


Intro: PRESERVING ERROR

General rule: —“Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.” Syl. Pt. 1, *State v. Simons*, 201 W. Va. 235 (1997).

Exception: Plain error. “To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3 (1995).



Protecting the Record.

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Shifting of the Burden of Proof.

Shifting of the Burden of Proof

- At the close of evidence in a case, the court read its charge. It instructed Jurors:

“If upon examination of the evidence and circumstances proven in this case you find that the determination of one or more material facts in the case is to be determined by oral testimony or by established physical facts and the oral testimony is in conflict with the established physical facts and the oral testimony is in conflict with the established physical facts, then you are instructed that **you should give controlling weight to the established physical facts** over the oral testimony in arriving at your verdict in this case.”





Confrontation Clause V.S. Hearsay Objections.

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Requires objection to BOTH issues to preserve error

If in doubt, say both

Could pass hearsay exemption but not

Confrontation Clause

Constitutionalizes Issue

Hearsay objections can be more than truth

of matter = relevance, prejudice

Examples:

Playing CAC Interviews = BOTH

Bolstering Testimony

Crawford v. Washington, 541 U.S. 36 (2004)

Smith v. Arizona, 602 U.S. 779 (2024)



Discovery
Violations.

Discovery Violations

What **needs** to be on the record:

A genuine surprise on a material fact and how it impacted trial preparations.

From there you must separately:

1. Move for a recess/continuance to review the material
2. Move to exclude if appropriate
3. Move for a mistrial if necessary

Case Example: (State v. Smith, 220 W. Va. 565, 648 S.E.2d 71 (2007))



Vouching the Record.

Vouching the Record

- If it is not on the transcript, it did not happen.
- Objecting during opening and closing statement.
- Have to object to preserve



Stipulations

Stipulations

- “When a defendant is charged with a crime in which a prior conviction is an essential element of the current crime charged (e.g. being a felon in possession of a firearm under W.Va.Code § 61–7–7(b)(1) [2008]), and stipulates to having been previously convicted of a crime, the trial court shall inform the jury that the defendant stipulated to the prior conviction. The jury shall be informed that the defendant was convicted of a prior felony or misdemeanor, but shall otherwise not be informed of the name or nature of the defendant's prior convictions. To the extent State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001), is inconsistent with this holding, it is hereby modified.” Syl. Pt. 5, State v. Herbert, 234 W. Va. 576, 767 SE2d 471. (2014)
- “When a defendant stipulates to a prior conviction that merely enhances the penalty for the current charge, the jury shall not be informed of the prior conviction.” Syl. Pt. 7, State v. Herbert, 234 W. Va. 576, 767 SE2d 471. (2014)

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Duplicity.

Duplicity

- “Duplicity is ‘the joining in a single count of two or more distinct and separate offenses.’ United States v. Pleasant, 125 F.Supp.2d 173, 175 (E.D. Va. 2000) (quoting United States v. Hawkes, 753 F.2d 335, 357 (4th Cir. 1985)). “The risk behind a duplicitous charge is that a jury may convict the defendant without unanimous agreement on a particular charge.” Id. at 175 (quoting United States v. Moore, 184 F.2d 790, 793 (8th Cir. 1999)).
- The policy behind outlawing duplicitous counts includes avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution.



Change of Venue Motions.

Change of Venue Motions


- Venue clause protects defendants.
- ONLY the defendant can request venue change.
- It is necessary to Vindicate Sixth and Fourteenth Amendment





Rule 29, Fast Facts, and Conclusion.

Rule 29 Motions

- With most objections discussed in this presentation, the overarching advice is to be specific and thorough. But Rule 29 Motions are unusual.
 - A general "I move for acquittal on all counts" will preserve any conceivable argument appellate counsel concocts after the fact.
 - However, some federal courts have held that a specific objection only preserves the ground argued.
 - For example: "I move for acquittal on Count 3 because there was no evidence X element" forfeits any future arguments concerning Count 2, or even element Y of Count 3.
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Fast Facts

- Pro: If meritorious= points with jury, if not preserved
- Watch out for: “Social ills” or misstatements of evidence
- “Clearing the courtroom”
- Verdict Form Errors
- Object Bolstering Testimony
- Indictment Objections must be made pre-trial



Thank You!

Any Questions?

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