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Walker, Jacobs, and the Importance of Preserving the Record

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Two weeks ago, the SOG hosted over 50 public defenders, contract attorneys, and private assigned counsel at its annual Felony Defender training. The training provides guidance to lawyers transitioning to superior court about handling a felony case from start to finish. Topics include discovery and investigation, pretrial motions, *voir dire,* and jury instructions, among others. On a personal note, it was my first training in my role as Defender Educator and my first behind-the-scenes look at the effort required to plan and execute a successful course. Without the hard work of the faculty and support staff from the SOG, as well as volunteers from IDS and the private bar, the program would not have been possible. Thanks to everyone that participated. I truly enjoyed the training, especially speaking with the lawyers that attended, and I hope they found it worthwhile as well.

One of the more difficult adjustments for a lawyer moving from district court to superior is that ”upstairs” is a court of record and lawyers must be concerned about preserving the record for appeal. When and how an objection or motion is made can make a big difference in terms of whether an issue is preserved for appellate review. Given the importance of the subject, we include a stand-alone session on it. Nearly all of the other presenters also touched on preservation in one way or another. My impression is that preservation isn't exactly the most thrilling subject, but to my surprise, there was considerable interest among the attendees. Several expressed disbelief at the technicality of some of the rules concerning preservation by defense counsel. That discussion and some recent appellate decisions got me thinking more about the subject and led to this blog post. To borrow a phrase from Jessica Smith, just as indictment defects can be the bane of a prosecutor's existence (for examples, see here, here and here), unpreserved error is the bane of the appellate lawyer's. Preservation is a frequent theme in the appellate opinions and a common pitfall for the defense. Two recent cases from the court of appeals help illustrate this point.

Preserve All Grounds for Dismissal for Insufficient Evidence. In *State v. Walker*, ___ N.C. App. ___ (March 21, 2017), the defendant was convicted at a bench trial of first-degree attempted murder and several counts of AWDWIKISI, among other offenses. After a determination that the defendant was a violent habitual felon, he received consecutive life sentences. On direct appeal, the defendant challenged the sufficiency of the evidence of the intent elements of each conviction.

At the conclusion of the State's evidence at trial, the defendant made a motion to dismiss, arguing that there was insufficient evidence of a serious injury for the assault charges and insufficient evidence of an overt act to constitute an attempt for the attempted murder charge. The motion did not specifically challenge the sufficiency of any other elements of those offenses. At the conclusion of all the evidence, the defense renewed the motion to dismiss on the same grounds. Trial counsel stated, “I'll just repeat the same arguments that I made previously. I believe there's not sufficient evidence *in all of the particulars* that I repeated in my initial argument.” *Slip op.* at 7 (emphasis in original). This, the court of appeals found, was insufficient to preserve appellate review of the intent elements.

The court first noted that Rule 10(a)(1) of the Rules of Appellate Procedure requires a party to make a timely objection stating the particular grounds for the ruling sought by the party in order to preserve the issue for review, unless the specific grounds for the objection are clear from the context. Rule 10(a)(3) further prohibits a defendant from arguing

the sufficiency of the evidence on appeal unless a timely motion to dismiss is made at the close of the State's evidence or, if the defendant presents evidence, at the close of all evidence. That sounds clear enough. How it works in practice, however, can be a little trickier.

No Horse-Swapping on Appeal. Where the defendant does not raise a specific issue before the trial court, the issue will (usually) be waived on appeal. This rule has led to the related principle that a party on appeal cannot argue a novel issue on appeal. "Where a theory argued on appeal was not raised before the trial court, the law does not permit the parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, (2002). Numerous cases have applied this principle to deny appellate review, and *Walker* reviews several examples. Because defense counsel in *Walker* specifically limited the motion to dismiss to the injury elements (for the assault cases) and the attempt element (for the attempted murder case), the defendant's appellate counsel was barred on appeal from arguing that the intent elements were insufficient. No other issues being presented, the appeal was dismissed. There's no telling if the challenge to the sufficiency of the intent elements would have been meritorious, but the court never reached the question.

Global Motions to Dismiss. A global motion to dismiss is permissible and preserves the sufficiency argument for all elements of each offense. Such a general motion is considered "apparent from the context" for purposes of Rule 10. "A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review." *Slip op.* at 6. Where, however, counsel limits the scope of the argument to one issue or element in particular without also making a broad, global challenge to the sufficiency of the evidence, appellate review will be limited to the issues argued, and only those issues. *Walker* is a reminder to make such general motions as to each element of each offense, in addition to any specific arguments, to ensure that all potential issues are preserved.

Constitutionalize Objections and Arguments. A similar issue arises with evidentiary challenges. A point we emphasized to attendees at the recent conference was to consistently constitutionalize objections and arguments. In the same batch of opinions as *Walker*, the court of appeals released *State v. Jacobs*, ___ N.C. App. ____ (March 21, 2017). In that rape and sex offense prosecution, the defendant wanted to present evidence that the victim had sexually-transmitted infections (STI), which the defendant did not. This evidence would have been used to show that the defendant did not commit the acts alleged. The State filed a motion *in limine* pursuant to North Carolina Rule of Evidence 412 (the rape shield rule) to prevent the defense from referencing such evidence, while the defense filed a notice of intent to call an expert to testify on the subject. A pretrial hearing was conducted and the trial court granted the State's motion, excluding any mention of the STI evidence at trial. On appeal, the defendant challenged this ruling as a matter of the scope and interpretation of Rule 412 as well as on a constitutional basis, arguing that exclusion of the evidence impermissibly impaired his constitutional right to present a defense. The court of appeals ruled against the defendant on the Rule 412 issue, but would not consider the constitutional argument because it was not raised at trial. "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 279 (2009). Again, there's no way to know how the court may have ruled on the constitutional argument, but the failure to raise it before the trial court meant that the issue would not be considered on appeal. *Jacobs* is a reminder to defense counsel to raise and specify all grounds for an objection. For instance, a hearsay objection will commonly also implicate the Confrontation Clause; prejudicial evidence may violate Due Process; a Rule 412 ruling may implicate the Sixth Amendment right to present a defense. I will address common evidentiary issues and related constitutional grounds in a future post in more detail, but for the moment, suffice to say that it is crucial for defense counsel to think about constitutional grounds for objections, in addition to any objections based on the rules of evidence.

A few exceptions exist to mitigate the sometimes-harsh operation of these rules. All are used sparingly and all require the defendant to meet a heightened standard of review, such as review for plain error. While some safety valves exist for situations involving unpreserved error, defense counsel should make every effort to preserve all possible bases for evidentiary objections, sufficiency arguments in motions to dismiss, and other issues. The appellate bar will thank you, and it may well make the difference in a defendant's appeal.

Update: On April 3, 2020, the North Carolina Supreme Court decided *State v. Golder*, ___ N.C. ___, ___ S.E.2d ___, 2020 WL 1650899. *Golder* overrules *Walker* and holds that a motion to dismiss for insufficiency of the evidence preserves all sufficiency issues for appellate review. You can read more about that decision here.