Preserving Your Record

by Debra Reece and Gerry Schulze

The General Rule

An issue must be presented to the trial court at the earliest opportunity to preserve it for appeal. Any error raised on appeal must have first been raised in the trial court. That means that you must direct the issue to the court's attention, give the court (and opposing counsel) an opportunity to address the issue, and actually get a ruling on the issue.

> The preservation rule serves several useful purposes. If a party objects immediately to a ruling, then the trial court, which is in the best position to avoid and correct error, may hear the arguments and change its decision at that time. Changing the ruling soon after it occurs, rather than waiting for an appeal, saves litigants and the judicial system time and resources. Additionally, it would be unfair to reverse a judgment on appeal based on arguments that the prevailing party never had the chance to meet at trial. Finally, the preservation requirement also prevents "sandbagging" by lawyers who might take unnecessary risks at trial knowing that, even if they lose, they can use a reversible error to escape an adverse decision. By making it likely that the trial court—rather than the appellate court—will determine the case's outcome, the preservation rule encourages trial lawyers to prepare and perform more carefully, rather than rely on an appellate opportunity to correct their mistakes.

Stella J. Phillips, *Putting It All Together: Law Schools' Role in Improving Appellate Practice*, 31 U. Ark. Little Rock L. Rev. 135, 144-45 (2008).

Although the quote below discusses Texas law, the theory in Arkansas is similar. The purpose of requiring contemporaneous preservation of error involve fairness to the trial court and opposing counsel, as far as to the appellate court itself.

> The primary policies underlying preservation of error are efficiency and fairness. By bringing error to the attention of the trial judge, efficiency is better served, as the court is given an immediate opportunity to avoid or correct mistakes. As one appellate court explained, the purpose of requiring an objection to a point of error is to help appellate judges "figger out" what act or omission of the trial court judge was wrong. Second, by requiring a party to make a timely, specific objection, opposing counsel is given an opportunity to respond at trial. In essence, the law does not appreciate an attorney holding back his error card in the event he loses at trial, and then playing it for the first time on appeal. Although the Texas judicial system is based upon the premise that everyone is entitled to their day in court, parties must abide by a court's decisions as long as the proceedings are fair. Fairness runs in both directions; the proceeding must

be fair to the litigant and the litigant must be fair to his opponent and the trial court by objecting to any event at trial which might be raised on appeal.

Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 St. Mary's L.J. 997, 1002-03 (1999).

The few exceptions

The Court will raise appellate jurisdiction on its own motion, even when none of the parties have raised it. *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991). The Court will consider the subject matter jurisdiction of the lower court for the first time, even if it was not raised below. *Miles v. Southern*, 297 Ark. 274, 760 S.W.2d 868 (1988).

An illegal sentence can be reviewed for the first time on appeal. A void or illegal sentence is a matter of subject-matter jurisdiction that cannot be waived by the parties and may be addressed for the first time on appeal. *Mayes v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002).

Direct the issue to the court's attention

-Proper pleading

Rules of pleading require some legal theories to be properly pleaded. Proper pleading in some cases means that the pleading was done in the first responsive pleading. Defenses such as venue and service of process must be raised in the first responsive pleading. Other defenses need not be pleaded in the first responsive pleading, but must be pleaded. Even these defenses can be waived if raised too late.

You must plead certain defenses. The statute of frauds must be affirmatively pleaded. *Majewski v. Cantrell,* 293 Ark. 360, 737 S.W.2d 649 (1987). Adverse possession, laches, and estoppel must be pleaded. *Bowlin v. Keifer*, 246 Ark. 693, 440 S.W.2d 232 (1969).

Raising an issue on the pleadings is necessary, but is not enough. A party, by his conduct at trial, can abandon an issue made by the pleadings. *Bond v. Dudley & Moore*, 244 Ark. 568, 426 S.W.2d 780 (1968).

-**Proper Objection**

Objections must be as clear as you can make them. "[W]hen challenging the exclusion of evidence, a party must make a proffer of the excluded evidence at trial so that [the] court can review the decision, unless the substance of the evidence is apparent from the context. *Leach v. State*, 2012 Ark. 179, 9, 402 S.W.3d 517, 524 (2012).

In *Ingram v. State*, 2014 Ark.App. 707, the defendant was charged with making a false report in a 911 call. The evidence was that she made an accusation in a 911 call that she was being held against her will by a man with a gun, and that the man had pointed the gun at her several times. She claimed that the man had hit her. Then she called 911 back to cancel the call. Predictably, the police came anyway. After quite a bit of drama and negotiation the defendant came out of the house. After a little bit of tear gas, the man came out of the house as well. On questioning at the police station, the defendant withdrew her claim that the man pointed the gun at her, threatened to use it, or prevented her from leaving the house.

The defendant was charged with making a false 911 call. At trial, defendant moved for a directed verdict on the ground that the state did not prove that the report was actually false. On appeal she relied on a case, *Thomas v. State*, 51 Ark. 138, 10 S.W. 193 (1888), for the proposition that two statements given by one person, without more, does not prove which of the two statements was false. The Court of Appeals rejected the argument, finding that appellant did not make the inconsistent-statements-rule argument before the circuit court. She just argued that the State did not prove that the statement on the 911 call was false.

Pretrial: Discovery

In Civil Cases:

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. Ark. R. Civ. P. 32

In Criminal Cases:

Brady violations. The U.S. Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), held that the prosecution withholding exculpatory evidence from a defendant is a violation of due process. In *Brady*, the defendant was charged with murder and the prosecution withheld a statement from a second person in which that person admitted to committing the murder.

Brady was extended in *Giglio v. U.S.*, 405 U.S. 150 (1972), to include evidence that could be used by the defense to impeach a government witness. In *Giglio*, the prosecutor failed to notify the defense about a deal with a witness that he would not be criminally charged in exchange for his testimony. The Court held that withholding material evidence of impeachment, even if withheld negligently or inadvertently, is a *Brady* violation that is reversible error.

The important thing to remember about *Brady* violations is that, time and again, courts have held that the defense waived any claim to a *Brady* violation if they failed to ask for the material (as though the defense would know to ask for something that it doesn't know exists). For this reason, it is not enough to have a "bare bones" discovery motion in a criminal case. A good discovery motion will ask for every possible type of evidence that could be used to impeach confidential informants, police officers, or any other witnesses.

In the case of government agency witnesses (i.e., crime lab analysts, forensic examiners, etc.), it is also critical to ask for items like field notes, lab reports, chain-of-custody documents, bench notes, graphs, charts, machine results, testing results, raw data, etc. Normally, the only thing the defense will receive is the final report, but the cross-examination value is found in these other items; and if they aren't asked for in discovery, then the defense has waived any later argument about a *Brady* violation.

Other criminal discovery issues. In 2004, the US Supreme Court handed down the case of *Crawford v. Washington*, 541 U.S. 36, which held that the Sixth Amendment Confrontation Clause trumps hearsay exceptions and requires the defense to be given the opportunity to cross-examine witnesses against the defendant or, if the witness is unavailable, exclude their testimony. That was extended in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), to include reports from analysts such as those from the crime lab. Prior to *Melendez-Diaz*, prosecutors would often successfully admit crime lab reports without an analyst present, by calling the report a "business document" (or some other hearsay exception), thus not affording the defense the opportunity to cross-examine the analyst. *Melendez-Diaz* requires that the defense be allowed to cross-examine the analyst who wrote the report; however, it is critical that the defense notify the State that it intends to cross-examine the analyst. So the defense should include that request in its discovery motion or in another discovery-type motion, requesting the presence of the analyst at trial for cross-examination. If the defense does not request the analyst, it has waived any claim that the admission of report violates *Crawford*.

Pretrial: Motions in Limine

"[M]otions in limine are not to be used as a sweeping means of testing issues of law. Such motions are to be used to prevent some specific matter, perhaps inflammatory, from being interjected prior to the trial court's having decided on its admissibility outside the hearing of the jury." *Schichtl v. Slack*, 293 Ark. 281, 285, 737 S.W.2d 628, 630 (1987). In Schichtl, the Arkansas Supreme Court quoted the Iowa Supreme Court's description of the purpose of motions in limine:

The Iowa Supreme Court described the purpose of motions in limine:

> The motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application of it lest parties be prevented from even trying to prove their contentions.

> That a plaintiff may have a thin case or a defendant a tenuous defense is ordinarily insufficient justification for prohibiting such party from trying to establish the contention. Nor should a party ordinarily be required to try a case or defense twice—once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury. Moreover, the motion in limine is not ordinarily employed to choke off an entire claim or defense, as it was here regarding arson. Rather, it is usually used to prohibit mention of some specific matter, such as an inflammatory piece of evidence, until the admissibility of that matter has been shown out of the hearing of the jury.

Schichtl v. Slack, 293 Ark. 281, 285-86, 737 S.W.2d 628, 631 (1987) quoting from *Lewis v. Buena Vista Mutual Ins. Assn,* 183 N.W.2d 198 (Iowa, 1971).

The Arkansas Supreme Court has said that "where a motion in limine is made to specific evidence, and denied, the objection is preserved." *Schichtl v. Slack*, 293 Ark. 281, 285, 737 S.W.2d 628, 630 (1987). Expanding on this, the Court explained:

> When a motion in limine is filed, a trial judge will usually make one of three rulings. One, he may grant the motion, and the evidence will not be admitted. Two, he may decline to rule on the motion for various reasons; for example, the motion may be too broad. *See, e.g., Schichtl v. Slack,* 293 Ark. 281, 737 S.W.2d 628 (1987). In that case it is necessary for counsel to make a specific objection during the trial. *Brown v. State,* 316 Ark. 724, 875 S.W.2d 828 (1994). Third, he may deny the motion. A motion in limine which is denied preserves the issue for appeal and no further objection is required. *Ward v. State,* 272 Ark. 99, 612 S.W.2d 118 (1981).

Massengale v. State, 319 Ark. 743, 746, 894 S.W.2d 594, 595 (1995).

If you win a motion in limine, and opposing counsel or a witness violates the order in limine, you must object. Failure to object to the violation of the trial court's order waives the objection on appeal. There is no affirmative duty on a trial court to enforce its order in limine. *Casteel v. State Farm Mutual Automobile Ins. Co*, 66 Ark. App. 220, 989 S.W.2d 547 (1999).

In Federal court, on the other hand, a motion in limine does not ordinarily preserve error for appellate review. A motion in limine, by itself, is not sufficient to preserve an issue for appellate review. *Huff v. Heckendorn Mfg. Co.,* 991 F.2d 464, 466 (8th Cir.1993). There are some exceptions, *see Sprynczynatyk v. Gen. Motors Corp.*, 771 F.2d 1112, 1118 (8th Cir. 1985). The exception applies where the "district court made a definitive pretrial ruling that affected the entire course of the trial." *Aerotronics, Inc. v. Pneumo Abex Corp.*, 62 F.3d 1053, 1066 (8th Cir. 1995). The Tenth Circuit, citing *Sprynczynatyk*, says that "a motion in limine may preserve an objection when the issue (1) is fairly presented to the district court, (2) is the

type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge." *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993).

In my humble opinion, relying on the rule in *Sprynczynatyk* is somewhat more difficult than spelling and pronouncing the name.[1] It seems like most cases citing the exception deal with why it doesn't apply. See, e.g. *Ross v. Douglas County, Nebraska*, 234 F.3d 301 (8th Cir. 2000).

Voir Dire

Misstatements of Law.

You must make a contemporaneous objection, and ask for a remedial instruction. *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003).

Batson Challenges

Jury Selection

"To preserve for appeal an objection to an empaneled juror, a party is required to have exhausted his or her peremptory challenges and must show that he or she was forced to accept a juror who should have been excused for cause. *Berry v. St. Paul Fire and Marine Ins. Co.*, 944 S.W.2d 838, 328 Ark. 553 (1997).

In other words, you have to use all your strikes. Otherwise, the error would be harmless.

Opening Statement and Closing Argument

Statements unsupported by evidence.

It is difficult to prevail on this ground in opening statement. Generally, courts agree that it cannot be error in opening statement to outline the case that counsel anticipates proving through the evidence and witnesses, even though counsel ultimately fails to have the evidence admitted before the end of the trial The reason for this rule is that counsel is not guaranteed her witnesses will conform to the testimony anticipated by counsel. Moreover, counsel is not certain what evidence the court will admit or reject. Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 Pepp. L. Rev. 243, 271-72 (2002) [footnotes omitted].

[1] And I studied Slavic languages in college. -Gerry

There are some circumstances in which this type of objection can be proper even in opening. Obviously, if there is no evidence at all for a particular statement, or if counsel makes a statement of evidence that the trial court has excluded on a motion in limine, an objection of this nature is proper. Nevertheless, the requirement of a contemporaneous and clear objection remains.

In closing argument, when the evidence is in, it is objectionable to refer to evidence or facts that didn't make it into the trial record. Even here, however, it is necessary to raise the objection before the trial court. Often, it can be necessary to move to strike, ask for an instruction to disregard the statement, or even move for a mistrial in order to preserve your record and to preserve your right to a remedy.

Statements in Opening Statement or Closing Argument.

Personal belief

"Absent a contemporaneous objection at trial, we will not review alleged errors in the State's closing argument." *Lard v. State*, 2014 Ark. 1, 26, 431 S.W.3d 249, 268 *cert. denied,* 135 S. Ct. 76, 190 L. Ed. 2d 67 (2014).

Arguments about conduct of counsel.

It is often difficult to make a record on exactly what happened. In *Jefferson v. State,* 372 Ark. 307, 276 S.W.3d 214 (2008) there is an example of how to make the record. Even though the challenge was ultimately unsuccessful, it is a good illustration of the lengths you must go to to provide the necessary context for your objection.

> In his opening statement, the prosecutor wrote on the court blackboard "We *are* responsible for the consequences of our actions." The circuit court allowed defense counsel to erase that writing before testimony. The prosecutor again wrote it on the blackboard during his first closing argument, and again, the circuit court permitted erasure of the statement before the closing argument. The following colloquy subsequently took place:
>
> DEPUTY PROSECUTING ATTORNEY: I knew, and I suspect everyone of you all knew when you came out of that jury room after we had completed voir dire, that where we were coming in this case is exactly where we are right now. You've got to come down to the proposition of what does it mean to cause somebody's death, and why that's on the board up there and that's why it got erased before. Because they can't stand it and—
>
> DEFENSE COUNSEL: Your Honor, may I approach?
>
> BENCH CONFERENCE:
>
> DEFENSE COUNSEL: That is totally improper argument. Mr. Long knows it's not proper just to leave mottos and aphorisms up, you know, on a bulletin board during a trial.

DEPUTY PROSECUTING ATTORNEY: If it's not proper did your Honor instruct for it to be erased?

DEFENSE COUNSEL: I ask permission and—I asked permission to erase and it was allowed—and because it was the proper thing to do, and I move for a mistrial and without waiving a motion for mistrial I—I—even thought an admonition is insufficient, I ask that it be admon—that the jury be admonished that—that having that—having items from **opening statement** displayed to the jury during the trial is improper and that's why it was erased.

THE COURT: The court's of the opinion that the jury instructions properly cover it. The motion's denied and the admonition's denied.

DEFENSE COUNSEL: Your Honor—for the record, just in case the record is not clear, the item which was put on a portable blackboard in the court in opening statement, which was erased and to which you refers [sic] and which is replaced by Mr. Morledge in close, reads "We are responsible for the consequences of our actions." With the word "are" "a-r-e" underlined.

THE COURT: Okay.

Jefferson argues that the prosecutor's statement was an improper attack on either the defendant or defense counsel. He states that it is wholly improper for the prosecutor to "attack" the defense for doing something—erasing the blackboard—specifically permitted by the circuit court. In support of his argument, Jefferson cites *Timmons v. State,* 286 Ark. 42, 688 S.W.2d 944 (1985). *Timmons* is distinguishable from the instant case. In *Timmons,* this court found prejudice where the prosecutor called a witness to the stand when it was known that the witness could not give valid relevant testimony and then argued to the jury that the defense prevented it from hearing the witness's testimony. Here, the prosecutor's reference to the board erasure was not an improper comment on evidence. Jefferson has failed to show that the prosecutor's remark regarding the blackboard erasure was prejudicial. Accordingly, we hold that the circuit court did not abuse its discretion in denying Jefferson's motion for mistrial.

Jefferson v. State, 372 Ark. 307, 324, 276 S.W.3d 214, 227 (2008)

Evidence

RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the

court by offer or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Errors Affecting Substantial Rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

Ark. R. Evid. 103

Introducing evidence

-Proffer evidence

If you seek to introduce evidence, and the opposing counsel successfully objects to it, you must proffer the evidence. The best way is to ask the Court for an opportunity to have the witness actually give the excluded testimony, but frequently a court will not be willing to stop proceedings to allow you to do that.

You must make the proffer so as to make it clear what you intended to show. It's not enough to say that this testimony would contradict the testimony of another witness. W*ade v. Grace*, 321 Ark. 482, 902 S.W.2d 785 (1995). How would it contradict the testimony? What would it say?

There are a couple of exceptions to the proffer rule. Where there are co-plaintiffs, if one plaintiff proffers evidence, the other can use that proffer as a ground for appeal. Ice v. Bramblett, 311 Ark. 157, 842 S.W.2d 29 (1992). When the substance of the evidence sought to be introduced is "apparent from the context within which questions were asked," an offer of proof is not required. Ark. R. Evid. 103(a)(2); *Lewis v. Gubanski,* 50 Ark.App. 255, S.W.2d (1995). It is best not to rely on that kind of rule, however, if a clear proffer would remove all doubt.. In the rare situation that the party does not actually have access to the evidence, but would have to get it from the witness, a proffer is not necessary. An example is set out in *Henderson v. State,* 279 ark. 435, 652 S.W.2d 16 (1983):

> [I]n this situation it is normally only the prosecutor and the accomplice who know what expectation, if any, the state is holding out for the accomplice. The defendant and his attorney do not usually have this information. Rule 103(a)(2) does not contemplate a proffer of evidence when the information is unavailable to the cross-examiner. The exclusion of evidence of possible bias or possible prejudice by the accomplice is sufficient. A proffer was not necessary.

Henderson v. State, 279 Ark. 435, 439-40, 652 S.W.2d 16, 19 (1983)

Objecting to evidence

-Making an objection

You must object to evidence if you want to rely on the improper admission of that evidence on appeal. There are some very practical reasons trial lawyers sometimes fail to object to evidence. Sometimes a lawyer will ask a question that calls for hearsay. The problem is, that if you object to the question before the jury, the jury is going to know that you want to keep some information from them. Even worse, sometimes the objectionable question can be easily cured if called to the attention of opposing counsel. Sometimes inadmissible evidence comes before the jury in the form of an unresponsive answer to a lawyer's question. In those circumstances, not only are you calling the jury's attention to the evidence, it is evidence the jury has already heard. That essentially means you have to make a judgment call. Do you want to disrupt the flow of the trial and give up the objection, or do you want to keep your record clean and exclude the damaging evidence, or at least preserve your objection for appeal?

Sometimes you choose not to object because you anticipate that the answer will not hurt you.

The objection must be timely. Sometimes "timely" is described as being at the first available opportunity. It does no good to object to evidence that got into the record earlier without objection. Generally speaking, raising an issue in a post-trial motion is neither necessary, *Marron v. Williams*, 2010 Ark.App. 229, nor sufficient. *Office of Child Support Enforcement v. Harper*, 2013 Ark. App. 171, pp 7-8.

You must give the judge every objection to the evidence. Some evidence is objectionable on more than one basis. In order to preserve your objection for appeal, you must state all the grounds.

You also must give opposing counsel a sufficient objection that any curable defect can be cured. *Smith v. Union National Bank*, 241 Ark. 821, 410 S.W.2d 599 (1967) ("It is not our practice to reverse the action of the trial court when a party fails to object to a procedural defect that could have been readily supplied had the point been raised seasonably.") This creates a particular problem in the context of motions for directed verdict. If an error is curable, you may have to give the plaintiff or the prosecution a blueprint on how to move to reopen the case and fix the error.

Complete objections and "speaking" objections.

A "speaking objection" is an objection that goes beyond stating the grounds for the objection and becomes an opportunity to argue a point in the presence of the jury or to coach a witness to say or not say a particular thing.

Drawing the line between a complete objection and a "speaking" objection can sometimes be difficult. If there's a question whether the objection may cross the line, it's wise to request to approach the bench.

Jury Instructions

-Proffer a jury instruction

If the instruction proffered by your adversary is an incorrect statement of the law, you may have a duty to proffer a correct statement in its stead. *Baxter v. Grobmyer Bros. Const. Co.*, 275 Ark. 400, 631 S.W.2d 265 (1982); *Wallace v. Dustin*, 284 Ark. 318, 681 S.W.2d 375 (1984). If your proffered instruction is also an incorrect statement of the law, you do not preserve your argument on appeal. *See, e.g., Delta School of Commerce v. Wood*, 298 Ark. 195, 766 S.W.2d 424 (1989) (Justice Glaze, concurring), but see *Tandy Corporation v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984). Remember, the trial court is not required to give repetitive instructions. *Porter v. Lincoln*, 282 Ark. 258, 668 S.W.2d 11 (1984); Baxter, supra.

In *Jacuzzi Brothers, Inc. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994), the Supreme Court made it clear that it is not enough to merely proffer a jury instruction, you must explain to the court why it is applicable. The Court explained:

> In its brief, appellant has carefully summarized all the evidence lending support to its argument that appellee went beyond the scope of his invitation. Although the trial court was aware of such evidence, the trial court was not aware of the particular argument appellant makes on appeal. As abstracted, the only basis for appellant's objection to the AMI 1104 business invitee instruction was that the proffered AMI 1106 should be given instead. Appellant did not give a reason why AMI 1104 should not be given, nor did it give a reason why AMI 1106 should be given. Such an objection accomplished nothing as far as informing the trial court of the particular error appellant

saw in AMI 1104. We have recently held that a proffered instruction without an accompanying reason for the objection to the instruction given is insufficient to preserve the issue for our review. *Gilliam v. Thompson*, 313 Ark. 698, 856 S.W.2d 877 (1993).

We do not intimate that appellant should have summarized all the evidence for the trial court as it did in its brief to this court. However, an objection simply stating that there was evidence indicating Mr. Todd had exceeded the scope of his invitation into the plant and therefore the jury should be allowed to make the determination of fact as to whether Mr. Todd was a business invitee, licensee, or trespasser was required as a bare minimum to apprise the trial court of the particular error of which appellant complains on appeal. Accordingly, appellant has waived this argument on appeal. *Gilliam*, 313 Ark. 698, 856 S.W.2d 877.

Id. at 790-91.

Give the court the opportunity to address the issue.

Give the trial judge a fair chance to consider your position and correct any error alleged. *Smith v. Union National Bank*, 241 Ark. 821, 410 S.W.2d 599 (1967). ("It is not our practice to reverse the action of the trial court when a party fails to object to a procedural defect that could have been readily supplied had the point been raised seasonably.").

Get a ruling.

There is probably a long session in judge's school on how to avoid ruling. All trial judges are aware that they will never be reversed for a ruling they didn't make.

In *Stotts v. Johnson*, 302 Ark. 439, 791 S.W.2d 351 (1990), the appellant contended that the complaint had not been served within the time limits of Arkansas Rules of Civil Procedure 4(i). This was raised in the answer, as required, but not otherwise brought to the attention of the trial court. Since there was no ruling, there was no issue reserved for appeal.

There are judges who try to resolve objections by some ambiguous direction, such as "move on." That's not a ruling, and doesn't preserve an issue for appeal.

Moreover, you may have more than one objection to a particular piece of evidence; for instance, you may be moving to suppress a confession in a criminal case because (1) it followed an illegal entry by police into the home and was "fruit of the poisonous tree," and (2) the police failed to give the defendant his *Miranda* warning. You must obtain a ruling on *both* of these reasons, even though you are only trying to suppress *one* confession. If you obtain a ruling on one and not the other, you have abandoned that issue, even though you raised it.

Do not abandon the issue.

Once you have properly raised an issue, don't abandon it. You can abandon it by silence. In *Bond v. Dudley & Moore*, 244 Ark. 568, 426 S.W.2d 780 (1968), the appellee's attorney told the trial judge on opening statement that priority of a lien was the only issue. The appellant's attorney declined to make an opening statement. At the end of the hearing, the trial judge stated that he believed that the only issue before the court was which lien had priority. Appellant's counsel did not respond to that statement. The Court said, "While appellant's attorney did not specifically agree that the question of priority was the only issue, he certainly had a duty to advise the trial judge if he disagreed. His silence constituted at least a tacit acquiescence in the judge's statements relative to the issues and burden." *Id*.

You can abandon an issue by conceding it. You must be very careful not to accidentally concede an issue. For example, in *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989), the Court considered an issue conceded as follows:

> We will not reach this argument for not only did appellants fail to raise it below, they conceded the adequacy of the appellees' proof. The following was stated at the close of the plaintiffs' case:
>
> > Appellants' Counsel: Your Honor, I will move the Court to instruct a verdict in favor of the defendants on the plaintiffs' theory of trespass because of the doctrine and the plaintiffs' tortious contractual relations. I make that motion only on the merits of the case presumed by the plaintiff, not including the prayer for damage. To be honest with the Court, I think they've made a case on negligent construction except for damage. . .

A motion for a directed verdict must state the specific grounds. ARCP Rule 50(a). Failure to state the specific grounds of a motion or objection below constitutes a waiver of that argument on appeal. *Bond v. State*, 296 Ark. 1, 751 S.W.2d 339 (1988). Nor can grounds for an objection be changed on appeal. *Hart v. State*, 296 Ark. 290, 756 S.W.2d 451 (1988). Of course, conceding a point before the trial court precludes a claim of error on appeal. *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989).

Even if you don't concede an entire issue, you can concede that you are not entitled to a remedy. *Allen v. Burton*, 311 Ark. 253, 843 S.W.2d 821 (1992). If you concede you are not entitled to a particular remedy, and then you fail to ask for a different remedy, you can concede the issue.

Preserving "losing" arguments in criminal cases

If current law is unfavorable to your position, you may want to argue for a change in the law. It is important that you make a solid argument and preserve it like all other arguments

(raise it, give the court and opposing counsel the opportunity to respond, and get a ruling). Because if someone else wins that point on appeal, so long as you preserved the issue, you will be able to take advantage of the new ruling retroactively on your direct appeal. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Moreover, in some cases, federal criminal decisions may afford limited protection under the federal constitution, but the situation may not have been addressed under the Arkansas constitution. In these cases, it is vital that you make your arguments both under federal *and* state law. *See, e.g. State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004). In *Brown*, a group of armed law enforcements officers came to Ms. Brown's home and asked to search. In the face of this overwhelming force, she felt she had no choice but to comply, so she consented to the search, and contraband was found. At trial, her counsel argued that the officers should have informed her that she had the right to refuse consent to search (known as "informed consent); however, federal case law interpreting the US constitution was clear that informed consent is not necessary under federal law. Counsel wisely also argued this position under Article 2, Section 15 of the Arkansas Constitution, which matches the Fourth Amendment word for word. Under state constitutional jurisprudence, a state may afford a defendant *more* rights in its constitution than the federal constitution does, but it can never afford *fewer* or *lesser* rights than the federal constitution. The Arkansas Supreme Court in *Brown* held, as an issue of first impression, that Arkansas's constitution does indeed require informed consent before entering a residence, and affirmed the trial court's suppression of the evidence due to lack of informed consent. Note that if Brown had argued only under the Fourth Amendment, she would have lost. So in criminal cases, always make your arguments under both the federal and state constitutions, even if the provisions are identical.

On the other hand, there may be an argument based in federal law or the federal constitution that you believe is a "loser" in state court, but may be a winner under federal law. Under federal habeas jurisprudence, you must first "exhaust your remedies" in state court before you can bring a federal habeas petition. *Rose v. Lundy*, 455 U.S. 509 (1982). That means that you must bring up your federal issues at trial, and again on appeal, and in post-conviction hearings, if necessary, and be denied on all fronts in state court, before you are even allowed to bring it up in a federal habeas petition. Remember that some of the best cases that have been handed down in Fourth, Fifth, and Sixth Amendment issues in criminal cases were first affirmed by the state courts and then reversed by the federal courts, such as *Miranda v. Arizona*, *Gant v. Arizona*, *Georgia v. Randolph*, *Batson v. Kentucky*, and *Gideon v. Wainwright*, just to name a few. If any of these defendants had abandoned their arguments at the trial or appellate state court levels, or failed to make them because they were contrary to current law, those cases would have been affirmed. So preserve those arguments, even if you believe you may lose them in state court.

Arkansas does not have the plain error rule.

With a very few rare possible exceptions, we do not have the plain error rule. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). The exceptions are, or perhaps more accurately may be:

- In death penalty cases, the trial court's failure to bring to the jury's attention a matter essential to its consideration of the death penalty itself.
- When defense counsel has no knowledge of the error and no chance to object, as when a judge entered the jury room without the knowledge of the defense counsel. *Bush v. State*, 261 Ark. 577, 550 S.W.2d 175 (1977), and *Bell v. State*, 223 Ark. 304, 265 S.W.2d 709 (1954)
- The trial court fails to control a prosecutor's argument and allows him to go too far. The argument must be so flagrant and highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the argument.
- Possibly an error so flagrant that it invokes Rule 103 (d). Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court. Ark. R. Evid. 103. As of *Wicks, supra*, that had never happened in Arkansas, and apparently has not happened since.

What's more, if you insist on raising an argument that was not presented at trial, it's your obligation to confess candidly to the Court that the issue was not raised below.

> In closing, we mention a position sometimes taken in appellate briefs in criminal cases, that a possible error should be argued by counsel even in the absence of an objection below, because the matter might be raised in a petition for postconviction relief. The short answer to that suggestion is that if the supposed error actually calls for postconviction relief, the defect is not cured by the presentation of an argument that is certain to be rejected by this court for want of an objection at the trial. Nevertheless, if counsel insist upon consuming their time and that of the court in making such an unsupported argument, the argument should be preceded by a clear statement that no appropriate objection was made below and that the point is being presented despite that omission.

Wicks v. State, 270 Ark. 781, 787, 606 S.W.2d 366, 370 (1980).

You are not entitled to a perfect trial, only a fair one. But if you don't object, you're not even entitled to a fair one.

The Arkansas Supreme Court discussed the *Wicks* factors in detail in *Anderson v. State*, 353 Ark. 384, 108 S.W.3d 592 (2003). Appellant contended on appeal that the prosecutor had shifted the burden of proof during voir dire. Although the appeal on this point

was ultimately unsuccessful, the Court did at least consider the objection to a prosecutor's statement in voir dire under *Wicks*. The Court then went on to reverse the case for resentencing on another ground.

Error Coram Nobis - Exercising Due Diligence

While we normally think of preservation as something that happens only at the trial level, there are times when preservation is a post-trial concern, and one of the best examples of this is when a writ of *error coram nobis* is being sought. *Error coram nobis* is an extraordinary writ that is rarely granted, which brings up issues that were not brought up at trial because they *could not* have been brought up at trial. There are four bases for a writ of *error coram nobis*: (1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor,
or (4) a third-party confession to the crime during the time between conviction and appeal. *Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002). Note that none of these issues (except, perhaps, the coerced guilty plea) could have been preserved at the time of trial, because, by their very nature, they would be unknown to the defendant. And the coerced guilty plea that would allow for a writ of *error coram nobis* would presumably be one of such dire coercion that the defendant was unable to bring it up at the time.

However, it is not enough that the defendant argues that one of these issues existed at the time of trial and has only now been discovered. The defendant must also show that he acted with due diligence, both in discovering the new evidence, and in bringing it to the court's attention in a post-conviction proceeding. Due diligence means (1) the defendant was unaware of the fact at the time of trial, (2) he could not have presented the fact at trial, or (3) upon discovering the fact, he did not delay in bringing his petition. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2006).

So, if a prosecutor withheld material exculpatory information under *Brady, supra*, (the third ground for *error coram nobis*), the defense can bring that up on *error coram nobis* unless it would have been available to the defense, too, if the defense had just due diligence in looking for it. Likewise, someone who has been convicted must bring his petition for a writ of *error coram nobis* immediately when he learns of the evidence that would support the petition. He cannot sit on this evidence and then petition down the road for a writ that he could have asked for years, or even months, before. For example, in the *Echols* case, the defendant brought a petition for a writ of *error coram nobis* ten years after his conviction, claiming the jury heard evidence (in the form of a co-defendant's coerced confession) that was improperly before it. However, this information was known by the defense, prosecutor, and everyone else at the time of trial, so the Court held that bringing it up ten years later in his petition was not an exercise of due diligence.

Preserving "Prejudice"

In criminal law jurisprudence, many issues include a requirement that the defendant must show prejudice in order to show reversible error. Regardless of the egregiousness of the error--admitting inadmissible evidence, ineffective assistance of counsel, or even prosecutorial misconduct--if the defendant cannot show prejudice, then the error will be considered "harmless" and the conviction affirmed. "Prejudice" means that, but for the error, the outcome of the defendant's trial -- either in the guilty finding or the sentence -- would probably have been different.

Of course, this is an almost impossible hurdle for a defendant to overcome. Therefore, it is critical that on appeal, or in a post-conviction proceeding, the defendant's counsel preserve the prejudice prong by presenting both evidence and argument to show *how* the outcome of the trial would have probably been different, and *why* it was the error that caused the outcome the way it happened. Without arguing the prejudice prong of most of these issues, and presenting evidence to back up that argument, many of these issues will result in an affirmance of the conviction on appeal, even if an error was shown to have occurred.

Wrapping Up

We hope we have made it clear that a convincing appellate argument does not begin when the appellate brief is written, but it starts at the trial when the issue is first preserved. Thus, trial lawyers, regardless of how confident they may be in their ability to persuade the jury, must go into trial acknowledging that they could *lose*, so they can preserve all their issues for appeal, if one becomes necessary.

It's often been said that the best defense is a good offense, and that is never more true than in preserving appellate arguments. So take the offensive position. Bring up your arguments. Put them on the record. Delineate every basis for the argument and articulate why it is so, supporting it with case law, if you have it at the ready. And then press in and make that judge give you a ruling, even though they will sometimes fight you in an attempt to avoid ruling on an issue. Don't let them sidestep it. Sometimes forcing a ruling is enough to turn a ruling in your favor, especially if the judge thinks they might be reversed on appeal. But, if not, then at least you will have preserved your issue so that the appellate court is required to address it.