18
- A. DIRECT EXAMINATION 18
 - B. CROSS-EXAMINATION 19
 - C. DENIAL OF THE DEFENDANT’S RIGHT TO REOPEN 19
 - D. MISSING WITNESSES 19
- VII. ADMISSION OF EXTRANEOUS OFFENSES 20

- A. PRE-TRIAL STRATEGIES 20
 - B. A SPECIFIC TRIAL OBJECTION IS A MUST 20
 - C. OBJECTIONS THAT ARE SPECIFIC ENOUGH 21
 - D. TIMING IS EVERYTHING 21
 - E. REMEMBER THE RULE IN MAYNARD 21
 - F. THE DEGARMO DOCTRINE IS DEAD AND BURIED 21
- VIII. COURT'S CHARGE TO THE JURY 22
- A. REQUESTED INSTRUCTIONS 22
 - B. OBJECTIONS TO THE COURT'S CHARGE 22
 - C. ESTOPPEL AND SUFFICIENCY CHALLENGES ON APPEAL 23
- IX. FINAL ARGUMENT 23
- A. CONSIDER FILING A MOTION IN LIMINE 23
 - B. TIME LIMITATIONS 23
 - C. MAKING A TIMELY AND SPECIFIC OBJECTION 24
 - D. OBTAINING A RULING FROM THE TRIAL COURT 24
 - E. ASKING FOR A CURATIVE INSTRUCTION 25
 - F. MOVING FOR A MISTRIAL 25
 - G. RENEWING YOUR OBJECTION 25
 - H. PRESENTING YOUR APPELLATE CONTENTION 25
- X. MOTIONS FOR NEW TRIAL 25
- A. YOUR MOTION MUST BE TIMELY FILED 25
 - B. THE RIGHT TO COUNSEL 26
 - C. YOUR MOTION MUST BE SWORN TO 26

D.	YOUR MOTION MUST BE TIMELY PRESENTED	26
E.	YOU MUST ALLEGE MATTERS OUTSIDE THE RECORD	27
F.	IT MUST BE HEARD WITHIN 75 DAYS OF SENTENCING	27
G.	CONSIDER AFFIDAVITS IN LIEU OF A HEARING	27
H.	BURDEN OF PROOF AND PROCEDURE AT THE HEARING	28
I.	“IN THE INTEREST OF JUSTICE”	29
XI.	MISCELLANEOUS	29
A.	PROBATION	29
	TOP TEN TIPS FOR PRESERVING ERROR	31
	2020 CASE LAW UPDATE	32
	2021 CASE LAW UPDATE	33
	2022 CASE LAW UPDATE	
	COMMANDMENTS OF PRESERVATION FOR YOUR TRIAL NOTEBOOK	34

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)

PRESERVATION OF ERROR

I. SCOPE OF ARTICLE

The past 40 years that I have spent as an appellate lawyer reviewing almost 400 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

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). The trial court may not prohibit counsel from preserving error by threatening him with contempt. *Ruiz-Angeles v. State*, 351 S.W.3d 489 (Tex.App.—Houston [14th Dist.] 2011, pet. ref'd).

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, pet. ref'd). This rule does not apply where the State has prevailed in the trial court and is the appellee on appeal. *Alford v. State*, 400 S.W.3d 924 (Tex.Crim.App. 2013). Even when the State stipulates as part of a plea agreement that a claim has been preserved for review, an appellate court must itself consider whether error has been preserved. *Laurent v. State*, 454 S.W.3d 650 (Tex.App.—Houston [1st Dist.] 2014, no pet.).

If the State does 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, no pet.). Where the State is 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, it cannot raise for the first time on appeal the issue that the district court lacked jurisdiction to review evidence underlying certification. *State v. Rhinehart*, 333 S.W.3d 154 (Tex.Crim.App. 2011).

Error preservation requirements apply to Sixth Amendment claims that the defendant has been denied her right to a speedy trial. *Henson v. State*, 407 S.W.3d 764 (Tex.Crim.App. 2013).

The defendant does not waive his right to be sentenced by a judge who considers the entire range of punishment by failing to object. *Grado v. State*, 445 S.W.3d 736 (Tex.Crim.App. 2014).

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 onset of the trial on the merits. *Laster v. State*, 202 S.W.3d 774 (Tex.App.–San Antonio 2006, no pet.). 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 forfeit her right to complain about the unauthorized cost for the appointment of an attorney pro tem by not objecting when she was never given the opportunity to object and was not required to file a motion for new trial to preserve this claim. *Landers v. State*, 402 S.W.3d 253 (Tex.Crim.App. 2013).

The defendant waived her right to complain about the restitution requirement assessed as a term of community supervision by not objecting. *Gutierrez-Rodriguez v. State*, 444 S.W.3d 21 (Tex.Crim.App. 2014).

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*, 440 S.W.3d 694 (Tex.App.– Texarkana 2013, no pet.).

B. SPECIFICITY

“Rather than focus on the presence of magic language, a court should examine the record to determine whether the trial court understood the basis of a defendant's [objection].” *State v. Rousseau*, 396 S.W.3d 550 (Tex.Crim.App. 2013). 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, no pet.). It is not

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