

Preservation of Error -  
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# PRESERVING THE RECORD FOR APPEAL

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## Texas Rules of Appellate Procedure 33.1

- A complain is not preserved for appeal unless it was made to the trial court by a **timely** request, **objection**, or **motion** that:
  - Stated the **grounds** for the ruling that the complaining party sought from the trial court with **sufficient specificity** to make the trial court aware of the complaint, unless the specific grounds were apparent from the context

## Purpose of Proper Objection

- To:
    - (1) *Inform* the trial court of the basis of the objection and give it an *opportunity* to rule on it; and
    - (2) *Give* opposing counsel the opportunity to *respond* to the complaint

(*Resendez v. State*, 306 S.W.3d 308, 312 (Tex.Crim.App. 2009))
  - No technical considerations or form of words are required to preserve error for review, and straightforward communication in plain English will always suffice if it lets the trial judge know what the party wants and why he thinks himself entitled to it
- (*Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992))

## "Imprecise Objection"

- If an objection is imprecise *but the context is clear to the prosecutor and the judge*, the objection is sufficient
- (*Taylor v. State*, 939 S.W.2d 148, 154-55 (Tex.Crim.App. 1996); *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992))
- "Certainly the rambling and inartful form of the objection here is to be discouraged. Nevertheless, because defense counsel stated as the ground of his objection that the nonresponsive answer unfairly opened the door to the defendant's character, and thereby allowed for improper impeachment, we conclude that, in substance, it can fairly be said to be an objection specifically directed to that portion of the answer."
- (*Smith v. State*, 763 S.W.2d 836, 842 (Tex.App.-Dallas, 1988))

## Texas Rule of Evidence 103(a)

- As a predicate to presenting a complaint on appeal, Texas Rules of Evidence 103(a) requires a party to object to the ruling excluding the evidence and to make an offer of proof of the excluded evidence. When the party fails to make an offer of proof or the substance of the evidence is not apparent from the context, the party may not urge error in the exclusion of evidence on appeal.

(*Guidry v. State*, 9 S.W.3d 133, 153 (Tex.Crim.App. 1999))

## Offer of Proof

- Appellant had the burden to bring forward a record on appeal sufficient to show the trial court erred in its ruling on the motion to suppress.

(*Amador v. State*, 221 S.W.3d 666, 675 (Tex.Crim.App. 2007)  
(reviewing courts cannot 'assume' or speculate about the contents of exhibits or other materials that are not contained in the appellate record))

- Accordingly, appellant has failed to preserve his argument for appellate review.

(See *e.g.*, *McQueen v. State*, 702 S.W.2d 302 (Tex.App- Houston [1<sup>st</sup> Dist.] 1985)(court's consideration of appellate complaint requires that record be complete on issue urged); *Vicknair v. State*, 702 S.W.2d 304, 306 (Tex.App.- Houston [1<sup>st</sup> Dist.] 1985)(failure to designate statement of facts on suppression hearing for inclusion in record tantamount to having no appeal at all))

## “Does Not Comport”

- A party’s point of error on appeal must comport with the objection made at trial.  
(*Wilson v. State*, 71 S.W.3d 346, 349 (Tex.Crim.App. 2002))
- The trial court must be allowed the opportunity to rule on the *objection and the specific rationale* that is complained about on appeal.
- “Because the objection appellant made to the trial court does not correspond to her complaint on appeal, we conclude appellant did not properly preserve error.”  
(*Clark v. State*, 881 S.W.2d 682, 694 (Tex.Crim.App. 1994))

## Evidence Admitted Elsewhere

- Evidentiary error is cured when the same evidence is admitted elsewhere **without** objection.  
(*Leday v. State*, 983 S.W.2d 713, 718 (Tex.Crim.App 1998))
- It is also necessary that the objecting party must **continue to object** each time the objectionable question or evidence is offered, **obtain a running objection**, or **request a hearing outside the jury’s presence** in order to preserve the complaint for appellate review.  
(See *Martinez v. State*, 98 S.W.3d 189, 193 (Tex.Crim.App. 2003); *Fuentes v. State*, 991 S.W.2d 267, 273 (Tex.Crim.App 1999))
- When, in response to an objection, the State **rephrases** the question and no objection is made to the rephrased questions, there is no adverse ruling to complain about on appeal.  
(*Badall v. State*, 216 S.W.3d 865, 872 (Tex.App.-Beaumont 2007))

## Inadequately Briefed Error

- TRAP 38.1(i)- Requirements of Appellant's Brief- Argument: The brief must contain a **clear and concise** argument for the contentions made, with **appropriate citations** to authorities and to the record
- We may overrule any inadequately briefed point of error.

(*Loun v. State*, 273 S.W.3d 406, 420 n.24 (Tex.App-Texarkana 2008))

## Multifarious

- An issue is multifarious when it raises more than one specific complaint, and we are permitted to reject multifarious issues on that basis alone.

(See *Mays v. State*, 318 S.W.3d 368, 385 (Tex.Crim.App 2010); *Wood v. State*, 18 S.W.3d 642, 649 n.6 (Tex.Crim.App. 2000))

## Untimely

- An objection is timely if it is made as soon as the ground for the objection becomes apparent, i.e., as soon as the defense knows or should know that an error has occurred.  
(*Neal v. State*, 256 S.W.3d 264, 279 (Tex.Crim.App. 2008))
- Generally, this occurs when the evidence is admitted.  
(*Dinkins v. State*, 894 S.W.2d 330, 355 (Tex.Crim.App. 1995))
- If a party fails to object until after an objectionable question has been **asked** and **answered**, and he can show **no legitimate reason to justify the delay**, his objection is untimely and error is waived.  
(*Id.*)

## Ineffective Assistance on Appeal

- Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and professional.  
(*Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001); *Fuller v. State*, 224 S.W.3d 823, 828-29 (Tex.App.- Texarkana 2007))
- Only when counsel's ineffectiveness is so apparent from the record will an appellant prevail on direct appeal absent a hearing on a motion for new trial asserting an ineffective assistance of counsel claim.  
(*Freeman v. State*, 125 S.W.3d 505, 506-07 (Tex.Crim.App. 2003))

## Reality of IAC Claim

- In addressing this reality, the Texas Court of Criminal Appeals has explained that appellate courts can rarely decide the issue of ineffective assistance of counsel because the record almost never speaks to the strategy reasons that trial counsel may have considered. The proper procedure for raising this claim is therefore almost always by application for writ of habeas corpus.

(*Freeman v. State*, 125 S.W.3d 505, 511 (Tex.Crim.App. 2003); *Aldrich v. State*, 104 S.W.3d 890, 896 (Tex.Crim.App. 2003))

## Texas Rules of Appellate Procedure 44.2: Reversible Error

- Constitutional Error- If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals **must** reverse a judgment of conviction or punishment unless the court determines **beyond a reasonable doubt** that the error did not contribute to the conviction or punishment
- Other Error- Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.