

32.9 Preservation of Issues for Appeal

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A. Necessity of Specific Objection

N.C. Appellate Rule 10(a)(2) states that “[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict” This rule also states that in order to properly preserve an objection to an instruction or to the omission of an instruction, trial counsel must state “distinctly that to which objection is made and the grounds of the objection” However, an objection is not required after the jury has been instructed if defense counsel, before jury arguments, submitted a written request for particular instructions and the trial judge denied this request. *See State v. Smith*, 311 N.C. 287 (1984) (holding that where the trial judge had denied defendant’s written request for a proposed jury instruction regarding the State’s identification testimony, neither N.C. R. App. P. 10(b)(2) [now, N.C. R. App. P. 10(a)(2)] nor Rule 21 of the General Rules of Practice for the Superior and District Courts required defendant to repeat his objection to the jury instructions, after the fact, to preserve the issue for appellate review).

Caution: Under G.S. 15A-1231(d), all instructions given to the jury and all instructions tendered but refused become part of the record. This subsection also provides that the “failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13).” **This is incorrect!** G.S. 15A-1446(d)(13) has been ruled unconstitutional because it is in direct conflict with Appellate Rule 10(b)(2) [now, Rule 10(a)(2)] as promulgated by the N.C. Supreme Court pursuant to its exclusive authority under article IV, section 13(2) of the North Carolina Constitution. *See State v. Bennett*, 308 N.C. 530 (1983). Always object with specificity on the record to any errors committed by the trial judge in instructing the jury.

B. Opportunity to Object

Rule 21 of the General Rules of Practice for the Superior and District Courts requires the trial judge to give counsel an opportunity outside the hearing of the jury, or on request outside the presence of the jury, to object on the record to the jury charge or omission therefrom. Appellate Rule 10(a)(2) prohibits a party from making as the basis of an issue on appeal any instructional mistake absent a specific objection by trial counsel “provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.” The purpose of these

rules is to allow the trial judge to correct any mistakes he or she made prior to deliberations. *State v. Maske*, 358 N.C. 40 (2004).

C. Plain Error Rule

To mitigate the potential harshness of Appellate Rule 10(a)(2), appellate courts will review an instructional error that was not preserved by trial counsel, but the error will be reviewed under the rigorous “plain error” standard of review. *See State v. Lawrence*, 365 N.C. 506, 512 (2012) (noting that “[b]ecause the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant’s advantage to object at trial and thereby preserve the error for harmless error review”) (citation omitted); *State v. Odom*, 307 N.C. 655, 660 (1983) (holding that the plain error rule is “always to be applied cautiously and only in the exceptional case”) (citation omitted).