PRESERVING THE RECORD ON APPEAL

These training materials were originally written by Danielle M. Carman, then Assistant Director and General Counsel, Office of Indigent Defense Services, and updated by Anne M. Gomez, Assistant Appellate Defender, Office of the Appellate Defender, and Julie R. Lewis, Assistant Public Defender, Office of the Mecklenburg County Public Defender

Last updated July 2020 by
Julie R. Lewis

I. INTRODUCTION

- Our appellate courts are increasingly using "waiver" to avoid reaching the merits of defense challenges in criminal cases.
- While appellate attorneys can and do fail to preserve appellate issues, "waiver" most often begins at the trial level. Trying cases is stressful, complex, and exhausting. Attorneys can often avoid waiver by thinking in advance of trial about issues that are likely to arise and how best to preserve them for appellate review. The purpose of this guide is to help trial attorneys recognize and preserve issues that frequently arise during trial.
- The website of the N.C. Office of Indigent Defense Services offers several other practical training resources on the preservation of issues on appeal. These are located in the Training and Reference Materials Index in criminal cases; scroll down to Preserving the Record.

II. BASIC PRESERVATION PRINCIPLES

- **Express disagreement with what the trial judge did (or did not do) and state the complete grounds for that disagreement by objection, motion, request, or otherwise**.
- Assert your position in a timely fashion.
- Assert your position in the form required by the applicable rule or statute.
- **Constitutionalize your position whenever possible by explicitly asserting both Federal and State constitutional grounds.**
- Reassert your position every time the same or a substantially similar issue arises.
- Obtain a ruling on your request, motion, or objection. If the judge says he or she will rule "later," make sure that he or she does so.
- Make an offer of proof if your evidence is wrongly excluded.
- **Case Note**: In *State v. Canady*, 355 N.C. 242 (2002), the trial attorneys preserved a number of statutory and constitutional errors. While the individual errors may not have

warranted a new trial, the N.C. Supreme Court held that, when "taken as a whole," the cumulative preserved errors "deprived defendant of his due process right to a fair trial." *Id.* at 254; *see also State v. Hembree*, 368 N.C. 2 (2015) (holding that the cumulative effect of the trial judge's three errors deprived defendant of a fair trial). The Court's opinions in *Canady* and *Hembree* demonstrate the benefit of lodging timely, specific, and frequent objections.

III. PRE-TRIAL

A. Short-Form Indictments

- G.S. 15-144, 15-144.1, and 15-144.2 permit short-form indictments in first-degree murder, first-degree rape, and first-degree sexual offense cases. Such short-form indictments arguably violate the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *See Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). They also arguably violate article I, sections 22 and 23 of the North Carolina Constitution. For similar reasons in capital cases, the failure to allege aggravating factors in the indictment arguably precludes the State from seeking the death penalty. *See Ring v. Arizona*, 536 U.S. 584 (2002) (aggravating factors are elements of a capital offense and must be found by the jury).
- In numerous cases, however, the N.C. Supreme Court has rejected the argument that short-form first-degree murder indictments that do not allege premeditation and deliberation violate *Apprendi*. *See, e.g., State v. Braxton*, 352 N.C. 158 (2000); *see also Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) (en banc) (finding N.C.'s use of the short-form indictment alleging the elements of "common law" murder to be sufficient to inform the defendant of the charge against him or her, thus satisfying the requirements of the Sixth and Fourteenth Amendments). The Supreme Court has also rejected a challenge to the failure of an indictment to allege aggravating factors in a capital case. *See State v. Hunt*, 357 N.C. 257 (2003).
- Although a motion to dismiss a short-form indictment is unlikely to succeed in light of the above cases, some judges may be inclined to grant a motion for a bill of particulars asking the State to identify the degrees of the offense (*e.g.*, first-degree vs. second-degree) and the theories (*e.g.*, premeditation and deliberation vs. felony murder).

B. Miscellaneous

- If your ex parte motion for expert assistance is denied, make sure you get the substance of your motion and the trial judge's order on the record.
- If you believe that your client's right to presence has been violated by an ex parte contact, find a way to have the record reflect that the contact occurred.

IV. GUILTY PLEAS

- **The ONLY pretrial motion that you can preserve for an appeal as of right after a guilty plea is the denial of a motion to suppress.** G.S. 15A-979(b); *State v. Smith*, 193

N.C. App.739 (2008); *see also State v. Davis*, 227 N.C. App. 572, 575 (2013) (although neither G.S. 15A-980 nor G.S. 15A-1444 specifically provide for an appeal from the denial of a motion to suppress the use of a prior conviction obtained in violation of the right to counsel, § 15A-979(b) "provides an appeal of right from such an order"). **To preserve this error, you must do two things. First, you must notify the State and the trial judge during plea negotiations of your intention to appeal the denial of the motion, or the right to do so is waived by the guilty plea.** *State v. Tew*, 326 N.C. 732 (1990); *State v. Brown*, 142 N.C. App. 491 (2001). The best way to do this is to put it in writing. Second, you must enter an oral or written "notice of appeal" from the judgment itself (not from the denial of the motion to suppress) *after* entry of final judgment in order to confer jurisdiction on the appellate court. *See State v. Miller*, 205 N.C. App. 724, 725 (2010) (appeal dismissed because, although defendant properly gave notice of his intention to file an appeal before he pled guilty, his written notice of appeal entered after final judgment was "from the denial of Defendant's motion to suppress[,]" not from his judgment of conviction); N.C. R. APP. P. 4.

V. COMPLETE RECORDATION

- In criminal cases, the trial judge must require the court reporter to record all proceedings *except* non-capital jury selection, opening and closing statements to the jury, and legal arguments of the attorneys. *See* G.S. 15A-1241(a).
- However, **you should ALWAYS move to have *everything* recorded under G.S. 15A-1241(b)!!** Recordation provides a complete record of the trial proceedings and may make the difference in whether the appeal is won or lost.
- Upon motion, the court reporter must record all proceedings. You should ensure that the court reporter is actually present and recording at all stages of trial.
- If a bench conference is not recorded, ask the trial judge to reproduce it for the record and ensure that all of your objections are in the record.
- If something "non-verbal" happens at trial, ask to have the record reflect what happened.
  - ✓ *e.g.*: In *State v. Golphin*, 352 N.C. 364 (2000), the trial attorneys should have asked to have the record reflect that the prosecutor pointed a gun at the only African American juror during closing arguments.
  - ✓ *e.g.*: If your client is shackled without the necessary hearing and factual findings required by G.S. 15A-1031, and the jury saw the shackles, ask to have the record reflect that fact. Also describe for the record what type of restraint was being used.

VI. JURY SELECTION

A. Preserving Your Right to Ask a Question on Voir Dire

The following fact pattern illustrates how to preserve the right to ask a relevant question during jury selection: In a case involving an interracial crime, you want to ask prospective jurors

questions about their views on interracial dating. However, the trial judge sustains the State's objections to your questions.

- G.S. 15A-1212(9) provides that "[a] challenge for cause to an individual juror may be made by any party on the ground that the juror . . . [f]or any other cause is unable to render a fair and impartial verdict." This section allows a statutory challenge for cause based on juror bias and, thus, should give a defendant a statutory right to explore possible sources of bias.
- In addition to asserting statutory grounds, you should try to constitutionalize your right to ask the question. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28 (1986) (right to impartial jury under the Fifth, Sixth, and Fourteenth Amendments guarantees a capital defendant accused of interracial crime the right to question prospective jurors about racial bias; violation of right requires death sentence to be vacated); *see also Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 868 (2017) (stating that "[i]n an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the U.S. Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire") (citations omitted).
- To fully preserve any error based on curtailed defense questioning during *voir dire*, you should submit a written motion listing the questions you want to ask and obtain a ruling on the record. You also need to exhaust your peremptory challenges. *See State v. Fullwood*, 343 N.C. 725 (1996).

B. Preserving Your Denied Motion to Excuse for Cause

- State clearly and completely the grounds for your challenge for cause. If the trial judge denies your challenge, you *must* use a peremptory to excuse that juror unless you have already exhausted all peremptories.
- In addition, G.S. 15A-1214(h) and (i) require that you then: **(1) exhaust all peremptories; (2) renew your challenge for cause; and (3) have your renewed challenge denied.** *See State v. Cunningham*, 333 N.C. 744 (1993) (ordering a new trial where defendant satisfied requirements of G.S. 15A-1214(h)); *State v. Hightower*, 331 N.C. 636 (1992) (same). This procedure is mandatory and must be precisely followed or the error is waived on appeal. *State v. Garcell*, 363 N.C. 10 (2009).
- **CAUTION:** Before exhausting your peremptories to preserve a denied cause challenge, consider whether you will lose a good juror or open yourself up to unfavorable prospective jurors.

C. *Batson* Error

- **Establish the races of all prospective jurors for the record**: File a pre-trial motion asking the trial judge to ensure that the races of prospective jurors are recorded by (1) the judge inquiring and making findings for the record, or (2) the judge requiring the parties to stipulate to jurors' races as selection proceeds. If the judge will not permit any other way, ask each juror to put his or her race on the record orally or by questionnaire.

- **If you use juror questionnaires, move to have them admitted into evidence and made part of the record.** If the questionnaires are left in your possession, save them for the appellate attorney.
- Object every time the prosecutor excuses a juror for even arguably racial reasons. *See State v. Smith*, 351 N.C. 251 (2000). If you are prepared to make a prima facie showing, ask the trial judge for an opportunity to present evidence. The judge is required to honor this request. *See State v. Green*, 324 N.C. 238 (1989).
- If the trial judge declines to find a prima facie case, object. If the judge asks the prosecutor to offer race-neutral reasons, ask for an opportunity to rebut the prosecutor's showing.
- Remember that *Batson* applies to gender-based challenges as well! *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

VII. EVIDENTIARY RULINGS

- If you do not make timely and proper objections at trial, erroneous evidentiary rulings will only be reviewed for "plain error" – an extremely difficult standard to meet. On appeal, the defendant will have to show the error was a fundamental one, *i.e.*, that it had a probable impact on the jury's verdict. *See State v. Lawrence*, 365 N.C. 506, 512 (2012) ("Because 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").

A. Objecting to the State's Evidence

- Make timely objections. *See* G.S. 15A-1446(a); N.C. R. EVID. 103(a)(1); N.C. R. APP. P. 10(a)(1). If the prosecutor asks a question that you think is improper or may elicit improper testimony, enter a quick *general* objection to stop the witness from answering and then immediately follow up by stating the specific *basis* for your objection if the specific grounds are not apparent from the context.
  - ✓ **A defendant's general objection to the State's evidence is ineffective unless there is *no* proper purpose for which the evidence is admissible.** *See State v. Moseley*, 338 N.C. 1 (1994) (burden on defendant to show no proper purpose).
  - ✓ **If evidence is objectionable on more than one ground, *every* ground must be asserted at the trial level. Failure to assert a specific ground waives that ground on appeal.** *See State v. Moore*, 316 N.C. 328 (1986); N.C. R. APP. P. 10(a)(1).
  - ✓ **Obtain a ruling on the objection or the issue is waived.** *See State v. Warren*, 244 N.C. App. 134 (2015); N.C. R. APP. P. 10(a)(1). If the judge tells you that he or she will rule later, the burden is on you to remember and to get a ruling on the record. *See State v. Williams*, 167 N.C. App. 657 (2004) (unpublished).
- If evidence is admissible for a limited purpose, object to its use for all other improper purposes and request a limiting instruction. *See State v. Stager*, 329 N.C. 278 (1991).

Upon request, the trial judge is required to restrict such evidence to its proper scope and to instruct the jury accordingly. *See* N.C. R. EVID. 105.

- ✓ *e.g.*: If the trial judge rules that hearsay statements are admissible for corroboration, ask the trial judge to instruct the jury about the permissible uses of that evidence.
- ✓ If there are portions of the statements that are non-corroborative, specify those portions and ask to have them excised.
- ✓ If there are portions of the statements that are objectionable on other grounds (*e.g.*, inadmissible "other crimes" evidence), specify those portions and ask to have them excised.

❖ **When appropriate, constitutionalize your objections.** If a defendant wishes to claim error on appeal under the state or federal constitution as well as statutory or common law, the defendant must have raised the constitutional claim when the error occurred at trial. *See State v. Rose*, 339 N.C. 172 (1994); *State v. Skipper*, 337 N.C. 1 (1994).

- ✓ *e.g.*: If the trial judge excludes your proffered evidence, do not object solely on state law relevance grounds. You should also cite your client's constitutional due process right to present evidence in his or her defense.
- ✓ *e.g.*: If the State offers hearsay evidence, do not object solely on state law hearsay grounds. You should also cite the Confrontation Clause.

❖ Object to any attempts by the prosecutor to admit substantive or impeachment evidence about your client's post-*Miranda* exercise of his or her constitutional rights to remain silent and have an attorney present. *See Doyle v. Ohio*, 426 U.S. 610 (1976).

- ✓ *e.g.*: If the State offers police testimony that your client refused to talk and asked for his or her attorney, object.
- ✓ *e.g.*: If the State tries to cross-examine your client about his or her failure to tell certain facts to the police, object.

B. Moving to Strike the State's Evidence

❖ If the prosecutor's question was not objectionable (or if your objection to a question is overruled and it later becomes apparent that the testimony is inadmissible) but the witness's *answer* was improper in form or substance, you must make a timely motion to strike that answer. *See State v. Grace*, 287 N.C. 243 (1975); *State v. Marine*, 135 N.C. App. 279 (1999). If you object after a witness has answered the question but do not make a motion to strike, the objection is waived. *State v. Gamez*, 228 N.C. App. 329 (2013).

❖ Similarly, if the trial judge sustains your objection but the witness answers anyway, you must make a timely motion to strike the answer. *See State v. Barton*, 335 N.C. 696 (1994); *State v. McAbee*, 120 N.C. App. 674 (1995).

C. Waiving Prior Objections

- **If you make a motion in limine to exclude certain evidence but then fail to object when the evidence is actually offered and admitted at trial, the issue is *not* preserved for appeal.** *See State v. Hayes*, 350 N.C. 79 (1999) (per curiam); *State v. Wynne*, 329 N.C. 507 (1991). Similarly, if your suppression motion is denied, you must renew that motion or object to the evidence when it is introduced at trial to preserve the error. *See State v. Golphin*, 352 N.C. 364 (2000). **You must do this even if the trial judge specifically says you don't have to.** *See State v. Goodman*, 149 N.C. App. 57 (2002), *rev'd in part on other grounds*, 357 N.C. 43 (2003).
- **Do NOT rely on N.C. R. Evid. 103(a)(2) to preserve the issue!!!** Although the legislature attempted to make things easier by amending Evidence Rule 103(a)(2) in 2003 to add a second sentence that states that once the trial court makes a definitive ruling admitting or excluding evidence, either at or before trial, there is no need to later renew the objection, do not rely on this rule. Rule 103(a)(2) has been held to be invalid because it conflicted with Appellate Rule 10(b)(1) [now codified as Appellate Rule 10(a)(1)] which has been consistently interpreted to provide that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal unless the defendant renews the objection during trial. *See State v. Oglesby*, 361 N.C. 550 (2007).
- **If you initially object but then allow the same or similar evidence to be admitted later without objection, the issue is not preserved for appeal.** *See State v. Jolly*, 332 N.C. 351, 361 (1992). Likewise, you waive appellate review if you fail to object at the time the testimony is first admitted, even if you object when the same or similar evidence is later admitted. *See State v. Davis*, 353 N.C. 1 (2000). **Bottom line:** You must object each and every time the evidence is admitted.
- One way to deal with this problem is to enter a standing line objection to the evidence when it is offered at trial. *See* G.S. 15A-1446(d)(9) & (10); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 18 (8th ed. 2018) (discussing waiver and the status of line objections in North Carolina).
  - ✓ To preserve a line objection, you must ask the trial judge's permission to have a standing objection to a particular line of questions. *See, e.g.*, *State v. Crawford*, 344 N.C. 65 (1996). In addition, you should clearly state your grounds for the standing objection. If your request is denied, object to every question that is asked.
  - ✓ **You cannot make a line objection at the time you lose your motion to suppress or your motion in limine; you must object to the evidence and request a line objection at the time it is offered.** *See State v. Gray*, 137 N.C. App. 345 (2000).
  - ✓ If there are additional grounds for objection to a specific question within that line, you must interpose an objection on the additional ground.
    - *e.g.*: If you have a standing line objection based on relevance and a specific question in that line calls for hearsay, you need to interpose an additional hearsay objection.

D. Making an Offer of Proof

- N.C. Evidence Rule 103(a)(2) provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." G.S. 15A-1446(a) provides that "when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence."
- Thus, **if the trial judge sustains the prosecutor's objection and precludes you from presenting evidence, making an argument, or asking a question, you must make an offer of proof.** For further discussion of this topic, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 18 (8th ed. 2018).
- **You should make a formal offer of proof by actually filing the documentary exhibit or by eliciting testimony from the witness outside the presence of the jury.** *See State v. Martin*, 241 N.C. App. 602, 605 (2015) ("a formal offer of proof is the preferred method and . . . the practice of making an informal offer of proof 'should not be encouraged'") (citation omitted). It is not enough to rely on the context surrounding the question. *See State v. Williams*, 355 N.C. 501 (2002). An informal offer of proof, *i.e.*, summarizing what the witness would have said or what a document would have shown, may not be adequate. *See State v. Long*, 113 N.C. App. 765 (1994). While an informal offer made with particularity may save court time and be permitted by the trial judge, exercise caution when using this alternative since "a reviewing court may still deem the offer insufficient to preserve an appeal." *See Martin*, 241 N.C. App. at 606.
- If the judge does not allow you to make an offer of proof, state: "Defendant wants the record to reflect that we have tried to make an offer of proof." Also state that the trial judge's failure to allow you to do so violates the defendant's constitutional rights to confrontation, to present a defense, and, if applicable, to compulsory process. It is error for the judge to prohibit you from making an offer of proof. *State v. Silva*, 304 N.C. 122 (1981).
- If the judge tells you to make your offer "later," the burden is on you to remember and to make sure that the offer is made.

VIII. MOTIONS TO DISMISS BASED ON INSUFFICIENT EVIDENCE

- Always move to dismiss all charges at the close of the State's case. *See* G.S. 15-173; G.S. 15A-1227.
- **Always renew your motion to dismiss ALL charges at the close of all the evidence (even if you only introduce exhibits and even if you do not wish to be heard on all charges)**. The defendant is barred from raising insufficiency of the evidence on appeal if you fail to timely make this motion. *See* N.C. R. APP. P. 10(a)(3); *see also State v. Stocks*, 319 N.C. 437 (1987) (appellate rule abrogates the contrary provision in G.S. 15A-1446(d)(5)). Furthermore, the "plain error" standard of review can only be used by appellate courts to review unpreserved instructional and evidentiary errors in criminal cases, not insufficiency errors, so it is critical that the motion to dismiss be renewed. *See State v. Richardson*, 341 N.C. 658 (1995); *State v. Freeman*, 164 N.C. App. 673 (2004).

- **Make a motion to dismiss ALL charges before making an argument as to the insufficiency of a specific element of one charge or as to the insufficiency of one charge out of multiple charges.** A motion to dismiss all charges for insufficient evidence made at the proper time under N.C. R. App. P. 10(a)(3) is sufficient to preserve all issues related to the insufficiency of any element of the crimes charged even if you then proceed to specifically argue insufficiency of one particular element or one particular charge. *See State v. Golder*, 374 N.C. 238, 249 (2020) (holding that the N.C. Court of Appeals' jurisprudence that categorized motions to dismiss as general, specifically general, or specific, and then assigned different scopes of appellate review to each category was inconsistent with Appellate Rule 10(a)(3); defendant preserved each of his challenges to the sufficiency of the evidence when he timely moved to dismiss the charges at trial even though he also made several specific arguments when moving to dismiss certain charges and even though he "swapped horses" and argued different grounds on appeal). A trial judge has an affirmative duty to examine the sufficiency of the evidence against a defendant for every element of the crimes charged once a motion to dismiss the charges is made. *Id*.
- **Make a specific motion to dismiss based on a fatal variance if applicable.** A fatal variance between a material element alleged in the indictment and the proof offered at trial is grounds for a motion to dismiss. The N.C. Supreme Court did not address this particular type of motion to dismiss in *State v. Golder*, 374 N.C. 238 (2020), but other cases have held that a variance argument will be waived on appeal if not specifically raised at trial, even where a motion to dismiss for insufficient evidence was made. *See, e.g.*, *State v. Hooks*, 243 N.C. App. 435, 442 (2015). Until there is clear authority to the contrary, you should continue to make this specific motion separately to ensure preservation of the issue.
- **Always constitutionalize your motion to dismiss**, asserting that defendant's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution and under article I, section 19 of the North Carolina Constitution have been violated.
- If you forget to renew your motion to dismiss at the close of all the evidence, you should move to dismiss based on the insufficiency of the evidence after the verdict and before entry of judgment. G.S. 15A-1227(a). You can also move to dismiss after the jury is discharged without a verdict and before the end of the session. *Id.* G.S. 15A-1414(b)(1)c. also allows a defendant to file a motion for appropriate relief after return of the verdict asserting that "[t]he evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury." This ground may be asserted even if the defendant made no prior motion to dismiss based on insufficient evidence. *Id.* In reviewing the defendant's contention under this statute, the judge will use the same "substantial evidence" test that would have been used by the judge if the motion to dismiss had been made during trial. *See State v. Acklin*, 71 N.C. App. 261 (1984).
- After a guilty verdict is rendered, you may file a motion for appropriate relief under G.S. 15A-1414(b)(2) asserting that "[t]he verdict is contrary to the weight of the evidence." This motion is appropriately made when the State's evidence is legally sufficient to go to the jury but the evidence favorable to the defendant (whether offered by the defendant or the State) has greater probative force than the evidence introduced against him or her. *See*

Roberts v. Hill, 240 N.C. 373 (1954). This type of motion is addressed to the discretion of the trial judge and is reviewable on appeal under an abuse of discretion standard. *See State v. Batts*, 303 N.C. 155 (1981).

- Although *Golder*, discussed above, simplified the phrasing that a defendant must use in making a motion to dismiss, it remains prudent to make a general motion to dismiss, then specify the elements for which there is insufficient evidence. If the motion to dismiss is based on a variance, state that ground for your motion. Here is some "magic language" when making your motions to dismiss: "Your Honor, the defense moves to dismiss each charge on the grounds that the evidence is insufficient as a matter of law on each and every element of each charge to support submission of the charge to the jury, AND that submission to the jury would therefore violate the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution. Further, the defense moves to dismiss each charge on the grounds that, as to each charge, there is a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury, AND that submission to the jury would therefore violate the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and article I, section 19 of the N.C. Constitution." After making the above general motions to dismiss, then lay out the specific insufficiency arguments you wish to make, as well as specific variance arguments, if there are any.

IX. CLOSING ARGUMENTS

- Always object to improper arguments. Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error. In the absence of an objection, appellate courts will review the prosecutor's argument to determine "whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Taylor*, 337 N.C. 597 (1994) (citation omitted). This is a much more stringent standard of review than is applied to preserved errors so it is critically important for appellate purposes to timely object to improper statements made by the prosecutor and to request curative instructions if the objection is sustained.
- If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also carefully consider whether further remedy is necessary or whether it would serve to draw further negative attention to the comments. If you decide that the prejudice resulting from a prosecutor's improper argument was severe and in need of further remedy, you may ask the judge to:
  - admonish the prosecutor to refrain from that line of argument;
  - require the prosecutor to retract the improper argument;
  - repeat the curative instruction during the jury charge; or
  - grant a mistrial.

  See State Jones, 355 N.C. 117, 129 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, "to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections"); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

- ❖ The filing of a motion in limine regarding closing arguments is not sufficient, by itself, to preserve closing argument error. Appellate Rule 10(a)(1) requires that you actually obtain a ruling on the motion from the trial judge. *See State v. Daniels*, 337 N.C. 243, 275–76 n.1 (1994). In addition, you should renew the motion or object during the prosecutor's closing argument.
- ❖ Object to any attempts by the prosecutor to argue in closing that your client's post-*Miranda* exercise of his or her constitutional rights to silence and counsel support an inference of guilt. *See Doyle v. Ohio*, 426 U.S. 610 (1976).
- ❖ Be vigilant to improper arguments and object! Even if a prosecutor's improper closing argument is not sufficient alone to amount to reversible error, the error may be sufficient when combined with other trial errors to deprive a defendant of his or her right to a fair trial. *See State v. Hembree*, 368 N.C. 2 (2015) (granting defendant a new trial where the cumulative effect of the trial judge's three errors, one of which was allowing the prosecutor to argue that defense counsel had suborned perjury, deprived defendant of a fair trial).

X. JURY INSTRUCTIONS

- ❖ Clearly and specifically object to erroneous jury instructions before the jury retires to deliberate. If the judge does not give you the opportunity to do so outside the presence of the jury, request the opportunity to do so. *See* N.C. R. APP. P. 10(a)(2); *see also State v. Bennett*, 308 N.C. 530, 535 (1983) (appellate rule abrogates the contrary provision in G.S. 15A-1231(d) and G.S. 15A-1446(d)(13)). If you do not object at trial, instructional errors will only be reviewed for plain error—an extremely difficult standard to meet. *See State v. Lawrence*, 365 N.C. 506 (2012) (in order to show plain error on appeal, a defendant must show the error was a fundamental one—that the error had a probable impact on the jury's verdict). Additionally, a defendant who invites error by declining a correct instruction or by requesting or agreeing to the giving of an erroneous instruction has waived his or her right to all appellate review concerning the invited error, including plain error review. *See, e.g.*, *State v. Gay*, 334 N.C. 467 (1993); *State v. Goodwin*, 190 N.C. App. 570 (2008); *see also* G.S. 15A-1443(c) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct").
- ❖ If the trial judge completely fails to give a requested jury instruction that he or she had agreed to give, the error is preserved for appellate review without further objection. *See, e.g.*, *State v. Lee*, 370 N.C. 671 (2018). However, if the judge undertakes to give the instruction but commits error during it, you must object to the instruction as given in order to preserve the error for review. *State v. Richardson*, ___ N.C. App. ___, 838 S.E.2d 470 (2020). The better practice is to object to all instructional errors, including a complete failure to give a promised instruction.
- ❖ **Submit all of your proposed jury instructions— especially special instructions—*in writing*.** *See* G.S. 1-181 (although located in the civil procedure chapter, appellate courts have long cited it as controlling in criminal cases); G.S. 15A-1231(a) ("At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions."); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21 (providing that "[i]f

special instructions are desired, they should be submitted in writing to the trial judge"). Requested instructions that are refused then become a part of the record on appeal by statute. G.S. 15A-1231(d). Then follow along on your copy as the judge instructs the jury. Judges very often make unintentional mistakes while instructing the jury.

- **Submit your proposed jury instructions as early as possible so the judge will have a chance to review them and make a ruling.** Parties may submit proposed jury instructions at the close of the evidence or at an earlier time if directed by the judge. G.S. 15A-1231(a). Requests for special instructions must be submitted to the judge before the judge begins to give the jury charge. G.S. 1-181(b); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 21 (providing that "[i]f special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference"); *State v. Long*, 20 N.C. App. 91 (1973) (holding that a request for special instruction is not timely if it is tendered after the jury retires to deliberate). However, the judge may, in his or her discretion, consider requests for special instructions regardless of the time they are made. G.S. 1-181(b).

XI. JURY DELIBERATIONS

- Before consenting to the jury's request to take an exhibit into the jury room pursuant to G.S. 15A-1233(b), carefully consider how the jury may use the exhibit during its deliberations and decide whether it would be in the defendant's best interest to consent. If the trial judge, without obtaining consent from all parties, sends an exhibit to the jury room that you believe is harmful to the defendant's case, object on the record in order to ensure preservation of the issue on appeal.
- Make sure that the timing of jury deliberations is made a part of the record. Lengthy or troubled jury deliberations are an extremely helpful way to show prejudice on appeal.
- Make sure that all jury notes and other communications between the judge and jury are made a part of the record.

XII. SENTENCING

- **Do not stipulate as a matter of course to the prior record level worksheet or to the defendant's prior convictions, especially if they are out-of-state convictions.** The burden is on the prosecution to prove that the defendant's prior convictions exist. G.S. 15A-1340.14(f). If there are out-of-state convictions, the State must prove that they are substantially similar to North Carolina convictions or else they must be classified at the lowest punishment level (Class I for felonies, Class 3 for misdemeanors). G.S. 15A-1340.14(e). If you stipulate (or fail to object when asked or agree in any way), the State does not have to prove anything. *See State v. Alexander*, 359 N.C. 824 (2005). The issue will most likely be preserved if you "take no position" but the safer position is to object (even if you do not wish to be heard).
- Errors that occur during sentencing are supposed to be automatically preserved for review. *See* G.S. 15A-1446(d)(18); *State v. McQueen*, 181 N.C. App. 417 (2007); *State v. Hargett*, 157 N.C. App. 90, 92–93 (2003) (citing *State v. Canady*, 330 N.C. 398 (1991)).

However, the North Carolina Court of Appeals has sometimes found that a defendant waives appellate review of a sentencing error when he or she fails to object. *See, e.g.*, *State v. Black*, 197 N.C. App. 731 (2009) (right to appellate review of constitutional issue was waived because defendant failed to raise it at the sentencing hearing); *State v. Kimble*, 141 N.C. App. 144 (2000) (issue regarding sufficiency of the evidence to support the finding of aggravating factors was not properly before the Court because defendant did not object during the sentencing hearing). To be safe, always object to errors that occur during the sentencing hearing.

- In response to the U.S. Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296 (2004), our legislature substantially amended the Structured Sentencing Act. S.L. 2005-145, referred to as the *Blakely* bill, went into effect on June 30, 2005 and applies to prosecutions for all offenses committed on or after that date. It is prudent to preserve all *Blakely* issues just as you would preserve other issues during a trial. This includes motions to dismiss for failure to prove an aggravating factor beyond a reasonable doubt, objections to evidence, and objections to erroneous jury instructions.
- Present evidence to support mitigating factors if the evidence was not presented during the trial itself. *E.g.*, Have your client's mom testify about your client's support system in the community. If the mitigating factors are supported by documentary evidence, ask that the documents be entered into evidence. Absent a stipulation by the prosecutor, your statements at the sentencing hearing are not evidence that will support a finding of a mitigating factor. *See State v. Swimm*, 316 N.C. 24 (1986).