PRESERVATION OF ERROR: YOU CAN'T WIN APPELLATE LOTTO WITHOUT BUYING A TICKET

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State Bar of Texas
46TH ANNUAL
ADVANCED CRIMINAL LAW
July 13-16, 2020

CHAPTER 41

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Brian W. Wice is recognized as one of Texas' top criminal appellate and post-conviction lawyers, having handled over 400 appellate matters, including 13 death penalty cases before 18 state and federal appellate courts. He is an attorney pro tem in the prosecution of Texas Attorney General Ken Paxton, prosecuted former Harris County District Attorney investigator Dustin Deutsch, and defended the conviction on appeal, and successfully defended the capital murder conviction and death sentence of multiple-capital murderer Dexter Johnson in state habeas corpus proceedings.

A 1976 magna cum laude graduate of the University of Houston and 1979 graduate of the University of Houston Law Center where he served on the Houston Law Review, Brian has been a frequent lecturer at continuing legal education events for the State Bar of Texas, serving as Course Director for the 2008 Advanced Criminal Law Course, as well as for the TCDLA, HCCLA, and HBA for the past 30 years.

Brian was honored as the "Attorney of the Year" by the Texas Criminal Defense Lawyers' Association in 2016, and by the Harris County Criminal Lawyers Association and the Houston Press in 2010, by the Houston Press as the "Best Legal Analyst" and "Best Appellate Lawyer, by Texas Monthly as a Texas Super Lawyer in 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, by "H Texas" Magazine as one of Houston's Top Lawyers in 2006, 2007, 2008, and 2009, and by Martindale Hubbell as an AV-Preeminent Lawyer in 2009-2013.

Brian is a legal analyst for KPRC-TV, Channel 2, in Houston, and MSNBC, and has appeared on the Today Show, Dateline-NBC, 48 Hours, 20-20, Good Morning America, CNN's New Day, Anderson Cooper 360, and the O'Reilly Factor, and virtually every criminal justice show on network and cable television.

Brian's high-profile successes include the reversal and dismissal of all charges on appeal for former House Majority Leader Tom DeLay, a new punishment hearing in the nationally-acclaimed Susan Wright murder case in 2010, a new punishment hearing from the Fifth Circuit in 2009 for Gaylon Walbey, Galveston County's only death row inmate at the time, and the Fourth Circuit's reversal of the Rev. Jim Bakker's 45-year prison term in 1991. He was also part of the defense team for Adrian Peterson, the Minnesota Vikings' All-Pro and two-time MVP running back.

Brian was a visiting county criminal court at law judge in Harris County and is a Special Master for the Harris County District Courts in post-conviction writs, and was an associate municipal court judge for the City of Houston from 1995 to 2005. He was as a law clerk to Court of Criminal Appeals Judge Sam Houston Clinton.

Brian's articles and op-ed pieces on the criminal justice system have appeared in a variety of publications.

ACKNOWLEDGMENTS

Brian Wice wishes to thank the late Judge Sam Houston Clinton, who served on the Court of Criminal Appeals with distinction from 1978 until his retirement in 1996, and for whom he had the privilege of serving as a briefing attorney in 1979 and 1980,. Judge Clinton was a giant of a jurist and a mentor as long as he lived.

Brian also wishes to express his sincere appreciation to former Judge Cathy Cochran, former Justices Murry Cohen and Terry Jennings, John Messinger, Scott Durfee, David Botsford, Randy Schaffer, Rick Wetzel, Chris Downey, and Carmen Roe for their continuing advice and counsel over the years.

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PROLOGUE

"[T]here are no technical considerations or form of words to be used [to preserve trial error]. Straightforward communication in plain English will always suffice.

"The standards of procedural default, therefore, are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it ... [Appellate courts] should reach the merits of those complaints without requiring that the parties read some special script to make their wishes known."

Lankston v. State, 827 S.W.2d 907, 909
(Tex.Crim.App. 1992) (emphasis added)

"Preservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion."

Haley v. State, 173 S.W.3d 510, 515 (Tex.Crim.App. 2005)

PRESERVATION OF ERROR

I. SCOPE OF ARTICLE

The past 40 years that I have spent as an appellate lawyer reviewing almost 400 appellate records in all kinds of criminal cases has convinced me that most criminal defense attorneys are either unwilling or unable to preserve error for appellate review. This malady is by no means confined to young or inexperienced lawyers. I have only recently read trial records where attorneys whose trial skills are thought to be unmatched by the public have failed to preserve otherwise meritorious appellate issues for review. What then could possibly be the problem?

Some trial lawyers simply get caught up in the urgency of the proceedings and forget to take the steps to preserve a claim. Others who are more candid confess that they simply don't know what to do. This article will serve to remedy both of these responses: first, it will tell you what you need to know to preserve error, it should be the first thing that you put in your trial notebook before you announce ready for trial.

This article is not the last word on error preservation. Any criminal trial necessarily entails a myriad of situations requiring a timely and specific objection to ensure that error has ben preserved for appellate review.

II. PRESERVATION OF APPELLATE COMPLAINTS: AN OVERVIEW

A. TEX.R.APP.P. 33.1

Rule 33.1 provides that in order to preserve a complaint for appellate review, a party must have presented to the trial court and obtained a ruling upon his timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. Long v. State, 800 S.W.2d 545 (Tex.Crim.App. 1990). Because an objection, instruction to disregard, and request for mistrial "seek judicial remedies of decreasing desirability for events of decreasing frequency, the traditional and preferred procedure for a party to voice its complaint has been to ask for them in sequence [but] this sequence is not essential to preserve complaints for appellate review. The essential requirement is a timely, specific request that the trial court refuses." Young v. State, 137 S.W.3d 65 (Tex.Crim.App. 2004). The trial court may not prohibit counsel from preserving error by threatening him with contempt. Ruiz-Angeles v. State, 351 S.W.3d 489 (Tex.App.–Houston [14th Dist.] 2011, pet. ref'd).

In cases where the State is the appealing party, such as where the trial court granted a motion to suppress, claims not raised or argued by the State at trial are waived and cannot be raised for the first time on appeal. State v. Ballman, 157 S.W.3d

65 (Tex.App.–Fort Worth 2004, pet. ref'd). This rule does not apply where the State has prevailed in the trial court and is the appellee on appeal. Alford v. State, 400 S.W.3d 924 (Tex.Crim.App. 2013). Even when the State stipulates as part of a plea agreement that a claim has been preserved for review, an appellate court must itself consider whether error has been preserved. Laurent v. State, 454 S.W.3d 650 (Tex.App.– Houston [1st Dist.] 2014, no pet.).

If the State does not object to the sufficiency of the trial court's findings of fact and conclusions of law in the trial court, it cannot raise this issue for the first time on appeal. State v. Froid, 301 S.W.3d 449 (Tex.App.– Fort Worth 2009, no pet.). Where the State is the losing party with respect to the district court's granting of a motion to quash based on juvenile court's decision to certify defendant as an adult, it cannot raise for the first time on appeal the issue that the district court lacked jurisdiction to review evidence underlying certification. State v. Rhinehart, 333 S.W.3d 154 (Tex.Crim.App. 2011).

Error preservation requirements apply to Sixth Amendment claims that the defendant has been denied her right to a speedy trial. Henson v. State, 407 S.W.3d 764 (Tex.Crim.App. 2013).

The defendant does not waive his right to be sentenced by a judge who considers the entire range of punishment by failing to object. Grado v. State, 445 S.W.3d 736 (Tex.Crim.App. 2014).

No objection is necessary to preserve for review the claim that the trial court erred in not declaring a mistrial where the defendant is found to be incompetent after the onset of the trial on the merits. Laster v. State, 202 S.W.3d 774 (Tex.App.–San Antonio 2006, no pet.). But a timely objection is required to preserve for review the trial court's improper intrusion into the plea bargaining process. Moore v. State, 295 S.W.3d 329 (Tex.Crim.App. 2009).

The defendant did not forfeit her right to complain about the unauthorized cost for the appointment of an attorney pro tem by not objecting when she was never given the opportunity to object and was not required to file a motion for new trial to preserve this claim. Landers v. State, 402 S.W.3d 253 (Tex.Crim.App. 2013).

The defendant waived her right to complain about the restitution requirement assessed as a term of community supervision by not objecting. Gutierrez-Rodriguez v. State, 444 S.W.3d 21 (Tex.Crim.App. 2014).

The defendant did not waive his claim of inability to pay his probation fees even though he pled true to this allegation because the requirement that the State prove that a probationer's inability to pay is intentional because this issue is one that cannot

be forfeited. Rusk v. State, 440 S.W.3d 694 (Tex.App.– Texarkana 2013, no pet.).

B. SPECIFICITY

"Rather than focus on the presence of magic language, a court should examine the record to determine whether the trial court understood the basis of a defendant's [objection]." State v. Rousseau, 396 S.W.3d 550 (Tex.Crim.App. 2013). The generally acknowledged policy of requiring a specific objection is two-fold. First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Martinez v. State, 22 S.W.3d 504 (Tex.Crim.App. 2000). Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or to supply other testimony. Zillender v. State, 557 S.W.2d 515 (Tex.Crim.App. 1977).

A general objection is the functional equivalent of no objection and will not ordinarily preserve error. Meek v. State, 628 S.W.2d 543 (Tex.App.--Fort Worth 1982, no pet.). It is not necessary that an objection refer to a specific statute if the objection is specific enough to put the trial judge on notice as to the basis of counsel's complaint. Lankston v. State, 827 S.W.2d 907 (Tex.Crim.App. 1992). The specificity requirement applies "to goose and gander, State and defendant." State v. Neesley, 196 S.W.3d 356 (Tex.App.– Houston [1st Dist.] 2006, pet. ref'd)(State waived claims regarding admissibility of blood sample suppressed by trial court by not raising them at suppression hearing). As the party offering the evidence, the defendant is not required to tell the trial court why his evidence is admissible, only that it is admissible. Cameron v. State, 241 S.W.3d 15 (Tex.Crim.App. 2007).

An isolated statement globally asserting that a blood draw was conducted without a warrant is insufficient to apprise the trial court that it must consider whether there were exigent circumstances to permit a warrantless search in a DWI case, when the context of the entire record at the suppression hearing refers to a different complaint. Douds v. State, 472 S.W.3d 670 (Tex.Crim.App. 2015).

Objections that the prosecutor is badgering the accused on cross-examination or being argumentative, making side-bar comments do not preserve the constitutional claim that the prosecutor's conduct is denying the accused his federal due process right to a fair trial. Because constitutional error is subject to a much stricter standard of harm than non-constitutional error, the trial court should know that it is being asked to make a constitutional ruling on the defense's objection. Clark v. State, 365 S.W.3d 333 (Tex.Crim.App. 2012).

Where the trial judge had sentenced the defendant to the six-year probated term assessed by the jury and where the jury had been discharged, counsel's request for a mistrial prior to the jury returning to the courtroom with a revised verdict of six years

in prison was both specific and timely enough to alert the judge and the State that he objected to the continuation of the proceedings in the wake of the entry of the initial verdict. Cook v. State, 390 S.W.3d 363 (Tex.Crim.App. 2013).

While an objection to "bolstering" is usually too general to preserve error, if that objection is coupled with other, more discrete objections, the objection is sufficient to preserve error and is not defective merely because it does not identify a Rule of Evidence. Rivas v. State, 275 S.W.3d 880 (Tex.Crim.App. 2009).

Where counsel provided the trial judge with a copy of the case that he relied on to support the basis for his objection, and the court noted "you have made your record," error was preserved. Layton v. State, 280 S.W.3d 235 (Tex.Crim.App. 2009); see also Everitt v. State, 407 S.W.3d 259 (Tex.Crim.App. 2013)(counsel preserved error in the admission of officer's testimony as to synergistic effect of alcohol and drugs in DW case where he repeatedly cited two controlling cases finding error in the admission of this very type of testimony.

Where motions to suppress only alleged that defendant's statements were "taken without the safeguards required by Art. 38.22 of the Code of Criminal Procedure" and did not refer to a specific provision of that statute, motion failed to preserve claim that defendant's Miranda warnings were not memorialized on tape as required by Art. 38.22, Sec. 3(a)(2). Resendez v. State, 306 S.W.3d 308 (Tex.Crim.App. 2009).

Where trial court orders exclusion of members of the public from the courtroom, an objection that the ruling "is too broad to exclude the defendant's wife and daughter" does not preserve error to the denial of the right to a public trial. Peyronel v. State, 465 S.W.3d 650 (Tex.Crim.App. 2015).

Where a defendant entered into a "dispositive" motion to suppress seeking the disclosure of the confidential informant because she could testify at the suppression hearing and at the guilt-innocence stage and the motion was denied, the defendant did not preserve error as to his guilt-innocence claim where he failed to adequately apprise the trial court that he still intended to challenge the motion to disclose on the second basis. Bland v. State, 417 S.W.3d 465 (Tex.Crim.App. 2013).

Where the defendant claimed that the State improperly destroyed evidence prior to trial but did not put the trial judge on notice that the Texas Constitution provides greater protection than the United States Constitution, this claim was not preserved for review. Pena v. State, 285 S.W.3d 459 (Tex.Crim.App. 2009). The court later held that the defendant had preserved a Brady claim in his motion for new trial because the issue was sufficiently clear from the record made at the motion for new trial hearing even though the word "Brady" was not specifically used in the motion. Pena v. State, 353 S.W.3d 797 (Tex.Crim.App. 2011).

A motion for new trial that alleges that the prosecutor was aware that an allegation in a PSI was false and that she had a duty to inform defense counsel and the trial court that the allegation was false was sufficiently specific to preserve a Brady claim where he did not become aware of the Brady claim until after the motion was filed. Clarke v. State, 270 S.W.3d 573 (Tex.Crim.App. 2008).

A pre-trial motion to suppress based upon constitutional principles, along with argument made to the trial court in support of that motion, is insufficient to preserve error under Chapter 14 of the Code of Criminal Procedure because it was not obvious to the trial court or opposing counsel that the defendant was also invoking state law. Buchanan v. State, 207 S.W.3d 772 (Tex.Crim.App. 2006).

A motion for new trial that alleged that telephone harassment statute was "unconstitutional as applied" preserved claim for appellate review that statute was unconstitutionally vague but did not preserve claim that statute was "overbroad as applied." Gillenwaters v. State, 205 S.W.3d 594 (Tex.Crim.App. 2006).

There is no requirement that the proponent of presumptively inadmissible evidence state the exception he is relying on when the trial court immediately rules in his favor. Ortega v. State, 126 S.W.3d 618 (Tex.App.--Houston [14th Dist.] 2004, pet. ref'd)). The State may waive a claim that a defendant's objection was not sufficiently specific where it fails to object to the format of a hearing and readily participates in it. Hill v. State, 90 S.W.3d 308 (Tex.Crim.App. 2002)(whether manifest necessity existed for declaration of mistrial).

A claim that "evidence establishing the defendant's innocence was withheld by a material prosecution witness" is not sufficiently specific to preserve a Brady claim for appellate review where the record supports the conclusion that neither the State nor the trial court understood that the defendant was raising a Brady claim and where the trial court's order denying the motion for new trial did not mention Brady. Keeter v. State, 175 S.W.3d 756 (Tex.Crim.App. 2005). An objection to one or two photographs will not preserve error as to the admission of other photographs even if they involve the same subject matter or were the subject of a motion in limine. Martinez v. State, 98 S.W.3d 189 (Tex.Crim.App. 2003).

If some portion of evidence or an exhibit is admissible and other portions inadmissible, it is the opponent's burden to make a specific objection to those portions that are inadmissible. Willover v. State, 70 S.W.3d 841 (Tex.Crim.App. 2002). Where the trial court ruled that the defense would have opened the door to the admission of a videotape interview with a CPS worker containing references to extraneous offenses by calling the worker to testify about an inconsistent statement, it was not necessary to call the worker to testify to preserve this claim for review. Sauceda v. State, 129 S.W.3d 116 (Tex.Crim.App. 2004). A defendant preserves his right to an interpreter

who is competent by informing the trial court that the defendant does not speak English. Garcia v. State, 149 S.W.3d 135 (Tex.Crim.App. 2004).

C. TIMELINESS

Defense counsel must object to inadmissible testimony, improper argument, or any claimed irregularity at the earliest possible opportunity and the failure to do so constitutes a waiver of the complaint. Mendez v. State, 138 S.W.3d 334 (Tex.Crim.App. 2004). A motion for mistrial based on a State's witness alluding to extraneous offenses in violation of a motion in limine was not timely when it was not made until after the witness had testified about the extraneous offenses without objection. Griggs v. State, 213 S.W.3d 923 (Tex.Crim.App. 2007).

In the event that the objection is sustained, defense counsel must renew the objection in the event the State attempts to make use of the inadmissible testimony or argument at a later time. Holman v. State, 772 S.W.2d 530 (Tex.App.--Beaumont 1989, pet. ref'd). If objection to testimony that has been conditionally admitted is sustained, counsel must move to strike this testimony or the issue is waived. Fuller v. State, 829 S.W.2d 191 (Tex.Crim.App. 1992). This rule applies with equal force to the State as well as the defense. In re State ex rel DeLeon, 89 S.W.3d 195 (Tex.App.--Corpus Christi 2002, orig. proceed.)(State forfeited right to complain about illegal sentence when it failed to timely exercise its right of appeal). State v. Moore, 225 S.W.3d 556 (Tex.Crim.App. 2007)(State forfeited its right to complain about untimely amendment of motion for new trial when it did not object at the time amendment was filed). But where the trial court lacks jurisdiction to place a defendant on shock probation, the State may raise such a claim for the first time on appeal even when it has not objected in the trial court. State v. Dunbar, 297 S.W.3d 777 (Tex.Crim.App. 2009).

Because the defendant never had the opportunity to object to the trial court's restitution order prior to his motion for new trial being overruled, where the order was not entered until after his motion for new trial had been overruled, this claim was not forfeited. Burt v. State, 396 S.W.3d 574 (Tex.Crim.App. 2013).

A motion to strike the testimony of an expert based on his lack of qualifications made after the witness has testified and based on testimony elicited on cross-examination serves as a renewed objection to the trial court's earlier ruling that the witness is qualified. Rodgers v. State, 205 S.W.3d 525 (Tex.Crim.App. 2006). An objection that an expert's testimony is not sufficiently tied to the facts of the case may be made for the first time on cross-examination where the defense first learned of the absence of underlying facts or data to support the expert's testimony on cross. Acevedo v. State, 255 S.W.3d 162 (Tex.App.–San Antonio 2008, pet. ref'd).

An objection made after the trial court inquired of two hold-out jurors whether

they could change their votes and sent them back in to deliberate was timely because the trial court was in no better position to grant a mistrial after the jury was sent back then when the request for a mistrial was made. Barnett v. State, 189 S.W.3d 272 (Tex.Crim.App. 2006). The failure to object to probationary conditions at sentencing does not constitute a waiver of this issue for appellate review. Kesaria v. State, 189 S.W.3d 279 (Tex.Crim.App. 2006). Where a curative instruction was not sought after evidence the State alluded to in opening statement was excluded, the accused waives the right to complain that a mistrial should have been granted).

The defendant's claim in motion for new trial that telephone harassment statute was unconstitutional as applied because it gave State opportunity to respond, trial court opportunity to take corrective action, and did not impair orderly presentation of case to jury. Gillenwaters v. State, 205 S.W.3d 594 (Tex.Crim.App. 2006). A claim that the judge lacked authority to preside over a motion to suppress hearing was timely although it was first raised in a motion for new trial. Lackey v. State, 364 S.W.3d 837 (Tex.Crim.App. 2012)("We are loath to construe Rule 33.1(a)91) in such a way as to require the appellant to make such a blind objection in order to preserve error for appeal, even in the name of judicial economy.").

A defendant forfeits his claim that the trial court erred in requiring him to pay court-appointed attorneys fees by failing to raise it on direct appeal from the order first imposing community supervision. Wiley v. State, 410 S.W.3d 313 (Tex.Crim.App. 2013).

D. OBTAINING AN ADVERSE RULING

After voicing a timely and specific objection, defense counsel must then pursue the matter to the point of securing an adverse conclusory ruling from the trial court. Tucker v. State, 990 S.W.2d 261 (Tex.Crim.App. 1999). This means asking for an instruction to disregard if the objection is sustained and moving for a mistrial if an instruction to disregard is given. Nethery v. State, 692 S.W.2d 686 (Tex.Crim.App. 1985). While the better practice is to obtain an express ruling, the trial court may implicitly rule on a motion. Gutierrez v. State, 36 S.W.3d 509 (Tex.Crim.App. 2001); see also Leal v. State, 469 S.W.3d 647 (Tex.App.– Houston [14th Dist.] 2015, pet. ref'd) (trial court implicitly overruled motion to suppress).

III. FIVE VALUABLE TOOLS IN PRESERVING ERROR

A. RUNNING OBJECTIONS

In Goodman v. State, 701 S.W.2d 850 (Tex.Crim.App. 1985), the Court of Criminal Appeals held that a running objection did not preserve error on a matter referred to by any witness at any time during the course of the trial, a view later noted

with approval by the El Paso Court of Appeals in Mares v. State, 758 S.W.2d 932 (Tex.App.--El Paso 1988, pet ref'd). But in Moreno v. State, 755 S.W.2d 866 (Tex.Crim.App. 1988), the Court held that defense counsel's running objection to this line of questioning was sufficient to preserve error. And in a footnote in Sattiewhite v. State, 786 S.W.2d 271 (Tex.Crim.App. 1989), the Court again held that defense counsel's running objection was sufficient to preserve error when all the parties were aware of the nature of the testimony at issue. In Ethington v. State, 819 S.W.2d 854 (Tex.Crim.App. 1991), the Court held that a running objection is sufficient to preserve error so long as defense counsel takes pains to make sure that the running objection does not encompass too broad a reach of subject matter over too broad a time or over different witnesses, so as to comply with TEX.R.APP.P. 33.1. See Mack v. State, 872 S.W.2d 36 (Tex.App.--Fort Worth 1994, pet. ref'd).

B. MOTIONS IN LIMINE

The purpose of a motion in limine is to prevent particular matters from coming before the jury and is, in practice, a method of raising objection to an area of inquiry prior to the matter reaching the ears of the jury through a posed question, jury argument, or others means. It is, therefore, wider in scope than the sustaining of an objection made after the objectionable matter has been expressed. Norman v. State, 523 S.W.2d 669 (Tex.Crim.App. 1975). But the granting of a pre-trial motion in limine will not by itself preserve error and for error to be preserved with regard to the subject matter of the motion in limine, it is absolutely necessary that an objection be made at the time when the subject is raised during trial and an adverse ruling secured from the trial court. Martinez v. State, 98 S.W.3d 189 (Tex.Crim.App. 2003).

C. OFFERS OF PROOF

When the trial court excludes evidence, the party offering same shall have the absolute right at any time before the court's charge is read to the jury, to be allowed to make an offer of proof in the form of a concise statement in the absence of the jury. Moosavi v. State, 711 S.W.2d 53 (Tex.Crim.App. 1986). Defense counsel is not limited to any one method of showing what the excluded testimony would have been, Gutierrez v. State, 764 S.W.2d 796 (Tex.Crim.App. 1989), and so long as the offer of proof puts the trial judge on notice as to what he is excluding, it is sufficient to preserve the matter for appellate review. Love v. State, 861 S.W.2d 899 (Tex.Crim.App. 1993); Williams v. State, 116 S.W.3d 788 (Tex.Crim.App. 2003). The trial court may not restrict defense counsel's ability to make an offer of proof on relevancy or materiality grounds and where the accused is denied this right, the cause must be remanded to the trial court so that an unfettered offer of proof can be made. Spence v. State, 758 S.W.2d 597 (Tex.Crim.App. 1988).

A general and cursory offer of proof will not suffice to preserve error where the

trial court excludes evidence. Mays v. State, 285 S.W.3d 884 (Tex.Crim.App. 2009).

D. MOTIONS TO STRIKE

TEX.R.APP.P. 103(a)(1) provides that error in admitting evidence may be preserved by an objection or motion to strike. If the trial court conditionally admits evidence subject to the proponent connecting it up at a later time, the opposing party must renew his original objection by a motion to strike the conditionally admitted evidence and the failure to do so constitutes a waiver by the opposing party for purposes of appeal. Heidelberg v. State, 36 S.W.3d 668 (Tex.App.--Houston [14th Dist.] 2001, pet. ref'd). A motion to strike the testimony of an expert based on his lack of qualifications made after the witness has testified and based on testimony elicited on cross-examination serves as a renewed objection to the trial court's earlier ruling that the witness is qualified. Rodgers v. State, 205 S.W.3d 525 (Tex.Crim.App. 2006).

E. AVOIDING THE MINEFIELD OF CURATIVE ADMISSIBILITY

When the defendant offers the same evidence to which he had earlier objected, he is not in a position to complain on appeal under the doctrine known as curative admissibility. Moraguez v. State, 701 S.W.2d 902 (Tex.Crim.App. 1986). There is, however, an important exception to this rule. The doctrine of curative admissibility does not cure the effect of improperly admitted evidence where defense counsel makes it a matter of record that the defendant's rebuttal testimony is being offered to meet, destroy, or explain that evidence which was admitted over his objection in the first place. Rogers v. State, 853 S.W.2d 29 (Tex.Crim.App. 1993).

F. PRE-TRIAL JEOPARDY CHALLENGES & PROSECUTORIAL MISCONDUCT

When a defendant claims that the collateral estoppel subset of double jeopardy precludes any further prosecution, he is obligated to introduce a record of the first proceeding in the second proceeding and to include that record on appeal. Guajardo v. State, 109 S.W.3d 456 (Tex.Crim.App. 2003). A defendant forfeits a double jeopardy challenge on appeal by not appealing the trial court's denial of his pre-trial jeopardy writ. Bowen v. State, 131 S.W.3d 505 (Tex.App.– Eastland 2004, pet. ref'd).

In determining whether prosecutorial misconduct bars a retrial after mistrial is declared, the defendant is entitled to introduce evidence of similar misconduct committed by the prosecutor in other cases. Ex parte Twine, 111 S.W.3d 664 (Tex.App.--Fort Worth 2003, pet. ref'd)(trial court erred in excluding evidence that prosecutor had asked improper question about defendant's post-arrest silence in another case in determining if prosecutorial misconduct barred retrial after mistrial). The defendant waives his claim that his reindictment of a previously dismissed charge following his successful civil rights action was the result of prosecutorial vindictiveness

when his claim was not raised until the punishment hearing, did not expressly mention that it was based on prosecutorial vindictiveness, and where the trial court never ruled on his claim of denial of due process. Neal v. State, 150 S.W.3d 169 (Tex.Crim.App. 2004).

G. MOTIONS TO SUPPRESS: FINDINGS OF FACT

Upon timely request by the losing party, the trial judge must provide explicit essential factual findings supporting the granting or denial of a motion to suppress. State v. Cullen, 32 S.W.3d 853 (Tex.Crim.App. 2000). "Essential findings" means that "the trial court must make findings of fact and conclusions of law adequate to provide an appellate court with a basis upon which to review the trial court's application of the law to the facts." State v. Copeland, 501 S.W.3d 610 (Tex.Crim.App. 2012). In the absence of such written findings, the appellate court will view the evidence in the light most favorable to the trial judge's ruling and assume that it made all implicit factual findings that support its ruling so long as they are supported by the record. See Aguirre v. State, 402 S.W.3d 664, 667 (Tex.Crim.App. 2013)(Cochran, J., concurring in the refusal of discretionary review)(defense counsel's failure to obtain findings of fact "sealed appellant's fate on appeal.").

IV. GUILTY PLEAS, PRE-TRIAL MOTIONS AND NOTICES OF APPEAL

A. THE DEMISE OF THE HELMS RULE

For generations, where a plea of guilty or nolo contendere is voluntarily and understandingly entered without a prosecutor's recommendation as to punishment, that is, a so-called "open-plea," all non-jurisdictional defects were waived including alleged deprivations of federally secured rights and pre-trial suppression matters. King v. State, 687 S.W.2d 762 (Tex.Crim.App. 1985). This body of law became known as the Helms Rule. Helms v. State, 484 S.W.2d 924 (Tex.Crim.App. 1972). But the Court of Criminal Appeals overruled Helms in Young v. State, 8 S.W.3d 656 (Tex.Crim.App. 2000) and held that an open plea will no longer waive the ability to seek appellate review of the denial of a motion to suppress where the trial court's judgment would not be supported without that evidence sought to have been suppressed.

B. TEX.R.APP.P. 25.2(b)

Where the defendant enters a plea of guilty or nolo contendere pursuant to Article 1.15, V.A.C.C.P., and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, TEX.R.APP.P. 25.2(b) places a limitation on the defendant's ability to appeal. To prosecute an appeal for a non-jurisdictional defect or error that occurred prior to the entry of the plea in felonies but not misdemeanors, Lemmons v. State, 818 S.W.2d 58

(Tex.Crim.App. 1991), the notice of appeal must state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial. Jones v. State, 796 S.W.2d 183 (Tex.Crim.App. 1990).

C. PRESERVING ERROR IF A PLEA AGREEMENT IS BREACHED

When a claim is raised that the State has breached its plea agreement with the defendant, error is preserved when the defendant brings the alleged breach to the trial court's attention in a motion for new trial. Bitterman v. State, 180 S.W.3d 139 (Tex.Crim.App. 2005); see also Joyner v. State, 548 S.W.3d 731 (Tex.App.– Houston [1st Dist.] 2018, pet. ref'd)(error waived where defense objection failed to direct court's attention to alleged breach of plea agreement). A trial judge does not have the authority to grant a new trial on her own motion after accepting a guilty plea and imposing sentence in accordance with that plea agreement. Murphy v. State, 223 S.W.3d 427 (Tex.App.–Eastland 2006, pet. ref'd).

D. THE NOTICE OF APPEAL MUST BE IN WRITING

TEX.R.APP.P. 25.2(b) also requires that the notice of appeal be in writing. This requirement is not satisfied where the clerk of the trial court merely reduces the defendant's oral notice of appeal to writing. Hammond v. State, 746 S.W.2d 278 (Tex.App.--Houston [14th Dist.] 1988, pet. ref'd). A written notice of appeal is sufficient so long as it shows the desire of the defendant to appeal. Massey v. State, 759 S.W.2d 18 (Tex.App.--Texarkana 1988, pet. ref'd). The notice of appeal need not be signed by trial counsel but may be signed by the defendant. Ex parte Axel, 757 S.W.2d 369 (Tex.Crim.App. 1988). If the initial notice of appeal is defective, it may be amended any time before the appellant's brief is filed. Bayless v. State, 91 S.W.3d 801 (Tex.Crim.App. 2002). A general notice of appeal from a plea-bargained conviction does not invoke the jurisdiction of the court of appeals. Johnson v. State, 84 S.W.3d 658 (Tex.Crim.App. 2002). A defendant's written waiver of appeal is involuntary where the trial court specifically granted permission to appeal and the parties all agreed that the defendant could appeal.

E. PRESERVING PRE-TRIAL ERROR DURING TRIAL

As long as the basis for the trial objection is the same as that raised and rejected at the pre-trial suppression hearing, or made outside the jury's presence during trial, defense counsel need not object again at trial when the evidence is offered to preserve error. Geuder v. State, 115 S.W.3d 11 (Tex.Crim.App. 2003); Writt v. State, 541 S.W.2d 424 (Tex.Crim.App. 1976). While the general rule is that the defendant waives any challenge to an adverse ruling on his pre-trial motion to suppress by stating that he has "no objection" to the admission of the challenged evidence, Graham v. State, 3 S.W.3d 272 (Tex.App.--Fort Worth 1999, pet.ref'd), if the record reveals that the

defendant did not intend to abandon her claim, the "no objection" rule does not apply and the claim is preserved. Thomas v. State, 408 S.W.3d 877 (Tex.Crim.App. 2013). Counsel's statement that he had "no objection" to admission of evidence at trial following the denial of his motion to suppress has been found to constitute deficient conduct under the performance prong of Strickland. Ex parte Moore, 395 S.W.3d 152 (Tex.Crim.App. 2013).

An exception to the "no objection= waiver rule" is that there is no waiver of the defendant's right to a jury instruction under TEX.CODE CRIM.PROC.ANN., Art. 38.23, even where defense counsel states that he has "no objection" to the admission of evidence seized in a search when that evidence is offered during the State's case-in-chief. Holmes v. State, 248 S.W.3d 194 (Tex.Crim.App. 2008).

Where the trial judge carries the motion to suppress until trial, there is no need for the defendant to object until the evidence at issue is actually offered. Garza v. State, 126 S.W.3d 79 (Tex.Crim.App. 2004). When evidence is properly admitted, a complaint will not be waived until a ground of inadmissibility arises. Johnson v. State, 878 S.W.2d 164 (Tex.Crim.App. 1994). If defense counsel relies upon co-counsel's pre-trial motions and mid-trial objections to preserve error in his own client's case, the record must affirmatively reflect this fact. Garza v. State, 622 S.W.2d 85 (Tex.Crim.App. 1981)(op. on rehr'g).

F. THE CERTIFICATION OF APPEAL REQUIREMENT

TEX.R.APP.P. 25.2 requires that the defendant file a written certification of appeal signed by the trial judge that appears in the Clerk's Record in every case regardless of whether it was a trial or a plea bargain or suffer dismissal of his appeal.

G. THE STATE'S RIGHT OF APPEAL

The State's right of appeal is governed by TEX.CODE CRIM.PROC.ANN., Art. 44.01 and its procedural requirements have been strictly construed. State v. Redus, 445 S.W.3d 151 (Tex.Crim.App. 2014)(dismissing State's appeal where notice of appeal and certification was defective). In addition to those five areas set out in Art. 44.01(a), the State may also appeal an illegal sentence. See State v. Gutierrez, 129 S.W.3d 113 (Tex.Crim.App. 2004)(State can appeal order modifying a sentence after the trial court's plenary jurisdiction has expired); State v. Kersh, 127 S.W.3d 775 (Tex.Crim.App. 2004)(State had right to appeal sentence that did not incorporate enhancements for prior felony convictions); State v. Moreno, 294 S.W.3d 594 (Tex.Crim.App. 2009)(State not authorized to appeal trial court's order granting defendant's motion for directed verdict because such an order fit definition of acquittal and not dismissal); State v. Hanson, 555 S.W.3d 578 (Tex.Crim.App. 2018)(State can appeal trial court's "amended order" granting defendant's request for shock probation).

Where the trial court suppressed evidence because of the State's failure to timely disclose it to the defense, filed notice of appeal but merely obtained an oral ruling but no written order, court of appeals lacked jurisdiction to hear State's appeal. State v. Sanavongxay, 407 S.W.3d 252 (Tex.Crim.App. 2012). Where the trial court refuses to issue a written order, the State's remedy is to file a writ of mandamus. State v. Martinez, 548 S.W.3d 751 (Tex.App.– Corpus Christi 2018, no pet.).

It is incumbent upon the State, as the party who lost below, to ensure that it knows the date the trial court signed an order granting a motion to suppress so that it may file a timely notice of appeal. State v. Wachtendorf, 475 S.W.3d 895 (Tex.Crim.App. 2015)

Where the State seeks to appeal a question of law pursuant to Art. 44.01(c) after the defendant has appealed, it need not file a notice of appeal to confer jurisdiction on the court of appeals. Pfeiffer v. State, 363 S.W.3d 594 (Tex.Crim.App. 2012).

Because the State may not appeal the granting of a motion to suppress after jeopardy has attached, where the trial court grants a motion to suppress mid-trial and then finds the State's remaining evidence legally insufficient to convict, this order is the functional equivalent of the entry of an acquittal which is not a basis for the State to appeal. State v. Blackshere, 344 S.W.3d 400 (Tex.Crim.App. 2011).

The trial court has inherent authority to vacate, modify, or amend its sentence downward within the time of its plenary power. State v. Aguilera, 165 S.W.3d 695 (Tex.Crim.App. 2005)(trial court had jurisdiction to re-sentence defendant to 15 years after valid 25-year sentence was pronounced and accepted). The State may not appeal a decision from a justice court directly to the court of appeals. Alley v. State,154 S.W.3d 485 (Tex.Crim.App. 2005). The State does not have the right to appeal a trial court's decision to treat an information alleging DWI with a prior conviction as a Class B misdemeanor and not as a Class A misdemeanor because such a ruling does not "terminate" the prosecution. State v. Morgan, 160 S.W.3d 1 (Tex.Crim.App. 2004).

The State's appeal of a the granting of a pre-trial motion to suppress must be filed within fifteen days and the filing of a motion for reconsideration of the trial court's ruling does not extend this time. State v. Cowsert, 207 S.W.3d 347 (Tex.Crim.App. 2006).

V. VOIR DIRE

Defense counsel's reply of "None" or No, Your Honor," to the question of whether there is an objection to "the seating of the jury," or "to the panel," or "to the panel as selected" at the conclusion of jury selection does not constitute a waiver of any previously preserved claim of error during voir dire. Stairhime v. State, 463 S.W.3d

902 (Tex.Crim.App. 2015).

A. THE VOIR DIRE MUST BE RECORDED

If the voir dire is not recorded or the record does not reflect any impropriety, nothing preserved for review and the error, if any, is waived. Villarreal v. State, 617 S.W.2d 703 (Tex.Crim.App. 1981). Although failing to have the voir dire transcribed is not per se ineffective assistance of counsel, Patton v. State, 717 S.W.2d 772 (Tex.App.--Fort Worth 1986, no pet.), there is no sound tactical reason for not having a record made of the voir dire.

B. COMMENTS MADE IN THE PRESENCE OF THE PANEL

If the prosecutor makes a comment in the presence of the panel "reasonably calculated" to prejudice the accused, Herring v. State, 758 S.W.2d 849 (Tex.App.--Corpus Christi 1983, pet. ref'd), counsel must first make a timely and specific objection to the remarks. Montoya v. State, 744 S.W.2d 15 (Tex.Crim.App. 1987). If the objection is sustained, counsel must ask that the panel be instructed to disregard the remarks, Mendoza v. State, 552 S.W.2d 444 (Tex.Crim.App. 1977), and then move to quash the panel. Hogan v. State, 496 S.W.2d 594 (Tex.Crim.App. 1973). Finally, counsel must exhaust his peremptory challenges against those jurors who heard the comment. Hammett v. State, 578 S.W.2d 699 (Tex.Crim.App. 1979).

The Court of Criminal Appeals has held, albeit in a plurality opinion, that when the trial judge makes the improper comment or comments in the presence of the jury, no objection is needed to preserve this claim for appellate review. Blue v. State, 41 S.W.3d 129 (Tex.Crim.App. 2000), rev'd on remand, 64 S.W.3d 672 (Tex.App.--Houston [1st Dist.], 2001)(trial judge's multiple comments that tainted the presumption of innocence warranted reversal even in the absence of an objection by defense). But the court has stressed that as a plurality opinion, Blue has no precedential value and is limited "to any persuasive value [it] might have." Unkart v. State, 400 S.W.3d 94 (Tex.Crim.App. 2013)(defendant did not preserve error when judge commented in voir dire that he would want to testify if accused of a crime where only relief sought was belated motion for mistrial, no request for curative instruction was sought and where comments could have been cured by such an instruction).

When the trial judge has permitted a juror to make prejudicial comments before the panel by not first calling that juror up to the bench, this claim is preserved for review when the defense asks for a mistrial although the defense does not object or ask for an instruction for the panel to disregard. Young v. State, 137 S.W.3d 65 (Tex.Crim.App. 2004).

C. VOIR DIRE TIME LIMITS

The court's limitations on voir dire must appear in the record and counsel must make a timely and specific objection to the limitations. Little v. State, 758 S.W.2d 551 (Tex.Crim.App. 1988). Counsel must request additional time, Guerra v. State, 760 S.W.2d 681 (Tex.App.--Corpus Christi 1988, no pet.), and must not attempt to prolong the voir dire. McCarter v. State, 837 S.W.2d 117 (Tex.Crim.App. 1992). The record must contain the questions which counsel proposes to ask, which must be relevant, not repetitious, and neither vague nor open-ended. Dhillon v. State, 138 S.W.3d 583 (Tex.App.--Houston [14th Dist.] 2004, pet. ref'd). After requesting to make a bill on what the venire persons' answers might have been, counsel must show which prospective jurors he was unable to question actually served on the jury. Ratliff v. State, 690 S.W.2d 897 (Tex.Crim.App. 1985). The defense does not waive the right to complain about an improper time limit by objecting to the trial court's proposal to dismiss the panel. Wappler v. State, 138 S.W.3d 331 (Tex.Crim.App. 2004).

D. LIMITATION ON ASKING A GIVEN QUESTION

Counsel may not ask questions that are too vague or overly broad. Barajas v. State, 93 S.W.3d 36 (Tex.Crim.App. 2002)(question asking venire whether they could be fair and impartial if complainant was nine years old was too vague and over broad and was improper). The record must contain the question sought to be asked and once the trial court instructs defense counsel not to ask the question at issue, the error has been preserved. Nunfio v. State, 808 S.W.2d 482 (Tex.Crim.App. 1991), overruled on other grounds, Barajas v. State, 93 S.W.3d 36 (Tex.Crim.App. 2002). Defendant's statement that he had "no objection" to composition of jury "as seated" did not waive his claim that he was denied his right to ask a proper question. Stairhime v. State, 463 S.W.3d 902 (Tex.Crim.App. 2015).

Defense counsel should also note for the record that the trial court's ruling has precluded him from intelligently exercising his peremptory challenges. Sawyers v. State, 724 S.W.2d 24 (Tex.Crim.App. 1986). Any error arising from the denial of a proper question is subject to a harm analysis pursuant to TEX.R.APP.P. 44.2(b). Rich v. State, 160 S.W.3d 575 (Tex.Crim.App. 2005). Where a juror withholds material information during voir dire, the trial judge's denial of a mistrial is reviewed under the constitutional harm standard in TEX.R.APP.P. 44.2(a). Franklin v. State, 138 S.W.3d 351 (Tex.Crim.App. 2004).

Where counsel tells the court that he wants to inquire of the venire whether they understood that the standard of proof beyond a reasonable doubt constituted a level of confidence under the law that was higher than both preponderance of the evidence and the clear and convincing evidence standards, he has preserved his claim that he was denied his right to ask a proper question even though he never asked the question that incorporated his inquiry. Fuller v. State, 363 S.W.3d 583 (Tex.Crim.App. 2012).

E. COMMITMENT QUESTIONS

Counsel may not ask a question that seeks to "commit" a juror, that is, a question where one or more of the possible answers was that a prospective juror would resolve or refrain from resolving an issue in a case on the basis of one or more facts contained in the question. Standefer v. State, 59 S.W.3d 177 (Tex.Crim.App. 2001), overruling Maddux v. State, 862 S.W.2d 590 (Tex.Crim.App. 1993).

For a question to be a proper commitment question, one of the possible answers to the question must give rise to a valid challenge for cause and the question must also contain only those facts necessary to test whether a prospective juror is challengeable for cause. Vann v. State, 216 S.W.3d 881 (Tex.App. – Fort Worth, 2007)(question that asked prospective jurors whether they would automatically disbelieve a witness who was a convicted felon was a proper commitment question).

The appropriate standard of harm when the State is permitted to ask improper commitment questions is that found in TEX.R.APP.P. 44.2(b). Sanchez v. State, 165 S.W.3d 707 (Tex.Crim.App. 2005).

F. DENIAL OF A CHALLENGE FOR CAUSE

The voir dire must be recorded and the strike lists of the parties must appear in the record. Payton v. State, 572 S.W.2d 677 (Tex.Crim.App. 1978). After voicing a timely and specific objection to the trial court's ruling, counsel must use a peremptory challenge on that juror, East v. State, 702 S.W.2d 606 (Tex.Crim.App. 1985), and must exhaust his peremptory challenges and request additional strikes. Molina v. State, 754 S.W.2d 468 (Tex.Crim.App. 1988). Counsel must also assert that if he had not been forced to use a peremptory challenge after his challenge for cause was overruled, he would have used that peremptory to excuse a juror who was seated whom he found objectionable. Homan v. State, 662 S.W.2d 372 (Tex.Crim.App. 1984).

Counsel may not stand mute when the trial court states erroneous facts as to the basis for its denial of a challenge for cause and where the trial court requests correction if necessary before denying the defendant's request for an additional peremptory strike. Loredo v. State, 159 S.W.3d 920 (Tex.Crim.App. 2004). TEX.R.APP.P. 44.2(b) does not change the way that harm is demonstrated for the erroneous denial of a challenge for cause and that harm is shown if the defendant complies with those preservation of error requirements alluded to above. Johnson v. State, 43 S.W.3d 1 (Tex.Crim.App. 2001).

G. GRANTING OF THE STATE'S CHALLENGE FOR CAUSE

In addition to those steps set out in Section F, counsel must show that the State

used all of its peremptory challenges and that this error deprived him of "a lawfully constituted jury," Jones v. State, 982 S.W.2d 386, 394 (Tex.Crim.App. 1998), which, as a practical matter, will be an impossible burden for the defense to shoulder.

H. SUA SPONTE EXCUSAL OF A JUROR

Counsel must make a timely and specific objection that the trial court has excused an otherwise qualified juror on its own motion, Nichols v. State, 754 S.W.2d 185 (Tex.Crim.App. 1988), as well as those other steps outlined at section J. If the excluded juror was disqualified, counsel must show that he was tried by a jury to which he had a legitimate objection, i.e., that the juror served who was otherwise undesirable from his standpoint. Green v. State, 764 S.W.2d 242 (Tex.Crim.App. 1989). If the juror excluded was otherwise qualified, counsel must show that the State used all of its peremptory challenges, and that but for the court's action, the excluded juror would have served. Nichols v. State, 754 S.W.2d 185 (Tex.Crim.App. 1988).

I. BATSON CLAIMS

Counsel must object that the prosecutor has exercised his peremptory challenges in a racially discriminatory manner before the jury is sworn and the venire panel is discharged. Williams v. State, 712 S.W.2d 835 (Tex.App.--Corpus Christi 1986, pet. ref'd). The record must contain the race of the accused, the race of the prospective jurors on the panel, and the race of those panel members struck by the prosecutor. McKinney v. State, 744 S.W.2d 252 (Tex.App.--Waco 1987, pet. ref'd). Article 35.261(a), of the Code of Criminal Procedure provides that defense counsel must make his objection after the parties have delivered their strike lists to the clerk and before the trial court has impaneled the jury and dismissed the remainder of the venire. Henry v. State, 729 S.W.2d 732 (Tex.Crim.App. 1987).

Although defense counsel is entitled to review the State's juror information notes if the prosecutor uses them to refresh his recollection as to why he exercised his peremptory strikes, defense counsel must ensure that these notes are made a part of the record in the event the trial court does not require the State to produce them. Salazar v. State, 795 S.W.2d 187 (Tex.Crim.App. 1990). Batson has been extended to discriminatory challenges made by the State based solely on sex, Fritz v. State, 946 S.W.2d 844 (Tex.Crim.App. 1997), and applies to the defense as well. Peetz v. State, 180 S.W.3d 755 (Tex.App.– Houston [14th Dist.] 2005, pet. ref'd).

The Supreme Court has held that a defendant is entitled to present evidence relating to a pattern and practice of race discrimination on the part of the prosecution, evidence that the prosecution questioned minority jurors in a racially disparate manner as to their views on the death penalty, and evidence that the prosecution used a jury shuffle to ensure that white venire members were selected in preference to

minorities. Miller-El v. Cockrell, 537 U.S. 322 (2003). In eventually granting habeas corpus relief in Miller-El v. Dretke, 545 U.S. 231 (2005), the Supreme Court stressed that disparate treatment of black and white jurors is a critical factor in determining if an allegedly race-neutral explanation for a strike is really a pretext. See also Snyder v. Louisiana, 552 U.S. 472 (2008)(same).

J. THE UNTRUTHFUL OR DISSEMBLING JUROR

When a juror withholds material information, the parties's use of challenges and peremptory strikes is hampered. When a partial, biased, or prejudiced juror is seated without fault or lack of diligence on the part of defense counsel, who has acted in good faith on the answers given to her during voir dire, not knowing them to be inaccurate, a new trial is warranted, even if the juror later claims that his or her verdict will not be affected. Von January v. State, 576 S.W.2d 43 (Tex.Crim.App. 1978). Error of this nature is reviewed pursuant to TEX.R.APP.P. 44.2(a). Franklin v. State, 23 S.W.3d 81 (Tex.App.– Texarkana 2000, pet. ref'd)("Where the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful harm analysis, then the error will not be proven harmless beyond a reasonable doubt.").

K. STRIKE MISTAKES

It is the responsibility of the parties to assure that the jury empaneled does not include a juror that has been struck and a party must object before the panel is sworn, or else show that the juror was otherwise disqualified because of prejudice against the defendant. Truong v. State, 782 S.W.2d 904, 905 (Tex.App. – Houston [14th Dist.] 1989, no pet.). If there is an error that is called to the court's attention before the jury is sworn, and the error is not cured, reversal is required. Pogue v. State, 553 S.W.2d 368, 370-371 (Tex.Crim.App. 1977).

L. DISABLED JURORS

While Article 36.29 of the Code of Criminal Procedure allows fewer than twelve jurors to render a verdict if, after the trial begins, a juror dies or becomes disabled, the trial court may not insist that the defendant proceed to trial with eleven jurors absent an attempt to replace the disabled juror. McClellan v. State, 143 S.W.3d 395 (Tex.App.– Austin 2004, no pet.).

VI. EXCLUSION OF TESTIMONY

A. DIRECT EXAMINATION

Defense counsel must first object to the trial court's exclusion of the proffered testimony and secure an adverse ruling from the court. Moosavi v. State, 711 S.W.2d

53 (Tex.Crim.App. 1986). Defense counsel must then make a concise offer of proof as to what the excluded evidence would have shown had it been admitted. Tatum v. State, 798 S.W.2d 569 (Tex.Crim.App. 1990). So long as the offer of proof fairly apprises the trial court as to the nature of the evidence it is excluding, the offer of proof is sufficient to preserve error. Guiterrez v. State, 764 S.W.2d 796 (Tex.Crim.App. 1989).

B. CROSS-EXAMINATION

After objecting to the trial court's limitation and securing an adverse ruling from the court, defense counsel must make an offer of proof as to the questions he would have asked and the answers which he might have received. Koehler v. State, 679 S.W.2d 6 (Tex.Crim.App. 1984). It is not necessary for defense counsel to show that his cross-examination would have affirmatively established the facts he sought to prove. Hurd v. State, 725 S.W.2d 249 (Tex.Crim.App. 1987).

C. DENIAL OF THE DEFENDANT'S RIGHT TO REOPEN

Defense counsel must demonstrate that the witness sought to be called is present and ready to testify and that his request to reopen has been made before the court's charge has been read to the jury and final argument have been made. Reeves v. State, 113 S.W.3d 791 (Tex.App.--Dallas 2003, pet.ref'd). Defense counsel must also show that the introduction of the testimony will not impede the trial or interfere with the orderly administration of justice. Scott v. State, 597 S.W.2d 755 (Tex.Crim.App. 1979). Finally, defense counsel must provide the trial judge with some indication via an offer or proof as to what the testimony would be and that it was material and bore directly on a main issue in the case. Yee v. State, 790 S.W.2d 361 (Tex.App.--Houston [14th Dist.] 1990, pet.ref'd). Where the substance of the excluded testimony was apparent to the trial court, error has been preserved even where defense counsel fails to make an offer of proof as to what the excluded testimony would have shown. Arteaga v. State, 757 S.W.2d 158 (Tex.App.--San Antonio 1988, pet. ref'd). Defense counsel must demonstrate that the evidence sought to be admitted would have materially changed the case in his favor. Birkholz v. State, 278 S.W.3d 463 (Tex.App.–San Antonio 2009, no pet.). The defendant's right to re-open also applies in probation revocation hearings. Smith v. State, 290 S.W.3d 368 (Tex.App.– Houston [14th Dist.] 2009, pet. ref'd).

D. MISSING WITNESSES – DENIAL OF A MOTION FOR CONTINUANCE

There three steps for preserving error when a subpoenaed witness does not appear. 1. The party must request a writ of attachment, which must be denied by the trial court. 2. The party must show what the witness would have testified to via an offer of proof. 3. The testimony that the witness would have given must be relevant and material. Sturgeon v. State, 106 S.W.3d 81 (Tex.Crim.App. 2003).

All that is necessary to preserve error when a motion for continuance is denied is for the defendant to file a timely motion that sufficiently advises the trial court of the defendant's request and the grounds therefor. Harrison v. State, 187 S.W.2d 429 (Tex.Crim.App. 2005)(error preserved where defendant filed timely motion for continuance and attached affidavit from defense investigator who detailed his efforts to find missing witness).

VII. ADMISSION OF EXTRANEOUS OFFENSES

A. PRE-TRIAL STRATEGIES

TEX.R.EVID. 404(b) provides that upon timely request by the accused, reasonable notice must be given in advance of trial of the State's intent to introduce as part of its case in chief any evidence in the nature of an extraneous offense. This provision does not entitle the defendant to notice of extraneous offenses which the State will introduce during their rebuttal case. Herring v. State, 752 S.W.2d 169 (Tex.App.--Houston [1st Dist.]1988, pet. ref'd). If nothing else, this provision will give you a sneak preview of whatever collateral misconduct the prosecution intends to bring before the jury during their case in chief. A discovery motion, however, is insufficient to trigger the notice provisions of Rule 404(b). Espinosa v. State, 853 S.W.2d 36 (Tex.Crim.App. 1993). The fact that the State has an "open-file" policy will not relieve it from the responsibility of complying with the defense's timely request under Rule 404(b). Buchannan v. State, 911 S.W.2d 11 (Tex.Crim.App. 1995).

Defense counsel should also file a motion in limine directing the prosecutor to instruct his witnesses not to mention or otherwise allude to any extraneous acts until the jury has been excused and the State has made a proffer of the expected testimony. A second motion in limine should also be filed designed to keep the prosecutor from asking the defendant or his witnesses any questions on cross-examination designed to "open the door" to the admission of otherwise inadmissible extraneous conduct.

B. A SPECIFIC TRIAL OBJECTION IS A MUST

While all trial objections must embody some degree of specificity to preserve error, nowhere is there an even greater need for specificity when it comes time to the admission of an extraneous offense. The ideal objection in this instance can be found in Booker v. State, 103 S.W.3d 521 (Tex.App.--Fort Worth 2003, no pet.). In Chatham v. State, 646 S.W.2d 512 (Tex.App.--Dallas 1983, pet. ref'd), an objection that the extraneous offense was "irrelevant,"" prejudicial," and "had nothing to do with the facts of this case" was held to be too general to preserve error when the State impeached the defendant with specific acts of misconduct for which he had not been convicted. When the defendant's Rule 404(b) objection is overruled, he must still make a Rule 403 objection to preserve error. Nelson v. State, 864 S.W.2d 496 (Tex.Crim.App. 1993).

C. OBJECTIONS THAT ARE SPECIFIC ENOUGH

The extraneous offense is inherently prejudicial and raises the possibility that the jury will convict the accused because he or she is a criminal generally. Williams v. State, 662 S.W.2d 344 (Tex.Crim.App. 1983). The admission of the extraneous offense tends to confuse the issues in the case and increases the possibility that the jury will convict on insufficient evidence. Boutwell v. State, 719 S.W.2d 164 (Tex.Crim.App. 1985), overruled on other grounds, Vernon v. State, 841 S.W.2d 407 (Tex.Crim.App.1992). The admission of the extraneous offense forces the accused to defend himself against charges of which he had no notice. Ford v. State, 484 S.W.2d 727 (Tex.Crim.App. 1972).

D. TIMING IS EVERYTHING

The mere fact that the trial court has sustained an objection to the State's attempted introduction of an extraneous offense during one stage of the trial does not absolve defense counsel from the responsibility of renewing his objection when the State takes a second bite at the apple during its rebuttal case. This is exactly what happened in Holman v. State, 772 S.W.2d 530 (Tex.App.--Beaumont 1989, no pet.), and the court held that defense counsel's failure to renew his objection waived any error.

E. REMEMBER THE RULE IN MAYNARD

You can attempt to take the sting out of the admission of an extraneous offense during the State's case in chief in presenting your defense by pointing out for the record that you are only offering your own evidence as to the extraneous offense to "meet, destroy, or explain" that evidence of uncharged misconduct which was erroneously admitted. Maynard v. State, 685 S.W.2d 60 (Tex.Crim.App. 1985). Unless you make your trial strategy a matter of record, you run the risk of waiving error under the doctrine of curative admissibility. Mannie v. State, 738 S.W.2d 751 (Tex.App.--Dallas, 1987).

F. THE DEGARMO DOCTRINE IS DEAD AND BURIED

Once upon a time, if the defendant took the witness stand during punishment and admitted that he committed the offense alleged by the State, she waived all error that occurred at the guilt-innocence stage including a challenge to the sufficiency of the evidence. DeGarmo v. State, 691 S.W.2d 657 (Tex.Crim.App. 1985). In Leday v. State, 983 S.W.2d 713 (Tex.Crim.App. 1998), the Court of Criminal Appeals held that the DeGarmo doctrine could not be used to preclude a defendant who appealed the denial of a motion to suppress from appealing merely because he took the stand during punishment and admitted his guilt. In Jacobson v. State, 398 S.W.3d 195 (Tex.Crim.App. 2013), the court finally pulled the plug on DeGarmo, holding that "it

disserves the interest in the 'fairness' of the trial at both stages.

VIII. COURT'S CHARGE TO THE JURY

A. REQUESTED INSTRUCTIONS

Counsel must ensure that any requested jury instructions are in writing and TEX.CODE CRIM.PROC.ANN., Art 36.15 provides that the writing requirement is satisfied by dictating the request to the court reporter in the presence of the prosecutor. There must be a showing that the requested charge was timely filed and presented to the court for a ruling. McCloud v. State, 527 S.W.2d 885 (Tex.Crim.App. 1975). If your charge is granted, the judge must incorporate it into the main body of the jury instructions as attaching it to the back of the rest of the charge does not satisfy this requirement. Perkins v. State, 528 S.W.2d 298 (Tex.Crim.App. 1975). So long as your requested instruction is substantially correct and places the trial judge on notice as to the omission in the charge, error has been preserved. Chapman v. State, 921 S.W.2d 694 (Tex.Crim.App. 1996). Once a requested instruction has been tendered to the trial court, no exception to the trial court's refusal to give the requested charge need be taken. Vasquez v. State, 919 S.W.2d 433 (Tex.Crim.App. 1996). The trial judge has the discretion not to charge jurors on fact-based questions impacting the voluntariness of a defendant's confession. Mendoza v. State, 88 S.W.3d 236 (Tex.Crim.App. 2002).

A request for a jury instruction on self-defense does not preserve a complaint on appeal that the trial court erred in failing to submit a jury instruction on defense of a third party. Bennett v. State, 235 S.W.3d 241 (Tex.Crim.App. 2007).

B. OBJECTIONS TO THE COURT'S CHARGE

Counsel's objections must be in writing and a ruling must be obtained on it prior to the reading of the court's charge. TEX.CODE CRIM.PROC.ANN., Art. 36.14. McCloud v. State, 527 S.W.2d 885 (Tex.Crim.App. 1975). A written objection that is incorrect, ambiguous or vague will not preserve the error for appellate review. Turner v. State, 726 S.W.2d 140 (Tex.Crim.App. 1987). Counsel's objection must isolate the portion of the charge which is alleged to be deficient and identify the reason for its deficiency. Taylor v. State, 769 S.W.2d 232 (Tex.Crim.App. 1989).

Even if the defense expressly states that it has no objection to the charge as given or makes no objection at all, it may still claim on appeal that this charging error caused the defendant egregious harm. Bluitt v. State, 137 S.W.3d 51 (Tex.Crim.App. 2004). The trial court has no duty to sua sponte instruct the jury on a lesser included offense where the defendant says she has no objection to the charge as given. Tolbert v. State, 306 S.W.3d 776 (Tex.Crim.App. 2010).

Because the verdict form is part of the jury charge, the defendant does not waive the claim that an omission in the verdict form caused him egregious harm under the Almanza standard. Jennings v. State, 302 S.W.3d 306 (Tex.Crim.App. 2010).

A defendant does not waive his challenge that the trial court lacked jurisdiction to convict him of a lesser included offense that is not part of the charged offense merely because the defendant did not affirmatively develop a record showing that he did not request the submission of the lesser. Trejo v. State, 242 S.W.3d 48 (Tex.App.–Houston [14th Dist.] 2007, pet. ref'd).

C. ESTOPPEL AND SUFFICIENCY CHALLENGES ON APPEAL

In McKinney v. State, 207 S.W.3d 366 (Tex.Crim.App. 2006), the court held that a defendant is not estopped from contending that the evidence is legally insufficient to support his conviction for a lesser-included offense he has asked to be included in the charge.

The defendant does not need to object to the State's manner of proof at trial in order to preserve for appellate review the claim that the evidence is legally insufficient. Moff v. State, 131 S.W.3d 485 (Tex.Crim.App. 2004).

Where an appellate court has held that it was error to give a jury instruction on a lesser-included offense and the defendant does not claim the evidence was legally insufficient to support conviction on the lesser, the appropriate remedy is to remand for a new trial on the lesser. Hampton v. State, 165 S.W.3d 691 (Tex.Crim.App. 2005).

IX. FINAL ARGUMENT

A. CONSIDER FILING A MOTION IN LIMINE

Although the mere filing of a motion in limine prior to argument will not preserve any error attendant upon improper argument by the State, Norman v. State, 523 S.W.2d 669 (Tex.Crim.App. 1975), filing such a motion prior to trial serves several important purposes. First, it will encourage the court to rule on your objections and not avoid its responsibility in this regard, and it will alert an appellate court to a prosecutor's bad faith in the event she engages in improper argument after the trial court has granted your motion in limine telling her not to do so.

B. TIME LIMITATIONS

The Court of Criminal Appeals has held that the trial judge abused his discretion limiting defense counsel's closing argument to 20 minutes and denying his request for three additional minutes. Dang v. State, 154 S.W.3d 616 (Tex.Crim.App.

2005). The court set out seven factors in determining whether the trial court's time limit is unreasonable: (1) the quantity of the evidence; (2) the duration of the trial; (3) conflicts in the testimony; (4) the seriousness of the offense; (5) the complexity of the case; (6) whether counsel efficiently used the time allotted; and (7) whether counsel set out what issues were not discussed because of the time limitation.

Counsel must object to the limitation when it is announced and then renew his objection and request additional time when he is cut off. He should then set out what issues he was unable to discuss when the arguments are concluded and renew this proffer at a motion for new trial hearing. Error in the trial court's denial of the right to offer final argument in a bench trial was preserved when counsel responded to the trial court's ruling by saying "all right." Hyer v. State, 335 S.W.3d 859 (Tex.App.–Amarillo 2011, pet. ref'd).

C. MAKING A TIMELY AND SPECIFIC OBJECTION

Even incurably improper prosecutorial jury argument may be waived when error is not preserved. Rodriguez v. State, 538 S.W.3d 623 (Tex.Crim.App. 2018)(State's use of inherently inflammatory and prejudicial racial slur during final argument did not mandate reversal where defense counsel failed to ask for a mistrial after the trial court sustained his objection and instructed jurors to disregard).

To preserve error, counsel must first voice an objection that is timely in that it is made as soon as the tenor of the improper argument is evident or the claim is waived on appeal. Cockrell v. State, 933 S.W.2d 73 (Tex.Crim.App. 1996). An objection that comes after the complained-of argument is concluded is untimely. Borgen v. State, 672 S.W.2d 456 (Tex.Crim.App. 1984). The objection must be specific enough to apprise the court of the reason or reasons why the argument is improper. Objections that argument is "improper" or "impermissible" are too general to preserve error. Meek v. State, 628 S.W.2d 543 (Tex.App.--Fort Worth 1982, no pet.). An objection that the State has "attacked the defendant" is not sufficiently specific to preserve for review the claim that the State has improperly commented on the defendant's failure to testify. Wead v. State, 129 S.W.3d 126 (Tex.Crim.App. 2004). The test of whether an objection is specific enough is whether it puts the prosecutor and the trial judge on notice as to the nature of the improper final argument. Daniel v. State, 550 S.W.2d 72 (Tex.Crim.App. 1977).

D. OBTAINING A RULING FROM THE TRIAL COURT

After voicing a timely and specific objection to the State's improper argument, counsel must secure a ruling from the trial court either granting or denying the relief sought. Most trial judges will not rule on counsel's objection unless they are compelled by either a motion in limine requesting them to do so or by counsel pressing for such

a ruling. The trial judge merely admonishing the prosecutor to "stay in the record," Graham v. State, 566 S.W.2d 941 (Tex.Crim.App. 1978), or noting that "the jury will recall the evidence," Mayberry v. State, 532 S.W.2d 80 (Tex.Crim.App. 1976), are not rulings which will preserve error on appeal.

E. ASKING FOR A CURATIVE INSTRUCTION

If your objection is overruled, error is preserved. If your objection is sustained, you must next ask the trial court to instruct jurors to disregard the improper argument or error has been waived. Nichols v. State, 754 S.W.2d 185 (Tex.Crim.App. 1988).

F. MOVING FOR A MISTRIAL

If you receive a curative instruction, you must press the trial court to an adverse ruling by moving for a mistrial, and the failure to do so will preclude appellate review of your complaint. Duran v. State, 505 S.W.2d 863 (Tex.Crim.App. 1974).

G. RENEWING YOUR OBJECTION

Even if you have initially preserved error after the prosecutor engages in forensic misconduct, you must renew your objection if and when the prosecutor again engages in the same or similar argument or the error in the first instance will be waived. McMahon v. State, 582 S.W.2d 786 (Tex.Crim.App. 1978).

H. PRESENTING YOUR APPELLATE CONTENTION

Assuming that you have preserved the error, your appellate contention must track your trial objection or the appellate court will be quick to note that the error, if any, has been waived and that nothing is preserved for review. Euziere v. State, 648 S.W.2d 700 (Tex.Crim.App. 1983).

X. MOTIONS FOR NEW TRIAL

A. YOUR MOTION MUST BE TIMELY FILED

Your motion must be filed within 30 days after the date the trial court imposes or suspends sentence in open court. TEX.R.APP.P. 21.4(a). It is important to remember that the filing of a notice of appeal does not divest the trial court of its jurisdiction to act on an otherwise timely motion for new trial. Hall v. State, 698 S.W.2d 150 (Tex.Crim.App. 1985). The trial court has the authority to grant a motion for new trial in the interests of justice based upon grounds that are not specifically set out in TEX.R.APP.P. 21.3. The trial court does not have the authority to act on a amended motion for new trial that is not timely filed. State v. Lewis, 151 S.W.3d 213 (Tex.App.--

Tyler 2004, pet. ref'd). Where the State does not object to the filing of an untimely amended motion for new trial, the trial court has the authority to grant it. State v. Moore, 225 S.W.3d 556 (Tex.Crim.App. 2007); Clarke v. State, 270 S.W.3d 573 (Tex.Crim.App. 2008).

B. THE RIGHT TO COUNSEL

The 30-day period during which a motion for new trial can be filed is a critical stage of the proceedings at which the defendant is entitled to the assistance of counsel. Massingill v. State, 8 S.W.3d 733 (Tex.App.--Austin 1999, pet. ref'd). The Court of Criminal Appeals has held that the time allowed for preparing and filing a motion for new trial is a critical stage of the proceedings. Cook v. State, 240 S.W.3d 906 (Tex.Crim.App. 2007). When the defendant has been denied counsel or has been denied the effective assistance of counsel during this critical stage, the defendant is entitled to an out-of-time hearing on his motion for new trial. Garcia v. State, 97 S.W.3d 343 (Tex.App.--Austin 2003, pet. ref'd). There is a presumption that the defendant was represented by counsel, that counsel acted effectively, and that when a motion for new trial is not filed, there is a rebuttable presumption that it was considered by the defendant and rejected. Smith v. State, 17 S.W.3d 660 (Tex.Crim.App. 2000).

C. YOUR MOTION MUST BE SWORN

Although not required by the Rules of Appellate Procedure, case law mandates that your motion must be verified, i.e., sworn to, by someone having personal knowledge of the facts contained therein, for the defendant to be entitled to a hearing. Reyes v. State, 849 S.W.2d 812 (Tex.Crim.App. 1993). If affidavits are not attached to the motion for new trial, there is no abuse of discretion in denying the defendant an evidentiary hearing. Martin v. State, 97 S.W.3d 718 (Tex.App.--Waco 2003, no pet.).

D. YOUR MOTION MUST BE TIMELY PRESENTED & REQUEST A HEARING

TEX.R.APP.P. 21.6(a) requires the defendant to "present" the motion within 10 days of filing unless the trial court in its discretion permits it to be presented and heard within 75 days from the date it imposes or suspends sentence in open court. "Presentment" means bringing the motion to the trial court's attention so that it may be studied and, if necessary, set for a hearing. Carranza v. State, 960 S.W.2d 76 (Tex.Crim.App. 1998). This requirement is fulfilled by presenting the motion to the judge or to the court coordinator and obtaining a hearing date. Butler v. State, 6 S.W.3d 636 (Tex.App.--Houston [1st Dist.] 1999, pet. ref'd). If the motion for new trial fails to request a hearing, the trial court does not abuse its discretion in failing to conduct a hearing. Rozell v. State, 176 S.W.3d 228 (Tex.Crim.App. 2005). A docket-sheet entry is sufficient to show the presentment of a motion for new trial. Stokes v.

State, 277 S.W.3d 20 (Tex.Crim.App. 2009).

E. YOUR MOTION MUST ALLEGE MATTERS OUTSIDE THE RECORD

It is an abuses of discretion to deny the defendant a hearing on his motion for new trial when the motion raises matters that cannot be determined from the record. Wallace v. State, 106 S.W.3d 103 (Tex.Crim.App. 2003). Where a hearing is erroneously denied, the remedy on appeal is not a reversal of the conviction but a remand for a hearing on the motion for new trial. McIntire v. State, 698 S.W.2d 655 (Tex.Crim.App. 1985)(op. on rehr'g). Rule 606(b) limits the defendant's ability to raise issues of jury misconduct solely to those instances where outside pressure has been brought to bear upon jurors. See State v. Ordonez, 156 S.W.3d 850 (Tex.App.–El Paso, 2005)(trial court abused its discretion in granting motion for new trial based on jury misconduct because juror was not competent to testify). Newly discovered evidence, denial of a motion for continuance and jury misconduct MUST be raised in a motion for new trial. TEX.R.EVID. 606(b) limits the defendant's ability to raise issues of jury misconduct solely to those instances where outside pressure has been brought to bear upon jurors.

F. YOUR MOTION MUST BE HEARD WITHIN 75 DAYS FROM SENTENCING

Your motion must be heard and ruled upon by the trial court within 75 days after imposing or suspending sentence in open court as the trial court loses jurisdiction on the 75th day and your motion will be deemed overruled by operation of law. TEX.R.APP.P. 21.8(a). Counsel's failure to alert the trial court to the proper deadline for ruling on his motion for new trial can constitute ineffective assistance of counsel. Belcher v. State, 93 S.W.3d 593 (Tex.App.--Houston [14th Dist.] 2002, pet. ref'd).

G. IN THE EVENT YOU OPT FOR AFFIDAVITS IN LIEU OF A HEARING

TEX.R.APP.P. 21.7 provides that the trial court may receive evidence in connection with a motion for new trial by affidavit in lieu of live testimony. In most situations, particularly those involving claims of ineffective assistance where you have spoken to the trial lawyer and obtained his cooperation, the defense is much better off foregoing an evidentiary hearing and proceeding by affidavits. There are, however, exceptions to this rule, such as where the trial lawyer has not been cooperative or will not speak to you prior to the hearing. Morse v. State, 29 S.W.3d 640 (Tex.App.--Beaumont 2000, pet. ref'd)(trial court abused its discretion in denying defendant evidentiary hearing and in conducting hearing via affidavit over objection as procedure violated defendant's right to confront and cross-examine adverse witnesses on contested issue). Make sure that your order of presentment shows that the hearing is being conducted by affidavit by order of the court or the appellate court can find that the trial court may have disbelieved your affidavits because you were unwilling to

support them with live testimony. Charles v. State, 146 S.W.3d 204 (Tex.Crim.App. 2004).

H. BURDEN OF PROOF, PROCEDURE, AND PRESERVATION OF ERROR AT THE HEARING

Facts alleged in the motion and in any supporting affidavits must be proved at the hearing in order to preserve error on appeal as the motion itself is only a pleading, and the allegations in the motion are not self-proving. Schneider v. State, 594 S.W.2d 415, 418 (Tex.Crim.App. 1989). The burden of proof at the hearing is on the defendant. Lera v. State, 165 S.W.2d 92, 93 (Tex.Crim.App. 1942). The State may appeal the grant of a motion for new trial under TEX.CODE CRIM.PROC.ANN., Art. 44.01(a)(3).

The resolution of conflicting evidence is the job of the trial judge at the motion for new trial hearing and factual determinations are subject to review under the abuse of discretion standard. Moreno v. State, 587 S.W.2d 405, 411 (Tex.Crim.App. 1979). The judge who hears the motion for new trial does not have to be the judge who tried the case on the merits. Woods v. State, 569 S.W.2d 901, 903 (Tex.Crim.App. 1978). A judge may not, however, use his own recollections of what he was told during post-trial discussions with jurors when making a decision on the defendant's motion for new trial based on juror misconduct.

Grounds alleged only in a legal memorandum filed 30 days after sentencing but not alleged in the motion for new trial may not be the basis for the granting of relief. State v. Zalman, 400 S.W. 3d 590 (Tex.Crim.App. 2013).

If the trial judge inadvertently signs an order granting a motion for new trial, she may be able to set it aside on the grounds that it was in the nature of a clerical error. English v. State, 592 S.W.2d 949, 956 (Tex.Crim.App. 1980). But in Moore v. State, 749 S.W.2d 54, 57 (Tex.Crim.App. 1988), the trial judge signed an order granting a motion for new trial but later struck the order because of defense counsel's bad faith after learning that the State had never been served with a copy of the motion. The Court of Criminal Appeals held that the trial judge could not rescind his grant of a new trial on these grounds and that a retrial was barred by double jeopardy. Where the trial court grants the defendant's post-verdict motion for mistrial, it is the State's burden of preserving for review the challenge to the validity of the order granting the mistrial. State v. Boyd, 202 S.W.3d 393 (Tex.App.–Dallas 2006, pet. ref'd).

It is not necessary that the defendant preserve error for purposes of appeal as a precondition for the trial judge to consider the merits of a motion for new trial, and to grant the motion for new trial in the interest of justice. State v. Herndon, 215 S.W.3d 901 (Tex.Crim.App. 2007).

The premature filing of the appellate record in the court of appeals will not divest the trial court of jurisdiction to hear a motion for new trial that is timely filed and presented. Taylor v. State, 163 S.W.3d 277 (Tex.App.–Austin 2005, pet. ref'd).

Where the defendant receives an out-of-time appeal, he is entitled on remand to file a motion for new trial even though that relief was not sought as part of his post-conviction writ. Mestas v. State, 214 S.W.3d 1 (Tex.Crim.App. 2007).

The trial court does not abuse its discretion in granting a new trial on the issue of punishment where it believes that the defendant's sentence is based on an error made by the trial court in assessing its original sentence. State v. Stewart, 282 S.W.3d 729 (Tex.App.–Austin 2009, pet. ref'd).

I. "IN THE INTEREST OF JUSTICE"

While the trial court has discretion to grant a new trial "in the interests of justice," this discretion is not "unbounded or unfettered." State v. Herndon, 215 S.W.3d 901 (Tex.Crim.App. 2007). The trial court cannot grant a new trial based on mere sympathy, an inarticulate hunch, "or simply because he personally believes that the defendant is innocent or received a raw deal." State v. Hart, 342 S.W.3d 659 (Tex.App. – Houston [1st Dist.] 2011, pet. ref'd).

A new trial may not be granted in the interest of justice upon a claim that defense counsel failed to call an exculpatory witness who was known to him and available at trial, if that claim is not based on ineffective assistance of counsel. State v. Thomas, 428 S.W.3d 99 (Tex.Crim.App. 2014).

XI. MISCELLANEOUS

A. PROBATION

While the defendant must object in the trial court to any term or condition of community supervision he finds objectionable or he forfeits any later complaint, he must be afforded the opportunity to object to any modified conditions. Dansby v. State, 448 S.W.3d 441 (Tex.Crim.App. 2014).

TOP TEN TIPS FOR PRESERVING ERROR

1. BE FEARLESS…BE PERSISTENT…BE CREATIVE

2. KNOW THE LAW

3. GET IT ON THE RECORD

4. OBJECT WITH SPECIFICITY

5. OBJECT TIMELY

6. OBTAIN AN ADVERSE RULING

7. USE RUNNING OBJECTIONS

8. USE MOTIONS IN LIMINE

9. DON'T FORGET TO MAKE AN OFFER OF PROOF

10. DON'T WAIVE ERROR YOU'VE ALREADY PRESERVED

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Morris v. State, 554 S.W.3d 98 (Tex.App.– El Paso 2018, pet. ref'd)(The defendant's failure to object to the trial court requiring the defendant to wear a stun belt waives any challenge to the trial court's order. But the defendant need not object to the trial court's actual use of the stun gun to preserve this claim for appeal.).

State v. Velasquez, 539 S.W.3d 289 (Tex.Crim.App. 2018)(TEX. CODE CRIM. PROC. art. 28.01 does not entitle the State to any additional notice if the trial court carries the motion to suppress with trial. Because the State did not present evidence at the suppression hearing, the trial court did not err granting the motion to suppress.).

Proenza v. State, 541 S.W.3d 786 (Tex.Crim.App. 2017)(The defendant need not object to preserve error where the trial court asks pointed, substantive questions of a witness bearing crucial defensive testimony because the trial judge has an independent duty to refrain from conveying her opinion of the case to the jury.).

State v. Copeland, 501 S.W.3d 610 (Tex.Crim.App. 2016)(Whether a theory of law applicable to the case that the losing party in the trial court must address on appeal does not turn on the completeness of the trial court's findings but whether it was litigated below. Because the State failed to brief a theory of law applicable to the case on appeal after the trial court granted the defendant's motion to suppress, it procedurally defaulted that claim on appeal.).

Ex parte Garrels, 559 S.W.3d 517 (Tex.Crim.App. 2018)(When the trial court declares a mistrial, it is the State's burden to show that defendant consented to it inasmuch as "the lack of record-based evidence affirmatively showing how [accused] 'impliedly' consented to the mistrial defeats the State's position.").

Golliday v. State, 560 S.W.3d 664 (Tex.Crim.App. 2018)(To preserve the claim that the exclusion of evidence violates constitutional principles, the accused must state the grounds for the ruling that he seeks with sufficient specificity, i.e., general hearsay objection does not preserve specific Confrontation Clause complaint).

State v. Opare, 583 S.W.3d 685 (Tex.App.– Fort Worth 2018, no pet.)(State failed to bring forward record sufficient to warrant reversal of trial court's ruling granting DWI motion to suppress where dash-cam video was informally played but never introduced in evidence and State did not file motion to abate to supplement record).

Alvarez v. State, 570 S.W.3d 792 (Tex.App.– Houston [1st Dist.] 2018, pet. ref'd) (accused was not responsible for inducing error in the court's charge where record did not reveal that accused helped prepare the charge).

Hernandez v. State, 538 S.W.3d 619 (Tex.Crim.App. 2018)(defendant failed to preserve error where prosecutor used "n word" in describing defendant's act of provocation in his summation in murder case by failing to move for a mistrial after trial court sustained his objection and gave jury curative instruction).

Commission for Lawyer Discipline v. Cantu, 587 S.W.3d 779 (Tex. 2019)(party was not precluded from relying on particular case to support his contention on appeal even if he did not cite to that case when raising his objection at trial).

Harrison v. State, 595 S.W.3d 879 (Tex.App.– Houston [14th Dist.] 2020, pet. filed) (defendant preserved her claim that trial counsel rendered ineffective assistance of counsel by not immediately apprising the defendant of the trial court's clearly hostile remark ("A deferred on an injury to a child case where there's a dead baby? I don't think so,") that would have impelled her to withdraw her plea of guilty by objecting as soon as she learned of the trial court's comment).

Burg v. State, 592 S.W.3d 444 (Tex.Crim.App. 2020)(defendant failed to preserve claim that trial court erred in suspending his driver's license when he failed to object to this ruling when given the opportunity; because a license suspension is not "punishment," he could not raise issue for first time on appeal as "illegal sentence" claim).

Dixon v. State, 595 S.W.3d 216 (Tex.Crim.App. 2020)(defendant did not preserve claim that trial court erred in closing courtroom to the public by excluding sketch artist when objection was not made until the following day or claim that trial court ordered the courtroom cleared by objecting but not obtaining a ruling).

State v. Heath, 2019 WL 6909439 (Tex.Crim.App. Dec. 18, 2019)(not designated for publication)(court of appeals erred by reversing trial court's exclusion of 911 call on the grounds that State failed to turn over the recording "as soon as practicable" under the Michael Morton Act under a theory that the State did not raise at trial or on appeal).

Brownlow v. State, 2020 WL 718026 (Tex.Crim.App. Feb. 12, 2020)(not designated for publication)(defendant preserved claim trial court erred permitting State's experts to use discredited Briseno factors to opine he was intellectually disabled and ineligible for the death penalty by filing a pre-trial motion to preclude use of Briseno factors and obtaining an adverse ruling on it and by renewing his objection to experts' testimony during pre-trial Daubert hearing on the admissibility of this testimony).

Hicks v. State, ___ S.W.3d ___, 2020 WL 1519968 (Tex.App.– Houston [1st Dist.] March 31, 2020, pet. filed)(defendant failed to preserve claims that seating of judge's brother and prosecutor's brother-in-law on jury violated Brady, Michael Morton Act, and due process right to fair and impartial jury given the failure to disclose such relationships where he failed to ask specific questions calculated to bring out this information).