

Robert O. Dawson
Conference on Criminal Appeals

May 6, 2020
Austin, Texas

Standards of Review

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Standards of Review

The starting point for the analysis of any issue on appeal should be the standard of review. A clear statement of the appropriate standard of review in your brief lends immediate credibility to the legal analysis in your brief, whether you are the appellant or the appellee. Both parties should address the appropriate standard of review in their briefs before conducting any analysis of the legal issue raised on appeal. This paper addresses some of the more common standards of review and how the appellant and/or appellee may use those standards in presenting a compelling appellate argument.

PRESERVATION OF ERROR

Most legal issues will not be reviewed by an appellate court unless they have been preserved for appellate review. Issues of procedural default are "systemic," by which the Court of Criminal Appeals means that an appellate court is not at liberty to reverse a case on the basis of a claim of trial error without first addressing any issue of preservation of error that may suggest itself from the record. *Gipson v. State*, 383 S.W.3d 152, 159 (Tex.Crim.App. 2012). Where preservation of alleged error is required, the appellant should always, and initially, demonstrate in their brief that the alleged error raised on appeal has been preserved for appellate review.

Preservation of error should be addressed by both the appellant and the appellee in their briefs. Even if the appellant does not address whether the issue raised on appeal has been preserved for appellate review, the appellee absolutely should address it. Preservation of error is more than just a technicality; it is actually a procedural *gateway* that the parties must pass in order to have their claims heard on the merits. *Pena v. State*, 285 S.W.3d 459, 465-66 (Tex.Crim.App. 2009) (Holcomb, J. dissenting). The appellate court will not address an issue if the party was required to preserve error but failed to do so. *Pena*, 285 S.W.3d at 466.

The standard of review for preservation of error is found in Rule 33.1 of the Texas Rules of Appellate Procedure. That rule states, in part:

(a) In General. --As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a **timely** request, objection, or motion that: (A) 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.

Addressing whether an issue has in fact been preserved for appellate reviews assists both the appellant and the appellee in drafting and presenting the issues and arguments in their briefs by identifying the *specific legal argument, if any*, that was presented to the trial court. In determining whether an objection is sufficiently specific at trial to preserve error on appeal, the appellate court looks to the context of the objection and the shared understanding of the parties at the time. *Lankston v. State*, 827 S.W.2d 907, 911 (Tex.Crim.App. 1992). A general objection will not suffice to preserve error. *Vasquez v. State*, 501 S.W.3d 691, 705 (Tex.App. – Houston [14th Dist.] 2016, pet.ref'd.) (objection of “improper argument” insufficient to preserve error). But, a general objection can be sufficient when the record shows that the trial court understood the nature of the objection. *Vasquez*, 501 S.W.3d at 705, citing *Everett v. State*, 707 S.W.2d 638 641 (Tex.Crim.App. 1986) (nature of the prosecutor's argument coupled with defense counsel's objection informed the court of the nature of the error, viz: argument outside the record). A trial court's understanding of an objection may be evidenced by comments or admonitions made after its ruling. *Vasquez*, 501 S.W.3d at 705.

Error preservation does not involve a hyper-technical or formalistic use of words or phrases; instead, “[s]traight forward communication in plain English” is sufficient. *Pena*, 285 S.W.3d at 464, quoting *Lankston*, 827 S.W.2d at 908-909. To avoid forfeiting a complaint on appeal, the party must “let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for

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First appeared as part of the conference materials for the
2020 Robert O. Dawson Conference on Criminal Appeals session
"Standards of Review"